United States v. Booker and *United States v. Fanfan*: The Tireless March of *Apprendi* and the Intracourt Battle To Save Sentencing Reform

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The Supreme Court's decision in *Apprendi v. New Jersey*[1] marked the beginning of a dramatically new role for the criminal jury. The Court, in an effort to protect the democratic voice in the courtroom from what it perceived to be the encroachment of legislative control over sentencing decisions, demanded that all facts necessary to increase the penalty beyond the statutory maximum be tried to a jury beyond a reasonable doubt.[2] Far from enhancing the jury's role, however, *Apprendi*'s abandonment of the longstanding distinction between sentencing facts and elements of an offense created a paradox in which any attempt to increase democratic participation invariably transfers greater power not to the jury but to one of two unelected officials: the prosecutor or the judge. At the same time, the Court frustrated both Congress's and the Sentencing Commission's ability to reduce sentencing inequities.

In its 1970 decision *In re Winship*,[3] the Supreme Court established for the first time that the Due Process Clauses of the Fifth and Fourteenth Amendments require that no one be convicted of a crime except by proof of guilt beyond a reasonable doubt.[4] Through subsequent opinions, the Court set about clarifying when this burden of proof applied. In *Mullaney v. Wilbur*[5] and *Patterson v. New York*,[6] the Court held that *Winship* did not require proof of all facts beyond a reasonable doubt, but that the prosecution must prove all "elements included in the definition of an offense" to

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[1] 530 U.S. 466 (2000).

[2] *See id.* at 494.

[3] 397 U.S. 358 (1970).

[4] *Id*. at 361–64.

[5] 421 U.S. 684 (1975) (invalidating a Maine statute that defined murder as any homicide but provided for an affirmative defense of lack of provocation).

[6] 432 U.S. 197 (1977) (upholding a New York murder statute that defined murder as an intentional homicide but provided for an affirmative defense of extreme emotional disturbance).

this higher burden.[7] By limiting its holdings to the elements of an offense, the Court intentionally excluded from the higher burden "sentencing factors"—facts that are not necessary to constitute the crime but, nonetheless, go to the severity of the punishment.[8]

At the same time the Court was constitutionalizing the burden of proof in criminal trials, Congress and several states were embarking on a campaign to reign in disparities in sentencing.[9] While there was disagreement over both the extent and causes of sentencing disparity, a consensus had arisen that disparities did exist and that they contributed to an appearance of unfairness in the criminal justice system.[10] Congress responded by enacting the Sentencing Reform Act of 1984 ("SRA"),[11] establishing the Federal Sentencing Commission whose mission was to study the level of sentencing disparity, to propose a guidelines-based remedy for the problem, and then to monitor the resultant program, adjusting it as necessary to assure its fairness and efficiency.[12] On April 13, 1987, the Commission, as directed by Congress,[13] recommended the Federal Sentencing Guidelines ("the Guidelines") as a means of controlling judicial sentencing discretion.[14] The Guidelines, implemented as a 258-cell grid,[15] required sentencing judges to find the existence of certain sentencing factors, such as criminal history, amount of money or drugs in question, and the existence of bodily injury, which, when combined with the offense of conviction, determined a narrow range of months to which a defendant could be sentenced.[16] Thus, the

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[7] *Id.* at 210.

[8] *See* Almendarez-Torres v. United States, 523 U.S. 224, 239–40 (1998) (discussing the distinction between elements of an offense and sentencing factors and noting that *Winship* and its progeny required the former but not the latter be proven to a jury beyond a reasonable doubt). Traditional sentencing factors include criminal history, mitigating factors, and, in some cases, the use of a firearm. *See, e.g.*, Castillo v. United States, 530 U.S. 120, 126 (2000).

[9] *See, e.g.*, 28 U.S.C. § 991(b)(1)(B) (2000); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 210, 332 n.17 (2003) (noting that the Federal Sentencing Guidelines were intended to bring "uniformity" to the sentencing system); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (describing the devolution of discretionary sentencing into widely disparate sentences for similar conduct); Kevin R. Reitz, *Sentencing: Guidelines*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1429, 1431 (Joshua Dressler et al. eds., 2d ed. 2002) (listing seventeen jurisdictions that had adopted guidelines systems and seven that were either studying the idea or considering proposals by 1999); Cassia Spohn, *Sentencing: Disparity*, *in* 4 ENCYCLOPEDIA, *supra*, at 1423, 1425–28 (detailing the guidelines movement to address sentencing disparities).

[10] *See, e.g.*, Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 525–26 (1981) (recounting the debate surrounding sentencing disparities in the federal system).

[11] Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C.).

[12] § 217(a), 98 Stat. at 2017 (codified as amended at 28 U.S.C. § 991).

[13] 28 U.S.C.A. § 994(a) (2000 & Supp. 2004).

[14] The Guidelines became effective on November 1, 1987. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004) (historical note).

[15] *See id.* at § 5A.

[16] *See* 18 U.S.C. § 3553(a) (2000). The upper bound of the sentence is never greater than the lower bound by more than six months or 25% of the lower bound. 28 U.S.C.

Guidelines limited the universe of factors a judge could examine in making a sentencing determination and restricted his choice of sentencing terms. Through required reporting of judicial findings, the Guidelines forced into the open the considerations underlying sentencing disparities.

In 1999, the Guidelines were set on a collision course with the Court's emerging Fifth and Sixth Amendment[17] jurisprudence. In *Jones v. United States*[18] and *Apprendi v. New Jersey*,[19] the Court abandoned the element/ sentencing factor distinction of *Winship* and declared that *any* fact increasing the applicable statutory maximum sentence must either be admitted by the defendant or proven to a jury beyond a reasonable doubt.[20] Many commentators feared that *Apprendi* signaled the end of the Guidelines system because the Guidelines utilized sentencing factors to limit the judge's capacity to assign a higher sentence than that recommended by the grid (often less than the statutory maximum).[21] That fear was only heightened when, in *Blakely v. Washington*,[22] the Court invalidated Washington State's guidelines system. The Court held that Washington's sentencing guidelines violated the Sixth Amendment principle set forth in *Apprendi* because they required judges to find facts beyond those contained in the jury verdict, increasing the maximum penalty for an offense.[23] In so concluding, the Court determined that the "statutory maximum" applicable under *Apprendi* was not the maximum sentence authorized in the criminal statute, but rather the maximum sentence a judge could impose based solely on the facts contained within the jury's verdict, even if, pursuant to a guidelines system, that sentence was less than the maximum applicable under the statute.[24]

Although the Guidelines were managed administratively rather than statutorily, they were identical to Washington's system in all material respects and, thus, subject to the same analysis.[25] Last Term, in the consoli-

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§ 994(b)(2) (2000).

[17] The Court shifted its analysis from Fifth Amendment due process to the Sixth Amendment jury trial right when it substituted the rule that any fact that increases the maximum sentence must be proven to a jury beyond a reasonable doubt for the analysis of offense elements and sentencing factors present in the *Winship* line of cases. *See* Jones v. United States, 526 U.S. 227, 242–45 (1999) (analyzing the Federal Carjacking Statute under the *Winship* test, but suggesting that, following *McMillan*, the question is better phrased as whether the sentence was authorized pursuant to facts tried to a jury beyond a reasonable doubt).

[18] 526 U.S. 227 (1999).

[19] 530 U.S. 466 (2000).

[20] *See id.* at 494.

[21] *See, e.g.*, Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1483–85 (2001) (noting that *Apprendi* might invalidate the Guidelines but concluding the Guidelines were reconcilable with the opinion).

[22] 124 S. Ct. 2531 (2004).

[23] *See id.* at 2537–38.

[24] *See id.* at 2537.

[25] *See id*. at 2549 (O'Connor, J., dissenting) ("Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b) and implemented in USSG § 5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.").

dated cases of *United States v. Booker* and *United States v. Fanfan*,[26] the Court applied *Blakely* to the Guidelines, concluding that, like Washington's program, the Guidelines violated the Sixth Amendment.

By mistakenly substituting *Apprendi*'s bright-line rule for *Winship*'s more reasonable, if less determinative, test, the Court rendered the Federal Sentencing Guidelines system one that neither served Congress's goals in enacting the program, nor the interests of the defendants the Court sought to protect. Instead, *Apprendi* created a paradox in which any attempt to increase democratic participation in the criminal justice system invariably transfers greater power not to the jury, but to one of two unelected officials: the prosecutor or the judge. At the same time, through the elimination of the sentencing factor/offense element distinction, the Court frustrated both Congress's and the Sentencing Commission's ability to reduce sentencing inequities.

On February 26, 2003, Beloit, Wisconsin police responded to a call about a possible trespasser and encountered Freddie Booker emerging from behind the reported residence.[27] In his possession was a duffle bag containing 92.5 grams of crack cocaine.[28] In addition, Booker admitted to having just sold twenty more ounces (566 grams) of crack.[29] Booker was charged with possession with intent to sell more than fifty grams of cocaine base (crack) and with distributing cocaine base, both in violation of 21 U.S.C. § 841(a)(1).[30] A jury convicted Booker of both offenses.[31] In the presentence report, Booker's probation officer initially recommended that Booker be assigned a base offense level of thirty-two corresponding to the 92.5 grams found in his duffle bag.[32] In an addendum, however, the report suggested including the 566 grams Booker sold, resulting in an offense level of thirty-six.[33] The sentencing judge adopted this latter recommendation, and, applying a two-level enhancement for obstruction of justice,[34] sentenced Booker under a base level of thirty-eight.[35]

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[26] 125 S. Ct. 738 (2005).

[27] United States v. Booker, No. 03-CR-026-S, 2003 WL 23142271, at *1 (W.D. Wis. Sept. 5, 2003).

[28] Petition for a Writ of Certiorari at 2, United States v. Booker, 125 S. Ct. 738 (2005) (No. 04-104).

[29] *Id.*

[30] *Id*. The statutory maximum sentence for distribution or possession with intent to distribute more than fifty grams of cocaine base is life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2000).

[31] Petition for a Writ of Certiorari at 2, *Booker* (No. 04-104).

[32] *Id.* at 1–2.

[33] *Id.* at 3.

[34] Although Booker had initially confessed to selling the twenty ounces, he testified at trial that he had no knowledge of that sale. *See id.*

[35] A base offense level of thirty-two, combined with a criminal history category of VI for his twenty-three prior convictions, *see id.,* exposed Booker to a maximum of 262 months imprisonment. U.S. Sentencing Guidelines Manual §§ 2D1.1(c)(4), 5A (2004). A base offense level of thirty-eight exposed him to 360 months to life incarceration. *Id.* at §§ 2D1.1(c)(2), 5A. Booker was ultimately sentenced to 360 months incarceration.

The Seventh Circuit reversed and remanded for resentencing.[36] Judge Posner, writing for the court, noted that *Blakely* established that the Sixth Amendment requires judges to impose sentences based solely upon those facts found by a jury or admitted by the defendant.[37] He quickly dismissed any argument that *Blakely*'s reasoning did not apply to the Guidelines, noting that the only major distinguishing factor was that the Guidelines are managed by an administrative agency.[38] Applying *Blakely* to the Guidelines, Judge Posner held that they ran aground of the Sixth Amendment's mandate by requiring that sentences be determined through judicial fact-finding under the burden of proof typically reserved for civil trials.[39] Accordingly, the court held that Booker's sentence had been unconstitutionally imposed.[40]

On June 11, 2003, Duncan Fanfan was charged in the District of Maine with conspiring to distribute and to possess with the intent to distribute 500 or more grams of cocaine in violation of 21 U.S.C. § 846.[41] The indictment followed an investigation in which a narcotics informant agreed to arrange a purchase with his supplier. When Fanfan arrived to complete the deal, he was arrested. In his possession were 1.25 kilograms of cocaine and 281.6 grams of cocaine base.[42] A jury found Fanfan guilty of both charges, indicating in a special verdict that Fanfan had been in possession of 500 or more grams of cocaine.[43] At sentencing, the court concluded that, for purposes of Guidelines calculations, the drug quantity

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[36] United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

[37] *Id.* at 510.

[38] *Id*. at 511–12.

[39] *Id. See also* 18 U.S.C. § 3553(a)(4)–(5) (2000) (requiring judges to find and report sentencing facts); Edwards v. United States, 523 U.S. 511, 513–14 (1998) (establishing preponderance of the evidence as the standard of proof for sentencing facts); U.S. Sentencing Guidelines Manual §§ 1B1.1, 3(a), 6A1.3(b) (2004) (same). Judge Posner concluded that "[i]t is tempting to think that maybe the guidelines can be saved by imagining the Sentencing Commission as a kind of superjudge who elaborates a code of sentencing principles much as a thoughtful real judge, operating in a regime of indeterminate sentencing, might do informally in an effort to try to make his sentences consistent. But the same reasoning would if accepted have saved Washington's sentencing guidelines, unless an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature." *Booker*, 375 F.3d at 512.

[40] In so doing, the court expressly rejected the Government's contention that Supreme Court precedent had established the constitutionality of the Guidelines with reference to the Sixth Amendment in *Edwards v. United States*, 523 U.S. 511 (1998). *Booker*, 375 F.3d at 513. The court noted that the petitioners in *Edwards* did not raise and the Court did not address the issue. *Id*. at 514. Judge Easterbrook, in dissent, disagreed with this conclusion. *Id.* at 516 (Easterbrook, J., dissenting).

[41] Petition for a Writ of Certiorari Before Judgment at 2, United States v. Fanfan, 125 S. Ct. 738 (2005) (No. 04-105). A conspiracy charge carries the same liability as if the accused had acted as a principle. 21 U.S.C. § 846 (2000). Distribution and possession with intent to distribute 500 or more grams of cocaine carries a statutory maximum sentence of forty years imprisonment unless serious bodily injury or death resulted from the use of the cocaine or the defendant had a prior conviction for a drug felony, in which case the statutory maximum sentence is life imprisonment. 21 U.S.C. § 841(1)(B)(ii)(II) (2000).

[42] Petition for a Writ of Certiorari Before Judgment at 2, *Fanfan* (No. 04-105).

[43] *Id.*

involved encompassed all of the cocaine and cocaine base found in Fanfan's possession.[44] In addition, the court applied a two-level enhancement, finding Fanfan to be the leader of the conspiracy. Thus, the court assigned an offense level of thirty-six.[45] Before imposing a sentence, however, the sentencing judge considered the impact of *Blakely* on the Guidelines and concluded that *Blakely* rendered both the drug quantity finding and the two-level enhancement unconstitutional.[46] He therefore assigned Fanfan an offense level of twenty-six corresponding to the 500 grams of cocaine irrefutably found by the jury, but not accounting for the remaining cocaine, the crack, or Fanfan's role in the conspiracy.[47] The government appealed, directly petitioning the Supreme Court for certiorari before judgment in the First Circuit.[48] The Court granted that petition.[49]

The Supreme Court affirmed both the Seventh Circuit's ruling in *Booker* and the District Court's decision in *Fanfan*,[50] holding that the Federal Sentencing Guidelines were, from a constitutional perspective, indistinguishable from the scheme considered in *Blakely* and, therefore, any facts necessary to authorize a sentence enhancement under the Guidelines must be admitted by the defendant or proven to a jury beyond a reasonable doubt.[51] The opinion of the court was divided into two separate majority opinions: Justice Stevens addressed the constitutionality of the Guidelines (the "merits majority"),[52] while Justice Breyer addressed the severability of any unconstitutional provisions of the Guidelines (the "remedial majority").[53]

Justice Stevens in an opinion in which Justices Scalia, Souter, Thomas, and Ginsberg joined, emphasized that, as there was no notable difference between Washington State's guidelines system and the Federal Sentencing Guidelines, the Guidelines fail the same constitutional analysis. Justice Stevens began by restating the historical argument underpinning the *Winship* and *Apprendi* decisions.[54] "It has been settled throughout our history," he noted, "that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of

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[44] *Id.* at 2–3.

[45] *Id.* at 3. Given his criminal history category of I, Fanfan faced 188 to 235 months imprisonment.

[46] *Id.*; *see also* United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004).

[47] Petition for a Writ of Certiorari Before Judgment at 3, *Fanfan* (No. 04-105). An offense level of twenty-six exposed Fanfan to sixty-three to seventy-eight months imprisonment, a difference of ten years.

[48] *Id.* at 11.

[49] United States v. Fanfan, 125 S. Ct. 12 (2004).

[50] United States v. Booker, 125 S. Ct. 738 (2005).

[51] *Booker*, 125 S. Ct. at 756 (Stevens, J., opinion of the Court).

[52] *Id.* at 746 (Stevens, J., opinion of the Court).

[53] *Id.* at 756 (Breyer, J., opinion of the Court).

[54] *Id.* at 748 (Stevens, J., opinion of the Court).

every fact necessary to constitute the crime with which he is charged.'"[55] Justice Stevens then reviewed the development of the Court's Sixth Amendment jurisprudence from *Jones* through *Blakely*.[56] Directly addressing *Blakely*, he noted that Washington's sentencing scheme violated the Sixth Amendment because it, like the Federal Sentencing Guidelines, required trial judges to impose sentences based on facts not proven beyond a reasonable doubt.[57]

Turning to the Federal Sentencing Guidelines, Justice Stevens found no distinctions "of constitutional significance."[58] He noted that, had the Guidelines been advisory rather than mandatory, they would not have run afoul of the Sixth Amendment because the trial judge would not have been required to make findings of fact beyond those contained within the jury's verdict.[59] Addressing the argument that the Guidelines were sufficiently advisory because they permitted departures,[60] Justice Stevens concluded that the availability of departures was not sufficient to cure the constitutional defect because departures were not available in every case.[61]

Nor, the Court concluded, were the Guidelines simply a codification of the constitutional power of judges to account for blameworthiness during sentencing.[62] The Court acknowledged that judges have historically had broad discretion to assign punishment with reference to facts not tried to a jury, but stated that the recent development of legislatively regulated sentencing raised new concerns requiring a more aggressive protection of the jury trial right.[63] Justice Stevens asserted that sentencing judges were not exercising the traditional discretion afforded them to adjust punishment within the confines of a sentencing range dictated by the jury's verdict. Rather, under the Guidelines, judges both set the sentencing range and selected the appropriate punishment from within that range. This new sentencing regime, the Court concluded, effectively eliminated the jury's check on governmental power.[64]

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[55] *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

[56] *Id*. at 748–49 (Stevens, J., opinion of the Court).

[57] *Id*. at 749–50 (Stevens, J., opinion of the Court).

[58] *Id.* at 749 (Stevens, J., opinion of the Court).

[59] *Id.* at 749–50 (Stevens, J., opinion of the Court) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence with a statutory range . . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts the judge deems relevant.").

[60] *Id.* at 750 (Stevens, J., opinion of the Court). Departures from the Guidelines were permitted only in the case of sexual crimes committed against children and in instances where the Guidelines do not take into account an aggravating or mitigating factor of a kind or to a degree that it appears, from the guidelines and policy statements contained therein, is relevant to the sentencing decision. *See* 18 U.S.C. § 3553(b) (2000).

[61] *Booker*, 125 S. Ct. at 751 (Stevens, J., opinion of the Court).

[62] *Id.* at 752 (Stevens, J., opinion of the Court).

[63] *Id.*

[64] *Id.*

The Court rejected the argument that *Blakely* did not apply to administrative regulations.[65] Although the *Apprendi* Court had required, and the *Blakely* Court reaffirmed, that all facts leading to punishment beyond the *statutory* maximum must be found by a jury beyond a reasonable doubt or admitted by the defendant, the Court explained that from a constitutional standpoint, the relevant maximum was the punishment the jury verdict alone authorized. "Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission," the Court concluded, "the principles behind the jury trial right are equally applicable."[66]

The Court similarly rejected the Government's contention that *stare decisis* precluded application of *Blakely* to the Guidelines. The Government argued that extending *Blakely* to the Guidelines would require overturning four prior decisions that had upheld the Guidelines against constitutional attack.[67] The Court addressed each case in turn, concluding that none was inconsistent with the Sixth Amendment's requirement that sentence-enhancing facts be tried to a jury.[68] In each of these cases, the Court

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[65] *Id.* at 753 (Stevens, J., opinion of the Court).

[66] *Id*.

[67] *See* Brief for the United States at 7, United States v. Booker, 125 S. Ct. 738 (2005) (No. 04-104). In *United States v. Dunnigan*, 507 U.S. 87 (1993), the Court unanimously held that the Fifth Amendment's protection against self-incrimination was not violated when a sentencing judge found that the defendant had perjured himself and, following the Guidelines, increased the defendant's offense level. *Id.* In *Witte v. United States*, 515 U.S. 389 (1995), the Court held that double jeopardy does not bar prosecution of an offense where the underlying actions had previously served as justification for an upward departure under the Guidelines. *Id.* In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court held that double jeopardy similarly does not prevent a sentencing judge from considering conduct for which the defendant has previously been acquitted. Such conduct can form the basis of an increased offense level so long as the judge finds by a preponderance of the evidence that, notwithstanding the earlier acquittal, the conduct in fact occurred. *Id.* Finally, in *Edwards v. United States*, 523 U.S. 511 (1998), the Court unanimously upheld a Guidelines sentence for conspiracy to distribute both cocaine and cocaine base where the jury had returned a general verdict after being instructed that it could find the defendant guilty if either drug had formed the basis of a conspiracy. The Court reasoned that, although the sentencing judge's finding that both drugs were involved led to a higher offense level under the Guidelines, the ultimate sentence was still within the statutory sentencing range for a verdict based on cocaine alone. Therefore, the sentence did not implicate the Due Process Clause or the Sixth Amendment. *Id.*

[68] *Booker*, 125 S. Ct. at 753–54 (Stevens, J., opinion of the Court). The Court urged that an extension of *Blakely* to the Guidelines would restrict but not overrule *Dunnigan*. While the sentencing judge could only apply a sentence within the Guidelines range supported by facts tried to the jury, he could consider a defendant's perjury in choosing a sentence within that range. *Id*. at 753. Addressing *Witte* and *Watts*, Justice Stevens noted that in neither case had the Sixth Amendment question presented in *Booker* been raised. So long as the ultimate sentence remains within the range supported by the jury's findings, he concluded, the judge is permitted to consider both uncharged and previously acquitted offenses. *Id*. at 753–54. Finally, with regard to *Edwards*, the Court noted that the defendants could not make a colorable argument that the conspiracy for which they had been convicted had not encompassed the drug quantities accounted for in sentencing, and the Court's reading of the record suggested that no such argument could succeed. Therefore, the Court concluded, Edwards's sentence fell within the range supported by the jury's verdict alone. *Id*. at 754.

reasoned, the judge was free to consider the relevant sentencing facts in selecting an appropriate sentence so long as that sentence remained within the range supported by the jury verdict or guilty plea. As none of the four cases would be overruled, Justice Stevens concluded that *stare decisis* did not bar an extension of *Blakely* to the Federal Sentencing Guidelines.

Finally, the Court rejected the Government's contention that an extension of *Blakely* would violate the separation of powers.[69] Although the Court had previously ruled that the Guidelines did not violate the non-delegation doctrine or the separation of powers,[70] the Government asserted that extension of *Blakely* to the Guidelines would undermine that conclusion by essentially converting the Guideline's sentencing factors into elements of an offense, thereby making the Sentencing Commission a legislative body.[71] The Court disagreed, stating that, following *Apprendi*, the characterization of Guidelines factors as sentencing factors or elements of an offense had no significance. Instead, the Court's concern was the Sixth Amendment's guarantee that the maximum sentence available for any given offense was limited by the facts found by a jury beyond a reasonable doubt.[72]

Justice Breyer dissented from the merits majority's opinion.[73] He noted that historically, criminal courts were charged with evaluating both elements of an offense and sentencing facts.[74] The Sixth Amendment, he maintained, speaks only to the right to have a jury decide those facts which go to guilt or innocence.[75] By extending the jury trial right to sentencing facts, Justice Breyer asserted, the majority had frustrated Congress's right to determine, within limited bounds, which facts define a criminal act and which relate solely to the appropriate punishment.[76] *Apprendi* and *Blakely*, he argued, applied solely to "statutory maximums" and not to administrative guidelines.[77] Furthermore, unlike the statute in *Blakely*, the Guide-

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[69] *Booker*, 125 S. Ct. at 754–55 (Stevens, J., opinion of the Court).

[70] *See* Mistretta v. United States, 468 U.S. 361, 371–412 (1989).

[71] *See* Brief for the United States at 38, *Booker* (No. 04-104). The Government argued that if a jury had to decide on the presence of sentencing factors under the Guidelines, then those factors would become elements of the offense and the Guidelines themselves would become a criminal statute. If so, the Sentencing Commission, responsible for promulgating the guidelines, would exercise powers constitutionally restricted to the legislature. *Id.*

[72] *Booker*, 125 S. Ct. at 755–56 (Stevens, J., opinion of the Court). The Court further noted that, although the Sentencing Commission is placed within the judicial branch by statute, it serves primarily policy-making and political concerns and is not comprised entirely of Article III judges. Therefore, Congress can properly delegate quasi-legislative functions to the body. *Id.*; *see also Mistretta*, 488 U.S. at 393 (holding that the Sentencing Commission's placement within the judicial branch was constitutional).

[73] Justices O'Connor and Kennedy and the Chief Justice joined in this opinion.

[74] *Id*. at 803–04 (Breyer, J., dissenting in part).

[75] *Id.* at 805 (Breyer, J., dissenting in part).

[76] *Id.* at 803–04 (Breyer, J., dissenting in part).

[77] *Id.* at 805–06 (Breyer, J., dissenting in part). Justice Breyer acknowledged that *Blakely* defined the applicable statutory maximum as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 806. However, he argued that that language may be read narrowly as *Blakely* pur-

lines provided for judicial discretion, allowing the sentencing judge to depart from the required sentence if the Guidelines did not adequately account, in kind or degree, for any sentencing factor.[78] Thus, Justice Breyer concluded that the statutory maximum under the Guidelines, but not under Washington's system, truly is the *statutory* maximum.[79]

In a separate majority opinion, Justice Breyer, joined by Justices O'Connor, Kennedy, Ginsberg, and the Chief Justice, addressed the appropriate remedy, holding that, as Congress would not have adopted the Guidelines system given the merits majority's jury trial requirement, the entire system must be found unconstitutional.[80] Justice Breyer noted that there were two options open to the Court. The first option would leave the Guidelines system intact, but would require that any facts necessary to affect sentencing enhancements be admitted by the defendant or found by a jury beyond a reasonable doubt.[81] The second approach, which the Court ultimately adopted, would find the entire Guidelines scheme unconstitutional and then would attempt to salvage the system through severability analysis.[82] The Court analyzed the Guidelines's legislative history to determine which option Congress would have preferred.[83]

The Court stated that the statute's text indicated that Congress's intent was for all sentencing decisions to be made by a judge and not a jury.[84] In setting out the sentencing procedure, the SRA makes repeated reference to "the court" and the Senate Report accompanying the Act directs "the judge" to make sentencing decisions.[85] It is this directive to the judge, Justice Breyer concluded, that is made mandatory by the Act and that is inconsistent with the merits majority's holding.[86]

In addition, the Court noted that applying the jury fact-finding requirement to the existing Guidelines would create a system incompatible with Congress's legislative goal of encouraging uniform sentencing based on the "real conduct" of the offender.[87] In an effort to achieve this goal, the Guidelines instruct judges to take account of information which is unavailable until after trial, to consider inadmissible evidence of an offender's conduct, and to disregard plea-bargained sentences if the judge determines that the bargain does not adequately account for the offender's conduct.[88]

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ported to be applying *Apprendi* and, in both cases, the sentence was imposed by reference to a statute and not, as was involved in *Booker*, an administrative guideline. *Id.*

[78] *Id*. at 807 (Breyer, J., dissenting in part).

[79] *Id.*

[80] *Id.* at 756–57 (Breyer, J., opinion of the Court).

[81] *Id.* at 757 (Breyer, J., opinion of the Court); *see also id.* at 771–72 (Stevens, J., dissenting in part) (arguing that this was the appropriate course).

[82] *Id*. at 757 (Breyer, J., opinion of the Court).

[83] *Id*.

[84] *Id.* at 759 (Breyer, J., opinion of the Court).

[85] *Id.*; *see also* 18 U.S.C. § 3553(a) (2000); S. Rep. No. 98-225, at 51–53 (1983).

[86] *Booker*, 125 S. Ct. at 759 (Breyer, J., opinion of the Court).

[87] *Id*. (emphasis removed).

[88] *Id*. at 760 (Breyer, J., opinion of the Court). Evidence which may not be available

Justice Breyer maintained that, as this information would not be available if all sentencing facts must be submitted to a jury, the merits majority's constitutional requirement is incompatible with Congress's goal of "ensuring similar sentences for those who have committed similar crimes in similar ways."[89] The Court concluded that the Guidelines, so modified, would no longer provide for uniform sentencing.[90]

The Court also maintained that the application of the jury trial requirement would frustrate Congress's intent in cases disposed of through plea bargaining.[91] Justice Breyer noted that the Guidelines were intended not just to guide those cases actually tried, but also those that were plea-bargained, because plea-bargaining takes place "in the shadow of . . . a potential trial."[92] It is with an eye towards greater uniformity that the Guidelines call upon the sentencing judge to evaluate any plea bargain with reference to the Guidelines and the presentence report and, if necessary, to assign an appropriate sentence in contravention of the parties' agreement.[93] In a system in which the judge could only consider facts admitted by the defendant or found by a jury, the parties could frustrate that uniformity by drafting plea agreements containing facts supporting only their desired sentencing range.[94] Prosecutors, armed with the power to make charging decisions, Justice Breyer concluded, would exercise the power delegated by the SRA to judges.[95]

The Court further asserted that a Guidelines system that required that all facts that would increase the maximum sentence be tried to a jury

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until after trial includes the presentence report which outlines aspects of the defendant's family and criminal background as well as the manner in which he committed the offense for which he was convicted. *Id.* In addition, Justice Breyer noted that the Guidelines permit the consideration of uncharged and unproved conduct as well as conduct which does not directly address an element of the offense. *Id.*; *see also* United States v. Watts, 519 U.S. 148 (1997) (per curiam) (holding that conduct which has not been formally the subject of a charge may be considered in setting the appropriate Guidelines range and that the Double Jeopardy Clause does not then bar the use of that conduct as the basis for a subsequent criminal complaint).

[89] *Booker,* 125 S. Ct. at 760 (Breyer, J., opinion of the Court); *see also id*. at 760–61 (Breyer, J., opinion of the Court) (illustrating through hypothetical situations how comparable offenders would be treated differently under a guidelines system where all sentencing facts are tried to a jury).

[90] *Id*. at 761 (Breyer, J., opinion of the Court).

[91] *Id*. at 762 (Breyer, J., opinion of the Court). The overwhelming majority of criminal cases in both state and federal court are resolved through either dropped charges or plea bargains. *See id.* at 772 (Stevens, J., dissenting in part). Ninety-five percent of all federal criminal cases terminated between March 2003 and April 2004 ended in either a guilty plea (86%) or dropped charge (9%). Only 3% of all criminal trials during the same period ended in a jury verdict. *See* OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 93 (2004), *available at* http://www.uscourts.gov/caseload2004/tables/D04Mar04.pdf.

[92] *Booker*, 125 S. Ct. at 762 (Breyer, J., opinion of the Court) (emphasis removed).

[93] *Id*.

[94] *Id*. at 763 (Breyer, J., opinion of the Court).

[95] *Id*. (illustrating the point through a hypothetical plea negotiation in Booker's case).

would be so complex as to be unworkable.[96] Justice Breyer noted the cost and difficulty of trying to a jury all of the details of an offense.[97] In addition to creating problems for the prosecution, Justice Breyer suggested such a system would work to the detriment of the defendant, who would be placed in the awkward position of simultaneously asserting both that he was not involved in the crime and that the crime was not carried out in the manner the prosecution suggested.[98] Finally, the application of the jury trial requirement would create difficulties for a judge called upon to consider a defendant's contemptuous behavior at trial, as the prosecution could not have charged such facts in the indictment.[99]

Finally, Justice Breyer argued that appending the jury trial requirement onto the Guidelines would create a one-way downward sentencing ratchet which, as urged by several U.S. Senators as *amici*, Congress did not intend.[100] It was an odd requirement, he noted, that the Constitution was violated only when judges departed upward but not downward from the Guidelines, given that Congress had taken steps to control the latter but not the former. Thus, the Court concluded that Congress would have preferred the invalidation of the entire statute to the application of *Blakely*'s jury-trial requirement to the Guidelines.

Justice Breyer next addressed the question of whether the statute, having been invalidated, could be saved through severability.[101] In seeking to sever any unconstitutional provisions of the Act, the Court attempted to "retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute."[102] Noting that both majority opinions agreed that the pre-Guidelines system of unguided judicial discretion complied with the Sixth Amendment, Justice Breyer focused on 18 U.S.C. § 3553(b)(1),[103] which requires judges to adhere to the Guidelines in most cases, and 18 U.S.C. § 3742(e),[104] which provides appellate review for deviations from that mandate. Absent these provisions, Justice Breyer noted, the Guidelines would be purely advisory, requiring judges to consider factors that address the defendant's "real conduct" but not mandating any particular sentence.[105] Thus modified, the Court concluded, the Act comports with the Sixth Amendment.[106]

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[96] *Id.* at 761 (Breyer, J., opinion of the Court).
[97] *Id.* at 761–62 (Breyer, J., opinion of the Court).
[98] *Id.* at 762 (Breyer, J., opinion of the Court).
[99] *Id.*
[100] *Id.* at 763 (Breyer, J., opinion of the Court).
[101] *Id.* at 764 (Breyer, J., opinion of the Court).
[102] *Id.* (internal citations & quotations omitted).
[103] 18 U.S.C. § 3553(b) (2000) (mandatory application of Guidelines).
[104] 18 U.S.C.A. § 3742 (West Supp. 2004) (review of sentence for failure to follow Guidelines).
[105] *Booker*, 125 S. Ct. at 764 (Breyer, J., opinion of the Court).
[106] *Id.*

Having excised Section 3742(e), the Court next sought to fashion a standard of review through statutory interpretation.[107] The Court applied the rule established in *Pierce v. Underwood*,[108] stating, "[w]e infer appropriate review standards through the consideration of related statutory language, the structure of the statute, and the 'sound administration of justice.'"[109] The Court concluded that all three factors supported the adoption of the "unreasonableness" review that was in place for the two decades of Guidelines sentencing prior to Congress's installation of *de novo* review in 2003.[110] Under the "unreasonableness" standard of review, appellate courts defer to the sentencing court's decision unless the sentence is unreasonable given the factors set forth in § 3553(a).[111] Through excision and an implied standard of appellate review, Justice Breyer concluded, the Court saved the statute from being set "loose from its moorings in congressional purpose."[112]

Justice Stevens, joined by Justice Souter and in part by Justice Scalia,[113] dissented from the remedial majority's opinion. Justice Stevens declared that the Court's severability analysis was flawed because the Guidelines as written could be exercised in a manner fully consistent with the Constitution.[114] Furthermore, he insisted, whatever effects a jury trial requirement would have were inconsequential as they would only affect the small percentage of cases tried to a jury. Nor did the legislative history of the SRA support the Court's holding.[115] Justice Stevens argued that Congress had considered discretionary alternatives to the Guidelines system similar to the Court's remedy and had roundly rejected them.[116] Furthermore, in the period since the SRA's adoption, Congress twice strengthened the mandatory nature of the Guidelines, suggesting that Congress would prefer either the SRA modified by the jury trial requirement or no Guidelines at all to the system derived by the Court. Finally, Justice Stevens characterized the remedial majority's solution as a return to judicial discretion that

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[107] *Id*. at 767–78 (Breyer, J., opinion of the Court).

[108] 487 U.S. 552 (1988).

[109] *Booker*, 125 S. Ct. at 765 (Breyer, J., opinion of the Court) (quoting *Pierce*, 487 U.S. at 559–60).

[110] *Booker*, 125 S. Ct. at 765 (Breyer, J., opinion of the Court). In 2003, Congress strengthened the standard of review to de novo. As this change was intended to bolster the mandatory nature of the Guidelines which the Court held unconstitutional, Justice Breyer resorted to the pre-2003 unreasonableness review which had been in place since the enactment of the SRA in 1984.

[111] *Id*.

[112] *Id.* at 766 (Breyer, J., opinion of the Court).

[113] Justice Scalia joined with the exception of Part III and Footnote 17.

[114] *See Booker*, 125 S. Ct. at 777–79 (Stevens, J., dissenting in part) (citing Alaska Airlines Inc. v. Brock, 480 U.S. 678, 684 (1987) (noting that the question for severability analysis is whether the statute can continue to operate in a manner consistent with the Constitution and legislative intent)). Justice Stevens criticized the majority for developing a "new" severability analysis designed around determining whether Congress would have preferred to leave the statute intact, or would have elected a different system of the Court's design. *Id.*

[115] *Booker*, 125 S. Ct. at 782–87 (Stevens, J., dissenting in part). Justice Scalia did not join this part of the analysis.

[116] *Id.* at 783–85 (Stevens, J., dissenting in part).

would permit the already divergent sentencing practices between the Circuits to expand to the pre-SRA level.[117]

Justice Thomas filed a separate dissent. He agreed with Justice Stevens that the SRA, while not facially invalid, was invalid as applied in Booker's case.[118] He disagreed, however, with the dissenters' claim that severability analysis did not apply simply because the SRA could be constitutionally applied. Rather, Justice Thomas framed the severability question as whether or not unconstitutional applications can be severed from the constitutional ones.[119] Analyzing this question, Justice Thomas concluded that the SRA as a whole could be applied in accordance with the majority's Sixth Amendment holding and, therefore, the unconstitutional applications can be severed, leaving the Guidelines in place.[120]

Justice Scalia also dissented from the remedial majority's opinion. He charged that the majority, by attempting to preserve the judge as sentence decision-maker, created a system contrary to congressional intent.[121] He maintained that Congress sought to create uniformity in sentencing by cabining judicial discretion.[122] By severing § 3553(b)(1), the majority returned sentencing to the pre-Guidelines world in which "district courts have discretion to sentence anywhere within the ranges authorized by statute . . . ."[123] Justice Scalia argued that, in addition to enlarging judicial discretion, the majority had, through flawed severability analysis, created a sweeping "unreasonableness" appellate review. He argued that by severing the statutory grant of reviewability and substituting an "implied" standard of review, the Court was "'redraft[ing] the statute' rather than just implementing the valid portions of it."[124]

While Justice Breyer's preferred remedy left the Guidelines in the best possible state given *Apprendi*,[125] its effective evisceration of Congress's goal of sentencing uniformity highlights the Court's error in adopting the *Apprendi* rule in the first place. In order to understand *Booker*'s effect on

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[117] *Id.* at 787–89 (Stevens, J., dissenting in part). Justice Scalia did not join in footnote seventeen of Part IV, which argued that the Court should have limited the retroactive effects of its decision to only those pending cases in which the petitioner could demonstrate a Sixth Amendment violation. *Id.* at 788 n.17 (Stevens, J., dissenting in part).

[118] *Id.* at 795 (Thomas, J., dissenting in part). Justice Thomas agreed with the remedial majority that 18 U.S.C. §§ 3553(b)(1) and 3742(e) were unconstitutional as applied in Booker's case; however, he noted additional sections, including the Guidelines elements used to raise Booker's offense level and Fed. R. Crim. P. 32(c)(1), calling for the judge to decide any disputes arising from the presentence report were also invalid. *Id*. at 796–97.

[119] *Id*.

[120] *Id*. at 799 (Thomas, J., dissenting in part).

[121] *Id.* at 789–90 (Scalia, J., dissenting in part).

[122] *Id.*

[123] *Id*. at 790 (Scalia, J., dissenting in part).

[124] *Id.* at 793 (Scalia, J., dissenting in part) (quoting United States v. Treasury Employees, 513 U.S. 454, 479 (1995)).

[125] *See* Albert W. Alschuler, *To Sever Or Not To Sever? Why* Blakely *Requires Action By Congress*, 17 Fed. Sentencing Rep. 11, 16–18 (2004) (suggesting Justice Breyer's solution as the best solution but arguing that only Congress could implement it).

criminal sentencing, it is important to understand the state of the world under the pre-*Booker* Guidelines. By all accounts, the Guidelines were a success in at least one respect: similarly *charged* defendants received similar sentences.[126] "Charged" is the operative word. One of the unintended consequences of the Guidelines was a shift in power from sentencing judge to prosecutor.[127] Guidelines sentences are based not only on the defendant's criminal history but also on the "crime of conviction."[128] While criminal history is a relative constant, largely out of the parties' hands,[129] the charged crime is a variable that the prosecutor alone controls. For any given criminal underlying conduct, prosecutors have a wide menu of applicable charges from which to choose. That charging decision determines the set of possible sentencing ranges under the Guidelines. Thus, under the Guidelines, the prosecutor had tremendous control over the sentencing range.

Realizing this,[130] the commissioners sought to rebalance power through five programs, two of which are significant: "real-conduct" sentencing and departures.[131] Real-conduct sentencing grants the judge the power to find various sentencing facts, like the quantity of drugs in Booker and Fanfan's cases, based only on a preponderance of the evidence. Departures permit the judge, in very limited circumstances, to set aside the default Guideline range

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[126] *See, e.g.*, Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines*: *Guideline Circumvention and Its Dynamics in the Post-*Mistretta *Period*, 91 Nw. U. L. Rev. 1284 (1997) (reporting a four-year study indicating that the Guidelines lead to more consistent sentencing given a particular charge).

[127] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2559 (2004); *see also* United States v. Harrington, 947 F.2d 956, 965 n.5 (D.C. Cir. 1991) (Edwards, J., concurring) ("One wonders whether the Guidelines, in transferring discretion from the district judge to the prosecutor, have not left the fox guarding the chicken coop of sentencing uniformity."); United States v. Stanley, 928 F.2d 575, 583 (2d Cir. 1991) (Feinberg, J.) (noting concern with the Guidelines's transfer of discretion from the district court to the prosecutor), *cert. denied*, 502 U.S. 845 (1991); United States v. Kikumura, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring) (observing that the combination of the Guidelines and mandatory minimums have essentially "replaced judicial discretion over sentencing with prosecutorial discretion").

[128] I use "charged crime" to refer to the offense charged in the indictment or information. "Crime of conviction" refers to the offense for which the jury found the defendant guilty. While these offenses will often overlap, because prosecutors can charge multiple and subordinate offenses, not all charged offenses will ultimately become crimes of conviction.

[129] Criminal history is not always readily discernable from a printout of the defendant's "priors." The Guidelines permit the sentencing judge discretion to move a defendant from one criminal history category to another (either up or down) if she finds the Guidelines do not properly account for the seriousness of the defendant's criminal past. *See* U.S. Sentencing Guidelines Manual § 4A1.3 (2004); *see also* United States v. Hammond, 240 F. Supp. 2d 872, 874–77 (E.D. Wis. 2003) (noting that, unlike offense level departures, this discretion is very broad).

[130] *See, e.g.*, U.S. Sentencing Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and the Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 65–77 (1991) (noting that the Guidelines shifted power away from judges and into prosecutors' hands but suggesting the impact on sentencing was minimal).

[131] The remaining three programs were a Guidelines education program, an ongoing study into the effects of the Guidelines, and an effort to have the Department of Justice enforce the Guidelines on its prosecutors. *See* Fisher, *supra* note 9, at 212.

and assign a sentence in another sentencing range that she finds more appropriate. Real-conduct sentencing is common; in fact, the Guidelines made it mandatory (it was this mandate that the remedial majority struck down). Departures are rare.[132] That is due, in large part, to Congress's efforts to cabin judicial discretion by granting the Government the right to appeal downward departures and the concomitant right of defendants to appeal upward departures.[133] In an effort to further restrict the availability of judicially initiated departures, Congress adopted the Feeney Amendment to the PROTECT Act of 2003, increasing the scope of both judicial and congressional review of downward departures.[134] The remedial majority effectively overruled this action when it inferred "reasonableness" review to replace Feeney's *de novo* review.

Justice Stevens's solution, directly following *Apprendi*'s mandate, would have shifted power even further to the prosecutor. Whereas fact-bargaining undoubtedly occurred under the pre-*Booker* Guidelines, it was not always a successful tactic—judges still had the power to deny stipulated findings and substitute their own.[135] Justice Stevens's solution would have eliminated that judicial check. Instead, fact-bargaining as part of plea agreements would end the game: judges would be bound by the facts as admitted by the defendant and "real-conduct" sentencing would be no longer. Nor would departures take its place; under the stringent *de novo* standard of review, any departure would almost certainly lead to reversal. So the prosecutor, through his charging decision and the power to coerce a plea under threat of even greater sentence, would simultaneously serve as judge and jury.

Justice Breyer's remedial majority, sensing these issues, sought to protect the Guidelines as much as possible from *Apprendi*'s effects. In doing so they shifted power too far in the other direction. Under the post-*Booker* system, judges have virtually the same free reign they had before the Guidelines were implemented.[136] This serves defendants in one sense.

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[132] In 2002, the latest year for which data are publicly available, 65% of all defendants were sentenced within the Guidelines range. Of the 35% of cases in which some departure occurred, 16.8% involved a judicially imposed downward departure, while only 0.8% of cases involved an upward departure. In the remaining 17.4% of cases, the defendant received a downward departure for substantial assistance, a category largely controlled by the prosecutor. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2002), *available at* http://www.ussc.gov/annrpts.htm.

[133] *See* 18 U.S.C. § 3742(a)(3), (b)(3) (2000).

[134] Congress amended the review provisions in the Feeney Amendment to the 2003 PROTECT Act in an attempt to restrict the number of downward departures by requiring judges to state their reasons for downward departure, providing for de novo review for all departures, and eliminating a number of grounds for downward departure. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 667 (2003).

[135] Fact-bargaining is the practice of stipulating in plea-agreements the underlying facts of the case. For a discussion of fact-bargaining generally, see Schulhofer & Nagel, *supra* note 126, at 1292–93; Stuntz, *supra* note 127, at 2556–57 (2004) (describing the prevalence of fact-bargaining as a means of circumventing the Guidelines's proscriptions).

[136] There is some debate as to whether the Breyer opinion's suggestion that judges abide

Now the prosecutor is no longer the only available bargaining partner. Instead, the defendant has an ally in the judge who, like the prosecutor, would prefer to see the case end with a plea.[137] The judge's discretion limits prosecutorial power by placing an upper bound on the prosecutor's negotiated sentence: the defendant will not accept a bargained-for sentence from the prosecutor if it is greater than the judge would be willing to grant should the defendant plead guilty without an agreement. Given that downward departures overwhelmingly outnumber upward departures, this upper bound is likely to push sentences downward. Thus, the remedial majority's solution may well serve to lower both sentences and plea rates.[138] But in order to get there, the majority had to sacrifice the Guidelines's central tenet: uniformity. While there is some question as to whether uniformity was really achieved under the Guidelines given each individual prosecutor's charging power,[139] it seems certain that uniformity will not result from a purely discretionary sentencing system. Instead, each defendant will find himself at the whim of the district in which he is tried. And, given the nebulous "reasonableness" standard, if the defendant seeks review, he is, at least for the time being, at the mercy of the circuit in which he was sentenced. So, while the remedial majority sounds the return of reasonable sentencing for some defendants, uniformity is once again a dream.

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by the Guidelines is more mandate than guidance. *Compare* United States v. Wanning, 354 F. Supp. 2d 1056 (D. Neb. 2005), *and* United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (holding that only "in unusual cases for clearly identified and persuasive reasons" should judges deviate from the pre-*Booker* Guidelines), *with* United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005), *and* United States v. Mullins, No. 2:04CR10066, 2005 WL 372209, at *3 (W.D.Va. Feb. 16, 2005) (describing the holding in *Ranum* that the Guidelines are merely one factor to be considered in determining a reasonable sentence and proceeding to disregard their suggested sentencing range). While I agree wholeheartedly with Judge Kopf in *Wanning* that "it is Congress (and its Commission) that has the power and authority, not to mention the Constitutional legitimacy, to determine the broad relevance of [sentencing] facts," 354 F. Supp. 2d at 1062 n.9, his view of the Sentencing Guidelines raises precisely the same questions that brought *Booker* and *Fanfan* before the Court in the first place. If the Guidelines are to be followed in all but the rare cases, then they can hardly be considered so advisory as to avoid the *Apprendi* problem.

[137] *See* FISHER, *supra* note 9, at 15–16.

[138] There is some evidence that, in fact, sentences may rise as a result of greater judicial discretion. In his testimony before the House Subcommittee on Crime, Terrorism, and Homeland Security, Judge Ricardo H. Hinojosa, chairman of the Sentencing Commission, noted that, post-*Booker*, judicially imposed downward departures decreased to 12.3% of cases (compared with 16.8% in 2002) while upward departures increased to 2.7% of cases (compared with 0.8% in 2002). *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary*, 109th Cong. 6–7 (2005) [hereinafter *Booker/Fanfan Implications*] (prepared testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission), *available at* http://judiciary.house.gov/Oversight.aspx?ID=95.

[139] *See, e.g.*, James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 300–04 (1999) (discussing the various forms of sentencing disparity and noting that while the Guidelines may have cured interjudge sentencing disparity, they exacerbated other forms of disparity, including those deriving from prosecutorial charging decisions).

The Court's expansion of *Apprendi* may have had more far-reaching effects than those created by the remedial majority's solution. Even before *Booker* reached the Court, proposals for "*Blakely*-izing" the Guidelines were circulating through Congress. Chief among them, and of greatest concern for defense lawyers, is the proposal offered in the now famous "Bowman Memo."[140] In that memo, Professor Bowman suggests that Congress can maintain the current Guidelines system by setting the upper bound of all of the sentencing ranges in the Guidelines table to the statutory maximum for the charged offense.[141] With this fix in place, a jury verdict or guilty plea will always authorize the statutory maximum and judges are, therefore, free to apply sentencing enhancements without transgressing the Sixth Amendment. Unfortunately, they would also be free to assign the statutory maximum in any case. Although Professor Bowman rightly notes that judges rarely assign a greater punishment than the Guidelines previously authorized,[142] the Bowman fix would remove a constraint meant to protect defendants from unnecessarily harsh punishment. Thus, when Congress speaks again,[143] it will likely mean larger sentences with less tailoring to the individual circumstances of the case.

This is the irony in the Court's decision. The line of cases ending in *Booker* started as a call for a greater role for democracy in criminal procedure.[144] Today's split majority finds itself caught in the paradox it brought upon itself: keep the Guidelines but give more power to the jury and ultimately that power flows to an unelected prosecutor; fix the Guidelines by making them advisory and ultimately more power flows to an unelected judge. This paradox resulted from the Court's attempt to simplify what was unquestionably a difficult standard to apply. Given any criminal statute, it was unclear what requirements should have been viewed as elements of an offense, subject to trial by jury and proof beyond a reasonable doubt, and what requirements were merely sentencing factors, prov-

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[140] Professor Bowman presented his proposal to Congress at a July 6, 2004 hearing on the impact of *Blakely* on the Guidelines. Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Frank O. Bowman III), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647. At a recent hearing before the House Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, the Committee invited four speakers, including Professor Bowman, to discuss their views on the appropriate congressional response to *Booker*. Interestingly, Professor Bowman advocated a retreat from his earlier proposal, instead urging Congress to take a slow course and wait to see *Booker*'s effects before responding. *Booker/Fanfan Implications*, *supra* note 138 (testimony of Frank O. Bowman III, Professor of Law, Indiana University).

[141] *See* Memorandum from Professor Frank Bowman to the United States Sentencing Commission 7 (June 27, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/frank_bowman_original_memo_to_ussc_on_blakely.doc.

[142] *See id.*

[143] *See* United States v. Booker, 125 S. Ct. 738, 768 (Breyer, J., opinion of the Court) ("Ours, of course, is not the last word: The ball now lies in Congress' court.").

[144] *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

able to the lesser preponderance standard in the absence of a jury.[145] The *Apprendi* rule cleared the swamp: *any* fact, whether an element of the offense or a sentencing factor, that raises the maximum possible sentence has to be proven to a jury beyond a reasonable doubt. Unfortunately, the *Apprendi* rule is over-inclusive. Legislative use of sentencing factors served the important goal of ensuring that sentences are meted out in a manner that takes into account the defendant's conduct and the circumstances of his crime. Guidelines systems ensured that this individualized sentencing decision was divorced from differing judicial preferences for harsher or more lenient punishment. By subjecting sentencing factors to the same requirements as elements of an offense, the Court took this tool away from the legislatures and returned sentencing control to the two parties least well suited to deal with disparities: prosecutors and judges.

The Court would have been well advised to follow an edict it announced not long ago:

> Among other things, it is normally "within the power of the State [and Congress] to regulate the procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription . . . unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[146]

By constitutionalizing its jury trial rule, the Court has prevented both Congress and the Sentencing Commission from exploring novel ways to advance the interests of the public while simultaneously protecting the interests of the defendant.

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[145] *See, e.g.*, Jones v. United States, 526 U.S. 227, 232–44 (1999) (engaging in a protracted analysis of whether serious bodily harm is an element or a sentencing factor in the Federal Carjacking Statute).

[146] McMillan v. Pennsylvania, 477 U.S. 79, 85–86 (1986) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).