
Brian M. Clary

I. INTRODUCTION

The Federal Sentencing Guidelines ("Guidelines") have been an integral part of the criminal justice system at the national level for almost twenty years. Their enactment limited judicial discretion in sentencing and was seen as a method for reducing the insidious results of disparate, unfair sentences based on race, geography, judicial temperament, politics, and a host of other factors.¹ Their enactment also worked as a check on the defendant's right to trial by jury, enshrined in both our Nation's heritage and governing document.² Although determinate sentencing ushered in an efficient and convenient means of sentencing criminal defendants, it slowly eroded the importance of the jury in the judicial system. William Blackstone wrote,

[H]owever convenient these [new methods of trial] may appear at first . . . yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.³

This note examines the Supreme Court's decision in United States v. Booker⁴ and its application to the Guidelines. This note begins by relaying the underlying facts of defendants Booker and Fanfan.⁵ Next, it explores the different approaches to sentencing utilized by England and America from the eighteenth century to modern times.⁶ Then, it turns to the Court's reasoning and holding in the Booker case.⁷ Finally, it discusses possible problems and solutions to the Court's decision.⁸

3. ⁴ William Blackstone, Commentaries *343–44.
5. See infra Part II.
6. See infra Part III.
7. See infra Part IV.
8. See infra Part V.
II. FACTS

The Court accepted two cases dealing with the constitutionality of the Guidelines and combined them on appeal. This section discusses the facts and procedural history of both cases. The first case is United States v. Booker and the second is United States v. Fanfan.

A. Freddie Booker

1. The Trial Court

On February 26, 2003, Freddie Booker sold drugs to a customer at the apartment of “Eric” in Beloit, Wisconsin. The arresting officers, responding to a criminal trespass complaint, knocked on the apartment door and witnessed the customer’s attempt to swallow a small amount of cocaine. The police arrested and detained Booker outside the apartment. After a search, the officers located a duffle bag that Booker admitted was his. The bag contained approximately ninety-two grams of crack cocaine, $400, and drug paraphernalia. After his arrest, Booker admitted that he had sold another 566 grams of crack cocaine.

On March 13, 2003, Booker was indicted in the Western District of Wisconsin on counts of possession with intent to distribute more than fifty grams of cocaine base and distribution of an unspecified quantity of cocaine base, both in violation of 21 U.S.C. § 841(a)(1). The jury found Booker guilty of both counts.

9. See infra Part II.A.
10. See infra Part II.B.
13. Id.
14. Id.
15. Id.
16. Id. At trial, Booker denied making a written statement to the police regarding the additional 566 grams of cocaine, and the police could not independently corroborate the allegation. Respondent Freddie J. Booker’s Brief in Response at 2, United States v. Booker, 543 U.S. 220 (2005) (No. 04-104).
17. “Cocaine base” means “crack.” “Crack” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rock-like form. UNITED STATES SENTENCING GUIDELINES § 2D1.1 (West 2005).
18. Petition at 2, Booker (No. 04-104).
19. Id.
2. Booker’s Sentence

Because Booker was found guilty at trial, the statute set a minimum sentence of ten years in prison and a maximum sentence of life. After trial, the pre-sentence report recommended that Booker be held responsible for possession of the ninety-two grams of crack cocaine located in his bag. This recommendation would have resulted in an offense level of thirty-two. The pre-sentence report later indicated that Booker’s relevant conduct should also include the 566 grams of cocaine that he admitted selling. Under the Guidelines, this higher amount resulted in a base offense level of thirty-six. Additionally, the trial court found that Booker had perjured himself at trial and increased his base offense level by two points to thirty-eight under the obstruction of justice provisions of the Guidelines. Booker had twenty-three prior convictions, resulting in a criminal history category of VI. Given Booker’s criminal history category and a base offense level of thirty-eight, the Guidelines set his sentencing range at 360 months to life imprisonment. The trial court sentenced Booker to 360 months in prison, to be followed by five years of supervised release. Without the two additional findings made by the judge, the Guidelines would have set a range of 210 to 262 months in prison.

3. The Court of Appeals for the Seventh Circuit

Six days after the Supreme Court issued its opinion in Blakely v. Washington, the Seventh Circuit Court of Appeals ordered both parties to file briefs addressing the applicability of Blakely’s holding to the present case. Booker argued that his sentencing range should be determined solely on the jury finding him guilty of possessing ninety-two grams of crack cocaine, not the judge’s finding that he possessed an additional 566 grams and that he

21. Id. at 2, Booker (No. 04-104).
22. Id. at 3. The Guidelines assign an offense level to all federal criminal statutes. Determination of the offense level is the first step in sentencing a defendant under the Guidelines. See infra Part III.C.2.
23. Petition at 3, Booker (No. 04-104).
24. Respondent Freddie J. Booker at 2, Booker (No. 04-104).
25. Id.
27. Petition at 3, Booker (No. 04-104).
28. Id. at 2.
29. Respondent Freddie J. Booker at 2, Booker (No. 04-104).
31. Petition at 3, Booker (No. 04-104).
obstructed justice. A divided appellate panel agreed, holding that the trial court’s sentence violated the Sixth Amendment, and remanded the case to the trial court to either sentence Booker within the sentencing range supported by the jury’s verdict or hold a separate sentencing hearing before a jury. The Government appealed, and the Supreme Court granted certiorari.

B. Duncan Fanfan

1. The Trial Court

Duncan Fanfan was arrested after arriving at a Burger King restaurant to sell cocaine to Donovan Thomas, a government informant. Narcotics agents found 1.25 kilograms of cocaine and 281.6 grams of cocaine base in Fanfan’s vehicle. On June 11, 2003, a federal grand jury in the District of Maine indicted Fanfan with conspiring to distribute and possession with intent to distribute 500 or more grams of cocaine in violation of 21 U.S.C. § 846. The jury found Fanfan guilty.

In response to a question on the verdict form, “Was the amount of cocaine 500 or more grams?,” the jury marked “Yes.”

2. Fanfan’s Sentence

The pre-sentence report indicated that the evidence supported a finding that 2.5 kilograms of cocaine powder and 281 grams of cocaine base was relevant conduct attributable to Fanfan. This finding resulted in a base offense level of thirty-four under the Guidelines. Additionally, the judge added a two point enhancement based on Fanfan’s role as a leader in the criminal activity, bringing Fanfan’s base offense level to thirty-six. Fanfan’s criminal history category was I, resulting in a sentencing range of 188 to 235 months in prison.

32. Id. at 4.
33. Id.
36. Id. See, supra note 17, for a description of cocaine base.
38. Id.
39. Petition at 2, Fanfan (No. 04-105).
40. Id.
41. Id. at 3. See infra Part III.C.2.
42. Petition at 3, Fanfan (No. 04-105).
43. Id. See infra Part III.C.2.
Four days prior to sentencing, the Supreme Court rendered its *Blakely* decision. Relying on *Blakely*, the trial judge noted, "if the reasoning of *Blakely* applies here, all the jury verdict permits us to conclude in this case is that [Fanfan] was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder." Based on the jury's verdict alone, Fanfan's sentencing range under the Guidelines was sixty-three to seventy-eight months in prison. The trial court sentenced Fanfan to seventy-eight months imprisonment.

The Government appealed to the Court of Appeals for the First Circuit arguing that the trial court committed clear error. Shortly after the case was docketed in the appellate court, the Government successfully sought a writ of certiorari before judgment from the Supreme Court.

### III. BACKGROUND

This section will explore the importance of the right to trial by jury at the time of the framing. Next, it will briefly explore the use of indeterminate sentencing as a means of punishment and rehabilitation. Then, it will trace the sentencing reform efforts of the 1980's and implementation of the Guidelines. Finally, it will follow the development of case law leading to the Supreme Court's decisions in *Apprendi v. New Jersey* and *Blakely v. Washington*.

#### A. The Importance of Trial by Jury

The Framers agreed that the right to trial by jury in criminal proceedings was an integral part of the Constitution's system of checks and balances. Neither the executive nor the legislative branches could criminally punish a person without the citizenry's consent. This sentiment has continued and was echoed in *Blakely*, "[J]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant
to ensure their control in the judiciary.\textsuperscript{57} A jury of ordinary men works as a check on the threat of "judicial despotism."\textsuperscript{58} Thomas Jefferson noted, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."\textsuperscript{59}

The Framers' concern regarding wrongful punishment and judicial tyranny grew out of colonial America's struggles with the English Crown.\textsuperscript{60} On several occasions, the Crown attempted to "emasculate colonial juries" by removing the right to jury trial for certain offences.\textsuperscript{61} Criminal juries were routinely used to challenge the power of the Crown to try persons for political offenses and violations of revenue laws.\textsuperscript{62}

Against this backdrop, the Framers thought it imperative that the right to trial by jury be preserved in the Constitution.\textsuperscript{63} Article III of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."\textsuperscript{64} The Sixth Amendment guarantees "the right to . . . an impartial jury."\textsuperscript{65} At the time of the framing of the Constitution, trial by jury generally meant that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."\textsuperscript{66}

B. The Use of Indeterminate Sentencing

Substantive law primarily governed sentencing in eighteenth century England.\textsuperscript{67} Punishment for an offense was sanction-specific; the law pro-

\textsuperscript{57} Blakely, 542 U.S. at 306.
\textsuperscript{58} Booker, 543 U.S. at 238.
\textsuperscript{59} Blakely, 542 U.S. at 306 (quoting 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958)).
\textsuperscript{60} Barkow, \textit{supra} note 2, at 57. The case of John Peter Zenger galvanized strong support for the jury as a tool against the Crown. \textit{Id.} at 52. In 1734, the Royal Governor of New York attempted to punish Zenger for criticizing the governor's administration. \textit{Id.} Three grand juries refused to indict Zenger, but the governor brought a charge on the basis of an "information." \textit{Id.} At trial, Zenger's attorney argued that the jury had the right to determine both the law and fact of the case. \textit{Id.} The jury could conclude that the truthfulness of Zenger's statements provided a ground for acquittal, even though the law provided for no such defense. \textit{Id.} The jury returned a verdict of acquittal. \textit{Id.}
\textsuperscript{61} \textit{Id.} at 52. While the Stamp Act gained its notoriety for taxation without representation, it also provided that violators of the act would be tried in the admiralty courts of London. \textit{Id.} at 53.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 34.
\textsuperscript{64} U.S. CONST. art. III, § 2, cl. 3.
\textsuperscript{65} U.S. CONST. amend. XI.
\textsuperscript{66} Apprendi, 530 U.S. at 477.
\textsuperscript{67} \textit{Id.} at 479.
vided a particular sentence for a particular crime.\footnote{Id.} Usually, a conviction for a felony resulted in death.\footnote{Id.} At this time, the trial judge in England exercised little authority over the sentence, unless he thought it unjustly harsh.\footnote{Id.} “The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law.”\footnote{3 WILLIAM BLACKSTONE, COMMENTARIES *396 [emphasis added].}

As the use of capital and corporal punishment was limited, the use of incarceration became more prevalent.\footnote{Id.} In both England and colonial America, sentencing judges exercised wide discretion in determining the length of punishment,\footnote{Id.} so long as the sentence was “imposed within limits fixed by law.”\footnote{Apprendi, 530 U.S. at 481.} The earliest criminal statutes of this country set the pattern of establishing a minimum and maximum term of imprisonment for varying offenses.\footnote{Apprendi, 530 U.S. at 481.} In the federal system, sentencing authority was vested in the trial judge; the jury had no role in the process.\footnote{Id.} During this time, the trial judge’s determination of sentence was subject to limited appellate review.\footnote{Id.}

Mitigating or aggravating factors relating to the underlying crime and the offender tempered the use of the trial court’s discretion.\footnote{Id.} Beginning in the nineteenth century and continuing into most of the twentieth, rehabilitation\footnote{Rehabilitation is “the process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.” BLACK’S} was the primary model for sentencing.\footnote{Id. Each sentence was to be tai-
lored to maximize the offender’s chances of rehabilitation. The Supreme Court approved the rehabilitative model and the historic practice of wide judicial discretion in sentencing matters. The Court stated, “the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.” The Due Process Clause of the Fourteenth Amendment did not require judges to abandon their reliance on out-of-court information for sentencing purposes. Rehabilitation justified the sentencing judge’s discretion and allowed the judge to be free from any procedural trial rules that might frustrate his use of that discretion. This rationale dominated sentencing systems until the latter part of the twentieth century.

C. The Institution of Determinate Sentencing

1. The Guidelines

Criticism of indeterminate sentencing increased during the late 1970s and early 1980s. Some objected to the rehabilitative model of sentencing and others to the apparent inequities of sentencing some offenders to longer terms than others for the same crime. Disparity and discrimination were increasingly used to describe indeterminate sentences. Indeterminate sentencing was also viewed as a contributing factor to rising crime rates. This criticism led many states, and the federal government, to adopt determinate sentencing systems.

LAW DICTIONARY 1311 (8th ed. 2004).

81. Id.
82. 337 U.S. 241 (1949). The jury convicted the defendant of first-degree murder and recommended a sentence of life imprisonment. Id. at 242. Based on a pre-sentence report prepared by the court’s probation department and evidence not introduced at trial, the judge sentenced the defendant to death. Id.
83. Berman, supra note 80, at 7.
84. Williams, 337 U.S. at 247.
85. Id. at 250–51.
86. Berman, supra note 80, at 7.
87. CAMPBELL, supra note 1, § 1.3.
88. Id.
89. STITH & CABRANES, supra note 73, at 30.
90. CAMPBELL, supra note 1, § 1.3.
91. Id. Studies demonstrated that non-rehabilitative factors, such as race and sex, were influencing sentencing decisions. Id.
92. Id.
93. Id.
The federal government adopted determinate sentencing for all federal offenses in the Comprehensive Crime Control Act of 1984, commonly referred to as the Sentencing Reform Act (SRA). The SRA established the United States Sentencing Commission ("Commission") as an independent agency within the judicial branch. Congress created the Commission as an independent agency to shield sentencing decisions from "raw politics." The mission of the Commission is to develop guidelines "that will further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender." Congress created the Commission with three goals in mind. The first goal, honesty, was designed to avoid the confusion and uncertainty that plagued indeterminate sentencing. Second, Congress required uniformity in sentencing for similar criminal conduct by similar offenders. Finally, Congress sought proportionality through a system that imposes appropriately different sentences for conduct of different severity.

2. How the Guidelines Work

The Commission set up a rather complicated formula for calculating the determinate sentences for convicted offenders. There are essentially six steps to the process. First, the judge selects the guideline that most closely matches the offense in question to determine the initial number of points or the base offense level. Second, the judge determines whether that number should be increased or decreased based on specific offense characteristics. Third, adjustments should be made, lowering or raising

95. CAMPBELL, supra note 1, § 4.6.
96. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, introductory cmt. (West 2005).
99. Id.
100. Id.
101. Id.
102. Id.
103. CAMPBELL, supra note 1, § 4.6.
104. Id. The Guidelines assign each offense a point value. Id. For example, a voluntary manslaughter conviction is worth twenty-nine points. U.S. SENTENCING GUIDELINES MANUAL § 2A1.3 (West 2005).
105. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (West 2005). These adjustments are located within the guideline of the offense.
the base offense level. Fourth, the judge must decide which criminal history category is appropriate for the defendant. Fifth, the judge locates the sentencing range on a grid where the row for adjusted offense number intersects the column for criminal history category. In the final step, the judge must determine if any "downward" or "upward" departures are proper. The sentencing judge makes the factual findings using a preponderance of the evidence standard. The sentencing determination may be appealed, but the appellate court uses an abuse of discretion standard and gives deference to the trial court's factual finding.

D. Case Law

1. Early Cases

In re Winship and United States v. Gaudin provided the basis for interpreting modern criminal statutes and sentencing procedures. In Winship, the Court explicitly held that the Constitution of the United States protected every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Due process required the State to bear the burden of persuasion before a defendant lost his liberties. Gaudin held that a criminal defendant may demand that a jury determine his guilt as to every element of the crime with which he is charged.

The Court, in Jones v. United States, addressed whether provisions of the federal carjacking statute constituted substantive elements of the

106. Id. Depending upon the victim's status, the offender's role in the crime, whether the defendant obstructed justice, whether there were multiple counts, or whether the offender accepted responsibility, the level should increase or decrease. Id. For example, accepting responsibility for the crime reduces the offense level by two points. Id. at § 3E1.1.

107. Id. § 4A1.1. This category is based on prior convictions, sentences, and length of time between prior convictions. Id. If the defendant has a prior conviction and was sentenced over thirteen months, he receives three points. Id.

108. CAMPBELL, supra note 1, § 4.6.

109. Id. Not relevant in this determination are the offender's race, sex, national origin, or socio-economic level. The Guidelines also provide a list of "not ordinarily relevant" classifications such as prior military service or family ties. U.S. SENTENCING GUIDELINES MANUAL § 5H.1-6 (West 2005).

110. CAMPBELL, supra note 1, § 4.6.

111. Id.


114. Winship, 397 U.S. at 364.

115. Id.


118. 18 U.S.C. § 2119 (1988). At the time of the offense, the statute read as follows:
crime of carjacking or mere sentencing considerations.\textsuperscript{119} The defendant, Nathaniel Jones, was arrested, charged, and convicted under the carjacking statute.\textsuperscript{120} Based on the jury’s verdict alone, a fifteen year sentence was appropriate.\textsuperscript{121}

The pre-sentence report recommended that the defendant be sentenced to twenty-five years in jail given the fact that one of the victims received serious bodily injury.\textsuperscript{122} Jones objected on the grounds that § 2119(2), referring to serious bodily injury, was an element of the offense that was neither charged nor proven to the jury beyond a reasonable doubt.\textsuperscript{123} The court disagreed and considered the provision a sentencing factor.\textsuperscript{124} Finding that serious bodily injury was supported by a preponderance of the evidence, the trial judge sentenced the defendant to twenty-five years in prison.\textsuperscript{125}

On appeal, the Court looked to rules of statutory construction, rather than constitutional concerns, to address the defendant’s objection.\textsuperscript{126} By classifying the provisions of the statutes as three separate crimes, the Court was able to avoid the more serious question of whether the Fifth and Sixth

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —

1. be fined under this title or imprisoned not more than 15 years, or both,
2. if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
3. if death results, be fined under this title or imprisoned for any number of years up to life, or both.

\textit{Id.}

\textsuperscript{119} Jones, 526 U.S. at 231.
\textsuperscript{120} Id. at 230. Jones held up two men, with the assistance of his two confederates, Oliver and McMillan. \textit{Id.} at 229. After Jones and McMillan went through the victims’ pockets, Oliver struck one of the victims in the ear. \textit{Id.} at 229. The victim suffered from a perforated eardrum, causing significant bleeding and permanent hearing loss. \textit{Id.} at 229. Jones made his getaway in one of the victim’s car. \textit{Id.} at 230. The indictment did not mention the numbered sections of the statute concerning serious bodily injury or death and, at arraignment, the magistrate judge informed him that he was faced with a maximum sentence of fifteen years, as opposed to twenty-five years or life in prison. \textit{Id.} The trial judge’s instructions to the jury regarding the elements of the offense made no reference to the ‘serious bodily harm’ provision of the statute. \textit{Id.} at 231.

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.

\textsuperscript{125} Jones, 526 U.S. at 231. The United States Court of Appeals for the Ninth Circuit affirmed, reasoning that Congress did not intend to create three separate crimes. The appellate court found persuasive that the subtitle of the bill creating § 2119 was “Enhanced Penalties for Auto Theft” and floor debate of the bill focused on penalties for a single carjacking offense. United State v. Oliver, 60 F.3d 547, 553 (9th Cir. 1995).

\textsuperscript{126} Jones, 526 U.S. at 243.
Amendments were indifferent to treating facts that set sentencing ranges as sentencing factors, rather than elements of the substantive crime. The question of whether judicial fact finding was proper was left for another day. Hinting at its concern, the majority was troubled about diminishing the jury’s role—finding guilt as to all elements of a crime beyond a reasonable doubt—to the position of “gatekeeper,” simply setting the floor of punishment that a judge may increase by finding facts by a preponderance of the evidence. In this case, the jury’s finding of facts would simply be a jumping off point, “open[ing] the door” for the trial judge to increase the punishment from fifteen years to twenty-five years. The Court held that the jury was required to make findings of fact that raise “the sentencing ceiling.”

In his concurrence, Justice Scalia was more forthcoming and wrote, “I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” According to Justice Scalia, these facts are to be proved beyond a reasonable doubt.

2. Apprendi and Blakely

In *Apprendi v. New Jersey*, the Court addressed the question left unanswered by *Jones*. The defendant in *Apprendi* plead guilty to two counts of second-degree possession of a firearm for unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb. Under New Jersey law, a prosecutor may request an enhanced sentence, if the crime was committed with a bias purpose, more commonly known as a “hate crime.” At sentencing, the trial judge concluded that “the crime was motivated by racial bias.” Had the judge not made the additional hate

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 244.
131. *Id.* at 251.
132. *Jones*, 526 U.S. at 252 (Scalia, J. concurring).
133. *Id.* In dissent, Justice Kennedy noted that Congress has the power to determine whether a sentencing factor is just that or an element of the offense. *Id.* at 255 (Kennedy, J. dissenting). He argued that the majority’s reading of the statute was strained. *Id.*
134. 530 U.S. 466 (2000).
135. *Id.* at 469. In the early morning of December 22, 1994, the defendant, Charles Apprendi, Jr., fired several bullets into the home of an African-American family that had recently moved into the defendant’s neighborhood. *Id.* Apprendi was arrested shortly after the incident and reportedly stated that he did not want blacks in his neighborhood. *Id.* A grand jury returned a twenty-three count indictment against him. *Id.*
136. *Id.* at 470.
137. *Id.* at 471. The Superior Court of New Jersey, Appellate Division, and the state
crime finding, the defendant would have been sentenced to a maximum concurrent sentence on all counts of twenty years. With the hate crime finding, the defendant’s maximum sentenced increased to thirty years.\textsuperscript{138}

The Court was directly confronted with the question of whether the Due Process Clause of the Fourteenth Amendment required that a jury or a judge make a factual determination increasing a maximum sentence. The Court stated, “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\textsuperscript{139} In reaching its decision, the Court relied heavily on the importance of the jury at common law.\textsuperscript{140} Classifying facts needed for increased punishment as sentencing factors, thus taking the decision away from the jury, worked as a threat to the jury system and due process.\textsuperscript{141} It is important to note that \textit{Apprendi} dealt with findings that exceeded statutory maximums, rather than sentencing ranges within the statutory allowance.

Many observers believed that the limits of the Court’s decision in \textit{Apprendi} would not reach or alter modern sentencing practices.\textsuperscript{142} When the Court granted certiorari in \textit{Blakely v. Washington},\textsuperscript{143} most lower courts had decided that \textit{Apprendi} was inapplicable to judicial fact finding that simply determined guideline sentencing outcomes within statutory ranges.\textsuperscript{144} The Court’s decision in \textit{Blakely} would prove otherwise.

In \textit{Blakely}, the defendant, Ralph Blakely, Jr., plead guilty to kidnapping his wife.\textsuperscript{145} The facts admitted during his allocution warranted a stan-

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\textsuperscript{138} \textit{Id.} at 470.

\textsuperscript{139} \textit{Id.} at 490.

\textsuperscript{140} \textit{Apprendi}, 530 U.S. at 484. Commenting on the importance of the jury trial guarantee in Article III of the Constitution, a New Hampshire farmer warned of the need “to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.” \textsc{The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins} 477 (N. Cogan ed. 1997).

\textsuperscript{141} \textit{Apprendi}, 530 U.S. at 476.

\textsuperscript{142} Berman, \textit{supra} note 80, at 9.


\textsuperscript{144} Berman, \textit{supra} note 80, at 9.

\textsuperscript{145} \textit{Blakely v. Washington}, 542 U.S. 296, 299 (2004). Blakely apparently suffered from psychological and personality disorders and had been diagnosed with paranoid schizophrenia. \textit{Id.} at 298. In 1998, Blakely abducted his wife, Yolanda. \textit{Id.} In the process, he bound her with duct tape and forced her into a wooden box in the bed of his truck at knifepoint. \textit{Id.} When the Blakelys’ son returned home from school that day, Blakely ordered him to follow in another car or Blakely would shoot Yolanda with a shotgun. \textit{Id.} The boy escaped and sought help at a gas station the two cars had visited. \textit{Id.} Blakely drove Yolanda to a house in Montana where he was subsequently arrested. \textit{Id.}
standard sentence range of fifty-three months. The trial judge imposed a ninety month sentence after finding that the defendant acted with "deliberate cruelty." Under Washington State’s sentencing scheme, “deliberate cruelty” was a ground for departing from the standard sentencing range.

The Court held that the imposition of the additional sentence violated the defendant’s Sixth Amendment right to jury trial when the facts supporting the deliberate cruelty finding were neither admitted by the defendant nor found by the jury. The maximum sentenced allowed, under Apprendi’s rule, “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” It is immaterial that the exceptional sentence could not exceed the statutory maximum of ten years. The statutory maximum “is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” In Blakely’s case, the maximum sentence supported by his guilty plea was fifty-three months. The jury’s verdict alone must authorize the sentence, not additional findings made by a judge.

The majority made clear that its holding in Blakely did not address the constitutionality of determinate sentencing, rather it addressed how determinate sentencing operates and complies with the Sixth Amendment. The Blakely case articulated an application of Apprendi that “reflects not just respect for long-standing precedent, but the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” The Court stated that a defendant has the right to demand that the State prove to a jury all the facts legally essential to his punishment.

In dissent, Justice O’Connor noted that the majority’s holding cast doubt on the validity of the Guidelines and twenty years of sentencing re-

146. Id. at 299. The defendant plead guilty to second-degree kidnapping involving domestic violence and use of a firearm. Id. State law prescribed a maximum sentence for second-degree kidnapping of ten years. Id. However, under Washington’s Sentencing Reform Act, the offense carried a standard punishment range of forty-nine to fifty-three months. Id.
147. Id. at 300. Under Washington’s Guidelines, the judge may depart from the standard range if he finds “substantial and compelling reasons justifying an exceptional sentence.” WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000).
149. Id. at 303.
150. Id.
151. Id. at 304.
152. Id. at 303–04.
153. Id. at 305.
155. Id. at 305–06.
156. Id. at 313.
She concluded that Blakely's application of Apprendi's rule would lead to a consolidation of sentencing power in the judiciary. Justice O'Connor, later reflecting on the significance of Blakely, described it as a "No. 10 earthquake."

IV. REASONING

United States v. Booker presented two separate issues for the Court. First, whether the Sixth Amendment was violated when facts necessary for sentencing under the Guidelines were found by the judge, rather than the jury. Second, if the answer to the first question was "yes," whether the Guidelines were inapplicable. Two separate majorities of the Court answered these questions.

A. The Sixth Amendment Right to Trial by Jury

In his opinion, Justice Stevens briefly described the litany of cases leading to the Court's holding in Blakely. He then went on to discuss the statutory language requiring judges to follow the Guidelines with little power to depart from them. Finally, he rejected three arguments offered by the Government to distinguish the Guidelines from the state sentencing scheme struck down in Blakely.

1. Groundwork Cases

The Court began by addressing previous cases relating to its decision in Blakely. Relying on In re Winship, Jones, and Apprendi, the Court determined that the right to trial by jury is implicated "whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the

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157. Id. at 314 (O'Connor, J. dissenting).
158. Id.
159. Berman, supra note 80, at 5.
160. Booker, 543 U.S. at 228.
161. Id.
162. Id.
163. Justice Stevens delivered the opinion of the Court as to the first question. He was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Id. at 226. Justice Breyer delivered the opinion of the Court as to the second question. He was joined by the Chief Justice and Justices O'Connor, Kennedy, and Ginsburg. Id. at 244.
164. Id. at 230–33.
165. Id. at 234.
166. Booker, 543 U.S. at 235–37.
167. Id. at 230.
168. See infra Part III.D.
jury verdict or admitted by the defendant." For Apprendi purposes, the "statutory maximum" is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 

2. The Mandatory Nature of the Guidelines

No Sixth Amendment violation would exist if the Guidelines were advisory, rather than mandatory. The selection of a sentencing range based on a particular set of facts would have been consistent with the trial judge's broad authority and discretion to impose a sentence within the statutory range. Section 3553(b) of the Guidelines directs that the court "shall impose a sentence of the kind, and within the range" established by the Guidelines. The Court had previously held that the Guidelines have the force and effect of laws.

The limited ability of the trial judge to depart from the Guidelines does not suggest that he is bound only by the statutory minimum and maximum. The Court stated that the trial judge is bound to impose the sentence called for in the Guidelines, and, in most cases, the Guidelines have taken into account almost every possible factor that could be used to depart. The facts of both Booker and Fanfan reflect the mandatory nature of the Guidelines. Justice Stevens noted that both were run-of-the-mill drug cases that did not present the trial judge with an opportunity to adjust the sentence upward or downward based on the facts of the case after the relevant offense range was calculated.

Sentencing factors had the effect of concentrating sentencing power with the judge. The role of the jury diminished as the judge was charged with setting the upper limits of sentencing. Depending on the factor and its corresponding punishment, the jury's finding of the underlying crime became less important. The Sixth Amendment requires the jury to stand
between the defendant and the power of the government under the sentencing system.\textsuperscript{182}

3. The Government's Position

The Government advanced three arguments distinguishing the holding in \textit{Blakely} from the Guidelines.\textsuperscript{183} First, the Government argued that a commission rather than the legislature, as in Washington's sentencing scheme, adopted the Guidelines.\textsuperscript{184} Second, stare decisis required the Court to follow earlier decisions that were inconsistent with \textit{Blakely}.\textsuperscript{185} Finally, the Government contended that \textit{Blakely}'s holding presented a separation of powers issue.\textsuperscript{186}

The majority quickly dismissed the Government's first argument, stating that it "lack[ed] constitutional significance."\textsuperscript{187} Regardless of whether a commission or Congress determined that a fact should increase a defendant's sentence, a judge, not the jury, was still making that determination.\textsuperscript{188} The Court noted that the principles it sought to defend were applicable to the Guidelines.\textsuperscript{189} The right to trial by jury sought to limit judicial power "that could arise from 'arbitrary punishments upon arbitrary convictions.'"\textsuperscript{190}

The Court also quickly dismissed the Government's stare decisis argument.\textsuperscript{191} The Government cited four cases that it argued were inconsistent with \textit{Blakely}.\textsuperscript{192} In \textit{United States v. Dunnigan},\textsuperscript{193} the Court held that the guideline provision requiring a judge to increase a sentence based on perjured testimony did not violate the defendant's right not to testify on her own behalf.\textsuperscript{194} The question of whether the perjury factor increased the defendant's sentence above the sentencing range found by the jury's facts was

Rodriguez, 73 F.3d 161 (7th Cir. 1996), the court increased the defendant's sentence from fifty-four months to life imprisonment. In United States v. Hammoud, 381 F.3d 316, 362 (4th Cir. 2004), the trial court increased the defendant's sentence from fifty-seven month to 155 years.
\textsuperscript{182} \textit{Booker}, 543 U.S. at 236.
\textsuperscript{183} \textit{Id}.
\textsuperscript{184} \textit{Id}.
\textsuperscript{185} \textit{Id}.
\textsuperscript{186} \textit{Id} at 238.
\textsuperscript{187} \textit{Id}.
\textsuperscript{188} \textit{Booker}, 543 U.S. at 238.
\textsuperscript{189} \textit{Id}.
\textsuperscript{190} \textit{Id}.
\textsuperscript{191} \textit{Id}.
\textsuperscript{192} \textit{Id} at 239.
\textsuperscript{193} 507 U.S. 87 (1993).
\textsuperscript{194} \textit{Id} at 98.
The trial judge may take into account such testimony if it does so within the statutory range. In *Witte v. United States*, the Court held that the Double Jeopardy Clause did not prevent a prosecution for conduct that was used to increase a defendant's sentence on a previous conviction. *Witte* relied on *United States v. Watts*, which held that the Double Jeopardy Clause did not prevent a court from considering acquitted conduct in sentencing a defendant. Because these cases did not specifically address sentencing enhancements, the Court in *Booker* dismissed their relevance.

Finally, in *Edwards v. United States*, the Court held that a jury's finding that the defendant was involved in a conspiracy with either cocaine or crack supported a sentencing enhancement for both drugs. The defendant argued that the jury's verdict limited the judge to enhancements based on one drug, not both. Justice Stevens rejected this case as well, because it did not specifically address sentencing enhancements.

For its third point, the Government argued that any holding that required sentencing factors to be proved to a jury beyond a reasonable doubt would transform the Guidelines into a code defining criminal conduct. This would lead to an unconstitutional grant of authority to the Commission of an inherently legislative function. The Court rejected this argument and concluded that the Sixth Amendment would be violated whether the enhancement facts were called "sentencing factors" or "elements" of the crime. Whichever label one chooses, the jury must find the fact beyond a reasonable doubt before it can be used to increase punishment beyond the sentencing range.

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196. *Id.*
198. U.S. CONST. amend. V. The relevant portion of the Fifth Amendment states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." *Id.*
201. *Booker*, 543 U.S. at 240.
202. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 755.
B. The Appropriate Remedy

After finding that the jury, not the judge, must find facts relevant to sentencing under the Sixth Amendment, the Court was faced with the issue of how to apply the constitutional holding to the Guidelines. The Court held that the proper remedy was to sever two provisions of the SRA, which effectively made the Guidelines advisory. The Court first explained why Congress would likely prefer the total invalidation of the Guidelines to engrafting the Sixth Amendment requirement onto it. Second, the Court explained why Congress would prefer the excision of two provisions of the Act rather than the Act's complete invalidation.

1. Severance or Addition of Sixth Amendment Requirement

The Court listed several considerations in determining that Congress would not want the Act to remain if the Sixth Amendment requirement was added to it. First, Congress intended the Guidelines to serve as an aid to the judge, not the jury, in determining punishment. The statute requires that “the court” should look to “the nature and circumstances of the offense and the history and characteristics of the defendant.” Adding the Court’s Sixth Amendment holding would require that “the judge working together with the jury” determine sentencing. Congress did not intend the jury to play such a role.

Second, Congress’s goal in implementing the Guidelines was to increase uniformity in sentencing based on the defendant’s real conduct. Judges rely on pre-sentence reports to relay information regarding the defendant’s actual conduct when he committed the crime. Although elements of the real conduct may not go to the jury, “conduct that is not formally charged . . . may enter into the determination of the applicable guideline sentencing range.” Applying the Sixth Amendment requirement to the SRA would prevent the judge from seeking information from the pre-
sentence report and prevent sentencing based on the defendant’s conduct at the time of the offense. This would undermine Congress’s goal in punishing similar crimes in similar ways.\textsuperscript{222}

Third, severing two portions of the Act would not create an overly complex system for administering punishment under the Guidelines.\textsuperscript{223} The Sixth Amendment requirement would require judges, prosecutors, defense lawyers, and juries to determine not only whether the underlying crime was committed, but also how it was committed.\textsuperscript{224} Indictments would be too intricate, detailing every possible act of the defendant during the commission of a crime.\textsuperscript{225} Defendants would have the difficult task of defending several acts while simultaneously trying to establish that they were not present at the time of the offense.\textsuperscript{226}

Fourth, any Sixth Amendment requirement would undermine Congress’s intent to punish uniformly in plea bargaining situations.\textsuperscript{227} The Guidelines established policies whereby judges could fairly evaluate and accept or reject plea bargains based on the defendant’s actual conduct.\textsuperscript{228} The judge would garner such information from the pre-sentence report. With the Sixth Amendment requirement, the prosecutor would gain a great deal of power over the defendant’s sentence without the judge providing a moderating force.\textsuperscript{229} Prosecutors would decide which defendants merit heavier sentences and charge accordingly.\textsuperscript{230}

Finally, Congress would not have enacted sentencing reform that made it harder to adjust sentences upward than to adjust downward.\textsuperscript{231} The Sixth

\begin{itemize}
\item \textsuperscript{222} Id. at 251. The Court provided an example of Smith and Jones violating the Hobbs Act forbidding interference with any commodity in commerce. Id. Smith threatened to injure a victim unless the victim advanced a few dollars, while Jones threatened the victim and the victim’s family for a larger amount of money. Id. The two committed the same crime, but their conduct was very different. Id. Engrafting the Sixth Amendment requirement would prevent the judge from relying on such information unless it was charged. Id. The two would receive the same sentence for different conduct. Id.
\item \textsuperscript{223} Booker, 543 U.S. at 254.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Id. By way of example, the Court pondered “would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished it, whether he threatened death, whether he caused serious bodily injury...?” Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 255.
\item \textsuperscript{228} Id. at 255.
\item \textsuperscript{229} Booker, 543 U.S. at 255.
\item \textsuperscript{230} Id. at 257. In Booker’s case, the prosecutor could elect to charge 658 grams of cocaine, ninety-two grams, or less. Id. The judge would be unable to sentence based on Booker’s real conduct of possession 658 grams. Id.
\item \textsuperscript{231} Id.
\end{itemize}
Amendment requirement would allow judges to find facts that warrant a lower sentence but not facts that exceed the sentencing range.\textsuperscript{232}

2. What Has to Go

Because the Court determined that it would be impractical to add the Sixth Amendment requirement to the Act, it next faced the question of which portions of the Act to sever in order to make the Act constitutional.\textsuperscript{233} Congress would prefer partial severance rather than complete invalidation.\textsuperscript{234} Those portions of the Act that are constitutionally valid, capable of functioning independently, and consistent with Congress’s goals must be retained.\textsuperscript{235} Consequently, the Court severed § 3553(b)(1), which required judges to sentence within the appropriate range, and § 3742(e), which required de novo review of departures from the Guidelines.\textsuperscript{236}

Removing the mandatory language from the Act satisfied \textit{Apprendi}’s rule.\textsuperscript{237} The remainder of the Act functions independently.\textsuperscript{238} It still requires judges to take the Guidelines into account when pronouncing sentencing and furthers Congress’s goal of uniformity.\textsuperscript{239}

Section 3742(e) must also be severed because of its cross-references to § 3553(b)(1) in the appellate process.\textsuperscript{240} This section required de novo review of the trial court’s sentencing determination in the circuit courts.\textsuperscript{241} The Court previously held that when a statute does not explicitly set forth the standard of review, it may do so implicitly.\textsuperscript{242} The standard may be inferred from similar statutes and the “sound administration of justice.”\textsuperscript{243} Prior to the enactment of § 3742(e) in 2003, appellate courts reviewed sentences for correctness and reviewed those sentences falling outside the sentencing range for unreasonableness.\textsuperscript{244} Appellate courts should look to the

\begin{itemize}
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id. at 258.
\item \textsuperscript{234} Id. at 258.
\item \textsuperscript{235} \textit{Booker}, 543 U.S. at 259.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id. “[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [SRA] the provisions that make the Guidelines binding on district judges.” Id. at 233 (Thomas, J., dissenting).
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id. at 260 (citing Prosecutorial Remedies and Other tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 401(d)(1), 117 Stat. 670).
\item \textsuperscript{241} \textit{Booker}, 543 U.S. at 282.
\item \textsuperscript{242} Id. See generally Pierce v. Underwood, 487 U.S. 552 (1988).
\item \textsuperscript{243} \textit{Booker}, 543 U.S. at 260.
\item \textsuperscript{244} Id.
\end{itemize}
factors to be considered in imposing a sentence and the reason for such imposition by the district court.\(^{245}\)

3. What Remains

The remedy kept the Commission intact and allowed it to continue to research, revise, and write new sentencing ranges, factors, and Guidelines.\(^{246}\) Congress’s intent to achieve uniformity, honesty, and proportionality in sentencing was maintained.\(^{247}\) The two cases were remanded to the district courts for resentencing based on the Court’s constitutional holding and appropriate remedy.\(^{248}\)

C. Dissenting Opinions

*Booker* included four dissenting opinions.\(^{249}\) The most important included Justice Stevens’s dissent as to the Court’s remedy\(^{250}\) and Justice Breyer’s dissent from the Sixth Amendment holding.\(^{251}\)

1. Justice Stevens’s Dissent

Justice Stevens wrote a dissenting opinion in response to the majority’s holding that the Sixth Amendment requirement could not be successfully added to the SRA.\(^{252}\) The Justice disagreed with the majority’s five considerations supporting severance of two portions of the Act rather than the addition of the Sixth Amendment requirement.\(^{253}\) Justice Stevens’s requirement would simply allow the judge to consider additional factors when determining punishment within the sentencing range established by the jury’s findings.\(^{254}\) In Booker’s case, had the jury found that Booker possessed 566 additional grams, the appropriate range would have been 324 to 405 months in prison.\(^{255}\) The obstruction of justice finding as well as any other information in the pre-sentence report could be used to determine Booker’s sentence

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245. *Id.*
246. *Id.* at 263.
247. *Id.*
248. *Booker,* 543 U.S. at 264.
249. Justices Stevens, Scalia, Thomas, and Breyer authored dissenting opinions.
250. *Booker,* 543 U.S. at 272 (Stevens, J. dissenting).
251. *Id.* at 326 (Breyer, J. dissenting).
252. *Id.* at 272. (Stevens, J., dissenting). Justice Stevens was joined by Justice Souter and partially by Justice Scalia. *Id.*
253. *Id.*
254. *Id.* at 273.
255. *Id.*
within the 324 to 405 sentencing range.\textsuperscript{256} The Guidelines combine mandatory sentencing and discretionary decision making by the judge in the same system.\textsuperscript{257}

Justice Stevens believed the majority inappropriately determined Congress's intent and desire regarding the Guidelines and made a policy determination that was better left to Congress.\textsuperscript{258} He was critical of the Court's severability analysis.\textsuperscript{259} The majority's opinion did not further Congress's goal of uniformity because the Guidelines were merely advisory.\textsuperscript{260}

\textbf{2. Justice Breyer's Dissent}

The same four justices have been on the losing side of the Court's Sixth Amendment analysis in sentencing decisions over the last decade.\textsuperscript{261} The dissent disagreed with the majority's historical analysis regarding the role of the jury in sentencing.\textsuperscript{262} Traditionally, the law has treated elements of a crime differently than factors to be used at sentencing.\textsuperscript{263} The dissenters were also concerned that the Sixth Amendment holding prevents Congress and state legislatures from defining appropriate punishment.\textsuperscript{264}

\textbf{V. SIGNIFICANCE}

The Court's decision in \textit{United States v. Booker} poses significant challenges to the operation of the federal criminal justice system. Both \textit{Booker} and \textit{Blakely} have impacted the working of justice like no other cases in the Court's criminal law jurisprudence.\textsuperscript{265} The Court's decision calls into ques-

\textsuperscript{256} Book, 543 U.S. at 173.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} Id. at 279.
\textsuperscript{260} Id. at 280.
\textsuperscript{261} The Chief Justice and Justices O'Connor, Breyer, and Kennedy dissented in Jones, Apprendi, and Blakely. Id. at 802 (Breyer, J., dissenting).
\textsuperscript{262} Book, 543 U.S. at 326–27.
\textsuperscript{263} Id.
\textsuperscript{264} Id. at 328.
\textsuperscript{265} Frank O. Bowman, III, \textit{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, 252 (2004). During a hearing before the Senate Judiciary Committee regarding the \textit{Blakely} decision, witnesses were asked if another case had had as big an impact on American criminal law as \textit{Blakely}. Blakely v. Washington and the Future of the Guidelines: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (July 13, 2004). Witnesses responded that Miranda v. Arizona, 384 U.S. 436 (1966), Mapp v. Ohio, 367 U.S. 643 (1961), and Gideon v. Wainwright, 372 U.S. 335 (1963), each had a constitutional impact on the criminal justice system, but their holdings were limited to specific acts and were accompanied by clear rules. Bowman, supra note 265, at 252.
tion over twenty years of sentencing reform efforts at the state and national level and leaves unresolved whether defendants sentenced under the Guidelines are entitled to new sentencing hearings.

A. Where Do We Go From Here?

In Blakely, Justice Scalia wrote that the Court did not find structured sentencing unconstitutional; rather it stated how it must work within the Sixth Amendment’s framework. Booker sought to do the same. Nowhere in the opinion did the Court explicitly rule out the continued use of determinate sentencing systems. It will be left to Congress and the Executive to implement a new system that best serves the interests expressed in the Guidelines while complying with the Sixth Amendment.

1. Other Options

There are several sentencing options available to Congress when it seeks to tinker with the Guidelines in light of the Booker decision. First, a jury sentencing scheme could be established. In this system, the jury would actually select a defendant’s punishment within the statutory range. The judge would play little or no part in the sentencing determination. This system would present the same problem as indeterminate sentencing and judicial discretion. A jury sentencing system is unlikely to take hold given the fact that judges have traditionally administered sentencing at the federal level. Second, Congress could enact a system whereby conviction for a certain crime results in a particular penalty similar to sentencing regimes in England prior to the nineteenth century. This approach is similarly unlikely, given Congress’ desire to punish crimes based on the defendant’s conduct during the offense. Third, Congress could return to a system of indeterminate sentencing that existed prior to the Sentencing Reform Act’s enactment in 1987. Finally, Congress could attempt to salvage the Guidelines by allowing the trial judge to consider facts and utilize discretion within the statutory or guideline range. This approach closely follows the reasoning of Justice Stevens in his Blakely dissent. This system would re-

267. Bowman, supra note 265, at 258.
268. See infra Part III.C.
269. STITH & CABRANES, supra note 73, at 9.
270. Bowman, supra note 265, at 258.
271. See infra Part III.B.
272. See infra Part III.C.
273. See infra Part III.B.
quire post-conviction findings of fact by the judge\textsuperscript{274} but would comply with \textit{Blakely} because the judge is not increasing the sentence beyond its statutory maximum.

\textbf{2. One Last Problem}

One of the most troubling issues yet to be faced is what to do with defendants sentenced under the Guidelines over the last eighteen years. Justice O'Connor, in her dissent in \textit{Blakely}, forecasted the results of invalidating state and federal sentencing systems.\textsuperscript{275} Justice O'Connor suggested that sentences imposed after \textit{Apprendi} could be exposed to collateral attack based on the Court's precedent affecting conviction when a new rule is announced.\textsuperscript{276} Additionally, all sentences on direct appeal at the time of the \textit{Blakely} holding are in "jeopardy."\textsuperscript{277}

\textbf{VI. CONCLUSION}

The Court's decision in \textit{Booker} has left many scholars, members of Congress, judges, prosecutors, and defense attorneys, wondering what is next. Some admired the decision, not so much for its enlightened reasoning, but rather for dismantling of an overly harsh sentencing system.\textsuperscript{278} Others view the decision as destroying more than twenty years of efforts to improve a good, but flawed, sentencing scheme.\textsuperscript{279} Whatever the result, players in the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{274} Bowman, \textit{supra} note 265, at 258.
\item \textsuperscript{275} \textit{Blakely}, 542 U.S. at 324 (O'Connor, J., dissenting).
\item \textsuperscript{276} \textit{Id.} See \textit{Teague v. Lane}, 489 U.S. 288 (1989) holding that "a case announces a new rule if the result was not \textit{dictated} by precedent existing at the time the defendant's conviction became final." \textit{Id.} at 301.
\item \textsuperscript{277} \textit{Blakely}, 124 S.Ct. at 2549 (O'Connor, J. dissenting). Writing for the majority, Justice Stevens held that "today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review." \textit{Booker}, 543 U.S. at 267. Justice Stevens acknowledged that not "every sentence will give rise to a Sixth Amendment violation" and that "courts are expected to apply ordinary prudential doctrines." \textit{Id.}
\item \textsuperscript{278} Bowman, \textit{supra} note 265, at 264.
\item \textsuperscript{279} \textit{Id.}
\end{enumerate}
\end{footnotesize}
criminal justice system will have a difficult time shaping a sentencing system that furthers the Guideline's goals of uniformity, proportionality, and honesty while complying with the Sixth Amendment's right to trial by jury.

Brian M. Clary*

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