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Apprendi's Limits

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APPENDIX LIMITS

R. Craig Green *

I. INTRODUCTION

Sentencing law has undergone a significant transformation, and although that change once drew sparse attention, at issue is nothing less than the jury's constitutional role. The Sixth Amendment grants criminal defendants the right to a jury trial,¹ but the Constitution does not explain what its terms mean, nor does it explicitly limit nonjury actors' authority at sentencing, after the jury's guilty verdict issues. In recent years, the Supreme Court of the United States has repeatedly analyzed how constitutional trial rights should apply to sentencing procedures, but public scrutiny of those decisions was limited until *Blakely v. Washington*,² which one scholar heralded as "the biggest criminal justice decision not just of this past term [2003], . . . but perhaps in the history of the Supreme Court."³

One reason *Blakely* spurred such excitement is a popular consensus that the decision virtually required the Federal Sentencing Guidelines ("Guidelines") to be held unconstitutional,⁴ thereby

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1. U.S. CONST. amend. XI.

2. 124 S. Ct. 2531 (2004).

3. Douglas Berman, *Supreme Court Cleanup in Aisle 4: Blakely Is Too Big and Messy to Ignore*, SLATE, at <http://slate.msn.com/id/2104014> (July 16, 2004) (last visited Apr. 2, 2005); see also Benjamin Wittes, *The Law of Suspended Sentencing*, THE ATLANTIC, Oct. 2004, at 50–53 (describing *Blakely* as "the single most irresponsible decision in the modern history of the Supreme Court").

4. See *supra* note 3; see, e.g., Albert W. Alschuler, *To Sever or Not to Sever? Why Blakely Requires Action by Congress*, 17 FED. SENTENCING REP. 11 (2004); Rachel E. Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 FED. SENTENCING REP.

undermining thousands of federal sentences and substantially altering vital details of how federal criminal law works. This Article challenges that consensus as incomplete. My first step is to demonstrate that the principles set forth in *Blakely* do not undermine the Guidelines. Unlike *Blakely*, two cases pending before the Court address the Guidelines' constitutionality,⁵ and although I will not predict how they might be decided, those cases confront the Court with important constitutional questions that have not been answered by *Blakely* or any of its predecessors.

This Article also offers an argument from constitutional principle for upholding the Guidelines. After analyzing two contrary theories of the Sixth Amendment, I suggest that the Court should not strike down the Guidelines because they do not impose any

312 (2004); Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. 333 (2004); Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENTENCING REP. 20 (2004); Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENTENCING REP. 316 (2004); Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of Blakely v. Washington*, 17 FED. SENTENCING REP. 28 (2004); Memorandum from Frank Bowman to United States Sentencing Commission, *Memorandum Presenting a Proposal for Bringing the Guidelines into Conformity with Blakely v. Washington*, reprinted in 16 FED. SENTENCING REP. 364 (2004); Mark Osler, *The Blakely Problem and the 3x Solution*, 16 FED. SENTENCING REP. 344 (2004); Aaron Rappaport, *What the Supreme Court Should Do: Save Sentencing Reform, Gut the Guidelines*, 17 FED. SENTENCING REP. 46 (2004); Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, 17 FED. SENTENCING REP. 60 (2004); Joan Biskupic, *High Court Ruling Sows Confusion; Decision Has Cast Doubt on Guidelines*, USA TODAY, Jul. 12, 2004, at A3; Bob Egelko, *Supreme Court Creates Seismic Shift in Legal System; Justices Upend Rules on Sentencing, Hearsay Testimony*, S.F. CHRONICLE, July 18, 2004, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/07/18/MNGAU7NGO11.DTL> (last visited Apr. 2, 2005); Anne Gearan, *Supreme Court Decision Throws States' Guidelines into Question*, PENN. L. WEEKLY, July 5, 2004, at 17; Adam Liptak, *Sentencing Decision's Reach is Far and Wide: Scholars Predict the Ruling Will Invalidate Guidelines*, N.Y. TIMES, June 29, 2004, at A16; David G. Savage & Henry Weinstein, *Ruling Could Change Sentencing Nationwide*, L.A. TIMES, June 25, 2004, at A24; Kate Smith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, at A27; Henry Weinstein, *Ruling Causes Uncertainty in Sentencing*, L.A. TIMES, July 22, 2004, at A14. But cf. Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors, *Department of Justice Legal Positions and Policies in Light of Blakely v. Washington*, reprinted in 16 FED. SENTENCING REP. 357 (2004).

5. United States v. Booker, 125 S. Ct. 738 (2005). The *Booker* decision consolidated *United States v. Booker*, No. 04-104 and *United States v. Fanfan*, No. 04-105.

This article was written prior to the Supreme Court's release of its ruling in *Booker* and *Fanfan*. The Court held in *Booker* that the mandatory system of Guidelines is unconstitutional, and that the Guidelines should instead be applied on an "advisory" basis, with appellate review of district court sentencing decision making for "reasonableness." See *id.* at 756. Although the Supreme Court's rulings have significantly altered the constitutional landscape of federal sentencing, they do not change any significant part of the doctrinal or theoretical analysis in this Article.

greater punishment at sentencing than the jury's guilty verdict authorized at trial. In my view, a guilty verdict by definition authorizes the court to impose any sentence up to the maximum prescribed by the crime of conviction. Because federal crimes and their maximum sentences are defined by statute, this Article concludes the Constitution cannot be violated by *nonstatutory* Guidelines that require the imposition of sentences that are *less than* the crime of conviction's statutory maximum.

A. Background

The landmark in modern sentencing law is *Apprendi v. New Jersey*,⁶ which forbids judges from imposing any sentence above the statutory maximum for a defendant's crime of conviction.⁷ *Apprendi* invalidated a New Jersey law that allowed sentencing judges to assign an enhanced sentence, greater than the otherwise applicable statutory maximum, based on a postconviction judicial finding that the defendant's offense was a hate crime.⁸ The Court held that where a defendant is convicted of unlawful firearm possession, which has a statutory maximum of ten years imprisonment, the Constitution bars the judge from assigning any prison term longer than that.⁹ To impose a sentence greater than the statutory maximum, in effect, would be to convict a defendant of a lesser crime, yet sentence her for a greater one. Thus, before a judge may use contested facts to sentence a defendant above her crime of conviction's statutory maximum, *Apprendi* requires that those facts be charged in the indictment and proved to a jury beyond reasonable doubt—just like any element of a conventional, aggravated offense.¹⁰ The question *Apprendi* left open was whether other facts might require similar treatment.

6. 530 U.S. 466 (2000).

7. *Id.* at 490.

8. *Id.* at 468–69, 490–497; see also *id.* at 468 (quoting N.J. STAT. ANN. § 2C:44-3(c) (West Supp. 2000)) (authorizing an “extended term” of imprisonment where “[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity”).

9. *Apprendi*, 530 U.S. at 490.

10. *Id.* at 501 (Thomas, J., concurring); cf. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (announcing the rule in a case of statutory interpretation concerning “constitutional doubt”).

From the start, four dissenting Justices feared that *Apprendi*'s scope would exceed its terms.¹¹ The dissenters viewed *Apprendi* as a radical decision that, unless strictly limited to statutory maxima, might unseat three principles of modern sentencing. First, the dissenters worried over the *Apprendi* Court's reference to facts that alter a defendant's *range of possible sentences*.¹² To focus constitutional analysis upon the range of sentences left to a judge's discretion would imply that facts altering a mandatory minimum need indictment and jury trial because minima (like maxima) impose legally binding limits on the range of sentences that a judge has discretion to impose. The dissenters thus feared that an expanded, range-based view of *Apprendi* might prevent judges from applying any mandatory minimum sentence unless its factual basis was alleged in the indictment and proved to a jury.¹³ That risk seemed important because in *McMillan v. Pennsylvania*¹⁴ the Court upheld judicially applied mandatory minima as constitutional,¹⁵ and lower courts imposed many sentences under statutes that followed *McMillan*'s rule.¹⁶

11. See *Apprendi*, 530 U.S. at 543–44 (O'Connor, J., dissenting); *id.* at 555–66 (Breyer, J., dissenting). The other two dissenting votes were Justice Anthony Kennedy and Chief Justice William H. Rehnquist.

12. Compare *id.* at 481, 490, with *id.* at 501 (Thomas, J., concurring), and *id.* at 520, 522 (Scalia, J., concurring).

13. *Id.* at 533 (O'Connor, J., dissenting); *id.* at 563 (Breyer, J., dissenting); accord *Harris v. United States*, 536 U.S. 545, 572 (2002) (Breyer, J., concurring); *id.* at 577–80 (Thomas, J., dissenting).

14. 477 U.S. 79 (1986).

15. *Id.* at 91–92.

16. *E.g.*, *Harris*, 536 U.S. at 567; see, e.g., Pub. L. No. 104-208, § 121, 110 Stat. 3009-29 (1996) (codified at 18 U.S.C. § 2252A); Pub. L. No. 104-132, § 708(a), 110 Stat. 1296 (1996) (adding mandatory minimum penalties to 18 U.S.C. § 844(f) and (i)); Pub. L. No. 100-690, § 6371, 102 Stat. 4370 (1988) (including mandatory minima under 21 U.S.C. § 844a for serious crack possession); Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 (1986) (including mandatory minimum terms under 21 U.S.C. § 841(b)); ALA. CODE § 13A-5-6(a)(4), (5) (1994); ALASKA STAT. § 12.55.125(b) (Michie 2004) (including mandatory minima when proved that defendant has a close relationship to the child murder victim); ARIZ. REV. STAT. § 13-604.02(B) (2001) (including minimum sentences before a prisoner receives release status); COLO. REV. STAT. § 18-1.3-401(c)(8)(a) (2003) (requiring "extraordinary aggravating circumstances" before deviating from the minimum); FLA. STAT. ANN. § 775.082(9)(a)(1) (West 2000) (defining "prison release reoffender"); 730 ILL. COMP. STAT. ANN. 5/5-5-3.2 (West 1997) (including factors in aggravation that allow more severe sentencing); KAN. STAT. ANN. § 21-4635 (1995) (requiring judges to determine if the defendant is required to serve a "hard 40" for first degree murder); KAN. STAT. ANN. § 21-4618 (1994) (adding mandatory jail time for crimes with firearms); MD. CODE ANN., CRIM. LAW §§ 5-627(c) (including minima for crimes relating to controlled dangerous substance near school), 5-905 (including higher minima for repeat offenders); 14-101 (2002) (including mandatory sentences for crimes of violence); MINN. STAT. ANN. § 609.11 (West 2003); MO.

The dissenters' second concern was that *Apprendi* might bar judicial sentence enhancements above *any legal baseline*, regardless of the statutory maximum. That issue seemed overwhelmingly important because, as the dissenters well knew, the Guidelines depend on nonstatutory, judicially imposed sentence enhancements.¹⁷ The Sentencing Reform Act of 1984¹⁸ created an "independent commission in the judicial branch" called the Federal Sentencing Commission ("Sentencing Commission"),¹⁹ which in turn promulgates guidelines that district judges are bound (with narrow exceptions) to follow in determining a defendant's sentence.²⁰ Although the Guidelines dictate that no sentence may

ANN. STAT. § 558.018.5(7) (West 1999) (including minima for predatory sexual offender); N.J. STAT. ANN. § 2C:43-6(c), (d) (West 1995); 18 PA. CONS. STAT. ANN. § 6314(a) (West 1998) (including minima for the delivery of controlled substance to a minor); 18 PA. CONS. STAT. ANN. § 6314(b) (West 1998) (including four specified circumstances during delivery of a controlled substance that increase the minima); 18 PA. CONS. STAT. ANN. § 6317(a) (West 1998) (including minima for delivery of controlled substance within specified distance of school property, playground, or on a school bus); 18 PA. CONS. STAT. ANN. § 7508(a)(4) (West 1998) (including minima dependent upon the nature and quality of controlled substance delivered or intended to be delivered); 42 PA. CONS. STAT. ANN. § 9712(a), (b) (West 2004); 42 PA. CONS. STAT. ANN. § 9713(a) (West 1998) (including minima for specified offense committed in or near public transportation); 42 PA. CONS. STAT. ANN. § 9717(a) (West 2004) (including minima when victim is over sixty years of age and not a police officer); 42 PA. CONS. STAT. ANN. § 9718(a) (West 2004) (including mandatory terms when victim is either under sixteen years of age or thirteen years of age); 42 PA. CONS. STAT. ANN. § 9719(a) (West 2004) (including mandatory minima for offenses committed by person impersonating a law enforcement officer); 75 PA. CONS. STAT. ANN. § 3742(b) (West 1996) (including minima for defendants who leave the scene of a car accident involving serious bodily injury or death); Virgin Islands Gun Control Act of 2001, 2001 V.I. Sess. Laws 6493.

17. See *Apprendi*, 530 U.S. at 544, 550–51 (O'Connor, J., dissenting); cf. *id.* at 561 (Breyer, J., dissenting). Justice Stephen Breyer was an original member of the Sentencing Commission, see *United States v. Wright*, 873 F.2d 437, 445–47 (1st Cir. 1989) (Breyer, J.). For his important explanation of the guideline system, see Stephen Breyer, *The Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5–6 (1988) [hereinafter *Key Compromises*]. Justice Breyer has been critical but cautiously optimistic about the Guidelines' present form and future prospects. Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, Remarks at the University of Nebraska College of Law (Nov. 18, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/readings/breyer.html> (last visited Apr. 2, 2005).

18. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

19. 28 U.S.C. § 991 (2000); see also 28 U.S.C. § 994 ("Duties of the Commission"); 28 U.S.C. § 995 ("Powers of the Commission").

20. 18 U.S.C. § 3553(b) ("The court shall impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.").

There are limited circumstances where a sentencing court need not follow the Guidelines' prescriptions. The two most important are where the prosecution requests a reduced

be imposed above the crime of conviction's statutory maximum,²¹ many instances require judges to increase a defendant's base offense level using factual findings that do not derive from the indictment or the crime of conviction.²² The Guidelines combine the resultant offense level and the defendant's criminal history on a two-dimensional Sentencing Table to prescribe the applicable sentencing range.²³

To understand how the Guidelines work, imagine a defendant convicted of bank robbery under 18 U.S.C. § 2113(a).²⁴ Section 2113(a) provides a twenty-year statutory maximum sentence where the jury convicts one of forcibly taking something of value from a banking institution.²⁵ Under the Guidelines, however, a district judge cannot choose just any sentence between zero and twenty years. Guideline section 2B3.1 provides that robbery-based crimes have a base offense level of twenty;²⁶ that level is enhanced by two if the robbery involves a financial institution's property²⁷ and by three more if the loss exceeds \$250,000.²⁸ Thus, for a first-offense bank robber, the Guidelines could provide a sentence of forty-one to fifty-one months (offense level twenty-two) if the judge finds no evidence of the amount stolen, but of fifty-seven to eighty-one months (level twenty-five) if the sentencing judge finds that the robbery involved \$250,001.²⁹ The Guide-

sentence based on the defendant's substantial assistance, *id.* § 3553(e); and where the judge finds and explains circumstances that the Guidelines system has not adequately taken into consideration. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) [hereinafter GUIDELINES]; GUIDELINES § 5K2.0; *see also* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: GUIDELINES IN THE FEDERAL COURTS 72-77 (1998); GUIDELINES §§ 5K2.1 to 5K2.21 (discussing other grounds for departure).

21. GUIDELINES, *supra* note 20, § 5G1.1(a); *see also* 28 U.S.C. § 994(a) (2000) (requiring all guidelines to be consistent with statutory provisions of the United States Criminal Code).

22. GUIDELINES, *supra* note 20, §§ 1B1.1, 1B1.3, 3A1.1 to 3C1.2, 3E1.1.

23. *Id.* ch. 5, pt. A (setting forth the Federal Sentencing Table, with offense levels of one to forty-three along the y-axis and criminal history scores of one to six along the x-axis).

24. For a general discussion of the Guidelines that predates the *Apprendi* Revolution, *see* STITH & CABRANES, *supra* note 20. Another insightful pre-*Apprendi* discussion, which proposes an interesting assessment of and solution to the Guidelines' procedural challenges, is Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence,"* 35 WM. & MARY L. REV. 147 (1993).

25. 18 U.S.C. § 2113(a) (2000).

26. GUIDELINES, *supra* note 20, § 2B3.1(a).

27. *Id.* § 2B3.1(b)(1).

28. *Id.* § 2B3.1(b)(7)(D).

29. *See id.* ch. 5, pt. A.

lines require such enhancements even though their supporting facts do not appear in the indictment, and their findings are made by sentencing judges, not juries.

Appendi's dissenters realized that the Guidelines could survive only if the majority's logic were limited to *statutory* maxima. The Guidelines always prescribe a sentence lower than the statutory maximum for the crime of conviction (e.g., twenty years for 18 U.S.C. § 2113(a)); they thus satisfy the terms of *Appendi's* statutory maximum rule.³⁰ But if future cases were expanded to require jury factfinding for sentences imposed above any *non-statutory maximum*, then almost every upward adjustment to a defendant's base offense level might be unconstitutional, thereby upsetting numerous sentences under the Guidelines.³¹ To such concerns, the *Appendi* majority replied only that "[t]he Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held."³²

The dissenters' third concern (of less importance here) involved Arizona's capital punishment system, which the Court had previously upheld.³³ Although the *Appendi* majority claimed that its

30. *Id.* § 5G1.1(a).

31. See *Appendi*, 530 U.S. at 544, 551 (O'Connor, J., dissenting); *id.* at 565 (Breyer, J., dissenting). Some academic commentators agreed with the dissenters that *Appendi* was inconsistent with the Guidelines. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148, 1171–72 (2001); Andrew M. Levine, *The Confounding Boundaries of "Appendi-land": Statutory Minimums and the Guidelines*, 29 AM. J. CRIM. L. 377, 390 (2002); Freya Russell, Casenote, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing: Appendi v. New Jersey and Its Effect on the Relevant Conduct Provision of the United States Guidelines*, 89 CAL. L. REV. 1199, 1201 (2001); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236, 1251–54 (2004). Other scholars thought *Appendi's* impact would be more limited. See, e.g., Susan N. Herman, *Applying Appendi to the Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 621–24 (2002); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1478–79 (2001); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating Appendi*, 12 FED. SENTENCING REP. 320 (2000); Jeffrey Standen, *The End of the Era of Guidelines: Appendi v. New Jersey*, 87 IOWA L. REV. 775, 796–801 (2002); Andrew J. Fuchs, Note, *The Effect of Appendi v. New Jersey on the Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1426 (2001); Ethan Glass, Comment, *Whatever Happened to the Trial By Jury? The Unconstitutionality of Upward Departures Under the United States Guidelines*, 37 GONZ. L. REV. 343, 358–62 (2002).

32. *Appendi*, 530 U.S. at 497 n.21 (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998)).

33. See *Walton v. Arizona*, 497 U.S. 639 (1990). Arizona's capital sentencing system shared characteristics with those of several other states. See Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Appendi to Upset Most Sentencing*, 15

decision did not affect the Arizona death penalty,³⁴ the same Justices reversed course two years later in *Ring v. Arizona*³⁵ and held that Arizona's capital system improperly relied on judicial "aggravating factors" to kill defendants for whom the statutory maximum sentence was life imprisonment.³⁶

In the years immediately following *Apprendi*, the dissenters' fears about mandatory minima failed to materialize. On the contrary, in *Harris v. United States*³⁷ a plurality found that *McMillan* remained good law,³⁸ that statutory minima were different from statutory maxima,³⁹ and that judicially imposed mandatory minima were permissible based on facts not found by the jury or charged in the indictment.⁴⁰ The Guidelines seemed similarly secure. After *Apprendi*, every court of appeals held that nonstatutory Guideline enhancements satisfy the Constitution because Guideline sentences are always less than the crime of conviction's statutory maximum.⁴¹ Although numerous defen-

FED. SENTENCING REP. 79, 80 (2002).

34. *Apprendi*, 530 U.S. at 496.

35. 536 U.S. 584 (2002).

36. *Id.* at 597 ("Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. . . . This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist" (citations and internal quotation marks omitted)); cf. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (describing *Ring* as holding that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death").

37. 536 U.S. 545 (2002).

38. *Id.* at 556–57 (plurality opinion).

39. *Id.* at 557 (plurality opinion).

40. *Id.*; *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004).

41. *E.g.*, *United States v. Johnson*, 335 F.3d 589, 591–92 (7th Cir. 2003), *cert. denied*, 540 U.S. 1011 (2003); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003), *cert. denied*, 540 U.S. 857 (2003); *United States v. Toliver*, 351 F.3d 423, 434 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2429 (2004); *United States v. Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir. 2002), *cert. denied*, 537 U.S. 1063 (2002); *United States v. Bartholomew*, 310 F.3d 912, 925–26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1177 (2003); *United States v. Marino*, 277 F.3d 11, 38 (1st Cir. 2002), *cert. denied*, 536 U.S. 948 (2002); *United States v. Fields*, 251 F.3d 1041, 1043–44 (D.C. Cir. 2001), *cert. denied*, 540 U.S. 961 (2003); *United States v. Rivera*, 282 F.3d 74, 76–77 (2d Cir. 2000), *cert. denied*, 537 U.S. 931 (2002); *United States v. Williams*, 235 F.3d 858, 863 (3d Cir. 2000), *cert. denied*, 534 U.S. 818 (2001); *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001).

dants sought review of those decisions, the Supreme Court denied certiorari, suggesting that the dissenters might have overstated *Apprendi*'s disruptive potential.⁴²

Then came *Blakely v. Washington*.⁴³ In *Blakely*, the Court applied *Apprendi* to invalidate a sentence imposed under Washington state law.⁴⁴ The relevant provisions warrant close attention, but for now it is enough to note that Washington's statutory system and the Guidelines were remarkably similar in content.⁴⁵ Indeed, the United States filed an amicus brief admitting that any differences between the Washington and federal systems might not "be sufficient [to save the Guidelines] if this Court applied *Apprendi*" to Washington's statutory system.⁴⁶ Regardless of its accuracy, that concession advised the Court that *Blakely* at least abutted the question that has loomed large since *Apprendi*:

After the Supreme Court's decision in *Harris*, academic commentators also seemed largely unconcerned that the Guidelines might be held unconstitutional. See, e.g., Bibas, *supra* note 33, at 80 ("The upshot is that *Apprendi*, which once threatened the Guidelines and the national trend toward determinate sentencing, is now a caged tiger."); Julie L. Hendrix, *Harris v. United States: The Supreme Court's Latest Avoidance of Providing Constitutional Protection to Sentencing Factors*, 93 J. CRIM. L. & CRIMINOLOGY 947, 968–71 (2003); Benjamin J. Priestler, *Structuring Sentencing: Apprendi, The Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 885–91 (2004); Charlotte LeClercq, Comment, *The 2002 Supreme Court Decisions: Did They Leave Enough of Apprendi to Effectively Protect Criminal Defendants?*, 24 N. ILL. U. L. REV. 117, 140–44 (2003). For an exception to that trend, see Note, *supra* note 31, at 1251–54.

42. See cases cited *supra* note 41. Two other factors mitigated *Apprendi*'s practical effect. First is the Court's refusal to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permitted judges to enhance sentences above the statutory maximum based on a defendant's criminal history. But cf. *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (indicating that his necessary fifth vote in the *Almendarez-Torres* majority was "an error"); *Shepard v. United States*, 348 F.3d 308 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 2871 (2004) (raising constitutional questions regarding the treatment of criminal history). Second, in *United States v. Cotton*, 535 U.S. 625 (2002), the Court held that *Apprendi* errors not raised at the time of trial—i.e., almost all of them before 1999—are reviewed under stringent standards of "plain-error." *Id.* at 631–33. *Cotton* thus allowed the government to adapt to *Apprendi*'s rule prospectively without disrupting large numbers of past sentences.

43. 124 S. Ct. 2531.

44. *Id.* at 2536, 2538.

45. See *infra* notes 80–97 and accompanying text. The dissenting Justices in *Blakely* repeatedly referred to Washington's system as a "sentencing guideline scheme[]," *Blakely*, 124 S. Ct. at 2543 (O'Connor, J., dissenting), thereby stressing its substantive similarity to the Guidelines. The Court's opinion did not refer to Washington's system as a set of guidelines. This Article, however, follows the latter convention.

46. Brief for the United States as Amicus Curiae Supporting Respondent at 9, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632); see also *id.* at 29–30 ("It is . . . not certain that this Court would ultimately conclude that the differences between the Washington system and the Guidelines are of constitutional magnitude.").

whether enhanced sentences under the Guidelines are constitutional. Nevertheless, the majority opinion in *Blakely*—like that in *Apprendi*—expressly disavowed any view as to the Guidelines' constitutionality.⁴⁷

Despite the *Blakely* Court's reticence concerning the Guidelines, the reaction to that decision was overwhelming. *Apprendi*'s dissenters dissented again, but their rhetoric describing *Blakely*'s effect on the Guidelines was unnerving.⁴⁸ Without mentioning prior, false prophecies concerning the death of mandatory minima, Justice Sandra Day O'Connor in *Blakely* proclaimed that "[w]hat I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."⁴⁹ In a later statement to the Ninth Circuit Judicial Conference, Justice O'Connor characterized the Court's decision making in *Blakely* as "disgust[ing]" and its result as a "No. 10 earthquake."⁵⁰

As though to fulfill such forecasts, the federal appellate courts responded to *Blakely* by producing one of the quickest, most robust circuit conflicts on record. Discarding earlier circuit law as

47. *Blakely*, 124 S. Ct. at 2538 n.9. The Court's language in *Apprendi* and *Blakely* is markedly similar. Compare *id.* ("The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Guidelines but questions whether those differences are constitutionally significant. The Federal Guidelines are not before us, and we express no opinion on them.") (citation omitted), with *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998) (holding that a sentencing judge may determine drug type and quantity for guidelines purposes, regardless of the jury's verdict, so long as the ultimate sentence lies "within the statutory limits" relevant to the crime of conviction)).

48. See *Blakely*, 124 S. Ct. at 2549–50 (O'Connor, J., dissenting) ("It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. . . . Indeed, [Washington's] provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. . . . If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would."); *id.* at 2561 (Breyer, J., dissenting) ("Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion. . . . Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.").

49. *Id.* at 2550 (O'Connor, J., dissenting).

50. Associated Press, *O'Connor Disgusted by Federal Sentencing Case*, available at http://www.donnunn.com/spiel/2004/07/cnncom_a_hrefht_1.html (last visited Apr. 2, 2005) [hereinafter *O'Connor Disgusted*].

"of course no longer authoritative,"⁵¹ Judge Richard A. Posner wrote for a divided panel of the Seventh Circuit that Guideline enhancements are invalid under *Blakely*.⁵² A divided Ninth Circuit panel agreed.⁵³ In contrast, the Fourth, Fifth, Sixth, and Eleventh Circuits held that *Blakely* does not alter prior precedents upholding the Guidelines.⁵⁴ The Second Circuit took the unusual step of certifying a request for a Supreme Court decision on whether guideline enhancements survive *Blakely* and requesting expedited briefing and argument during the Supreme Court's summer recess.⁵⁵

Commentators did not calm the waters either. Academics immediately described *Blakely* as having blockbuster status, and many commentators have since characterized the Guidelines' unconstitutionality as a foregone conclusion.⁵⁶ Congress also responded to the *Blakely* decision with vigor. After conducting a Committee Hearing, the Senate unanimously resolved that the Supreme Court should act quickly to resolve *Blakely*'s aftermath.⁵⁷ Twelve days later, the Supreme Court granted certiorari in two Guideline cases, *United States v. Booker*⁵⁸ and *United States v. Fanfan*.⁵⁹

51. *United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004).

52. *Id.*

53. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

54. *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004) (en banc); *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004); *United States v. Koch*, 383 F.3d 436, 438 (6th Cir. 2004) (en banc); *United States v. Reese*, 382 F.3d 1308, 1310 (11th Cir. 2004).

55. *United States v. Peneranda*, 375 F.3d 238, 248 (2d Cir. 2004). The Second Circuit later sided with the majority of circuits and upheld the Guidelines. *United States v. Mincey*, 106 Fed. Appx. 750, 751 (2d Cir. 2004) (per curiam).

56. See *supra* notes 3–4 and accompanying text.

57. S. Con. Res. 130 at 4, 150 Cong. Rec. S8572–74 (July 21, 2004) ("Now, therefore, be it *Resolved by the Senate (the House of Representatives concurring)*, That it is the sense of Congress that the Supreme Court of the United States should act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines.").

58. 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004).

59. 2004 U.S. Dist. LEXIS 18593 (D. Me. 2004), *cert. granted*, 125 S. Ct. 12 (2004).

B. *A New Approach*

This Article views *Blakely* and its succeeding events as an important opportunity to investigate principles that undergird the Supreme Court's sentencing revolution, and to analyze whether those principles require the Guidelines' invalidation. Part II challenges the popular premise that such theoretical analysis is unnecessary because *Blakely* already held the Guidelines unconstitutional. After examining *Blakely*'s language and context, I argue that the decision did not resolve any issue essential to the Guidelines' status. As the Court explained, Washington's statutory system in *Blakely* was nearly identical to the New Jersey statutes that were struck down in *Apprendi*.⁶⁰ Thus, *Blakely* itself broke little ground, and the key question about the Guidelines remains unanswered because neither *Blakely* nor *Apprendi* considered the status of nonstatutory maximum sentences. Although certain ambiguous language in *Blakely* might be read to address the Guidelines, the Court's opinion does not require that interpretation, which in any event would contradict the Court's clear statement that (as in *Apprendi*) it "express[ed] no opinion" about the Guidelines' status.⁶¹

Insofar as *Blakely* did not consider the Guidelines' constitutionality, the case is important mainly as a predictive signal of what the Court might hold in *Booker*. Even to careful court-watchers, however, *Blakely*'s clearest message may be that the odd combination of justices composing the *Apprendi/Blakely* majority—John Paul Stevens, Antonin Scalia, David Souter, Clarence Thomas, and Ruth Bader Ginsburg—has at least one member with uncertain or divergent views about the Guidelines' status. The "swing vote" in other *Apprendi* cases is Justice Scalia, *Blakely*'s author, which may confirm that *Blakely* left the Guidelines' constitutionality open. My point is not to predict the Court's result in *Booker*, but rather to identify the open question that I think the Court confronts, so that the relevant issues may be analyzed with a warranted level of care both before and after that decision issues.

60. *Blakely*, 124 S. Ct. at 2537.

61. *Id.* at 2538 n.9; *Apprendi*, 530 U.S. at 497 n.21.

Part III pursues theoretical issues that have been lost in *Blakely*'s shadow.⁶² In my view, controversies over the Guidelines' status embody fundamental disputes about the constitutional right at stake. This Article discusses three models of *Apprendi* and defends a theory under which a jury verdict's constitutional meaning connects with separation of powers principles. The Guidelines are distinct from Washington's system in *Blakely* because the former are nonstatutory rules of an agency within the judicial branch, while the latter are statutes enacted by a state legislature. I view that difference as significant not only because the Court has repeatedly used the phrase "statutory maximum" as the singular term that defines *Apprendi* rights.⁶³ More importantly, *Apprendi*'s procedural right depends on the maximum sentence that is "authorized by the jury's guilty verdict."⁶⁴

Not every increased sentence violates *Apprendi*. On the contrary, the Constitution protects only against sentence enhancements above what the jury authorized by its conviction. So how does one know what the jury authorized? This is the core question that has escaped academic and judicial attention as to *Apprendi* cases. Although the terms of a jury's verdict establish guilt, they do not explicitly specify the maximum punishment that may be imposed. Instead, the verdict's role in authorizing punishment must be deduced by reference to the definition of the crime of conviction. Convictions for shoplifting and murder carry different maximum sentences only because the statutes defining such crimes say so. For similar reasons, a guilty verdict authorizes

62. Most scholars after *Blakely* have turned their attention to what would happen if the Court does find the Guidelines to be unconstitutional. See, e.g., Barkow, *supra* note 4, at 312–15; Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 FED. SENTENCING REP. 307 (2004); Bibas, *supra* note 4, at 335–40; Bowman, *supra* note 4, at 364–68; King & Klein, *supra* note 4, at 317–332; Osler, *supra* note 4, at 344–47; cf. J. Bradley O'Connell, *Amazing Stories: Blakely v. Washington and California Determinate Sentences*, 16 FED. SENTENCING REP. 348 (discussing *Blakely*'s potential application to California sentencing). Such important issues concerning the property "remedy" will not be considered here.

63. *Booker*, 375 F.3d at 518 (Easterbrook, J., dissenting) ("Attributing to *Blakely* the view that it does not matter whether a given rule appears in a statute makes hash of 'statutory maximum.' Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that 'statutory maximum' might have something to do with statutes? Why write 'statutory maximum' if you mean 'all circumstances that go into ascertaining the proper sentence'?).

64. *Apprendi*, 530 U.S. at 494; accord *Harris*, 536 U.S. at 557, 565; see also *Blakely*, 124 S. Ct. at 2538.

punishment only to the extent provided by the crime of conviction.⁶⁵

Under federal law, crimes may be defined only by congressional statutes, not guidelines from the Sentencing Commission. Accordingly, I suggest that, no matter what substatutory sentencing rules may provide, a jury's conviction for a particular statutory crime authorizes the defendant to receive any sentence up to the maximum set forth in the statute defining the crime of conviction. *Apprendi* should not apply to the Guidelines because they are not statutes,⁶⁶ they do not define crimes, and they do not subject any defendant to a sentence greater than what the jury authorized by its verdict.

In my view, *Apprendi* rights establish a constitutional link between the statutory definition of a crime, the maximum sentence imposed by that definition, and the jury's decision to convict of the crime so defined. The connection between those three concepts is important, but limited. Congress's role in defining crimes and their punishments suggests to me that *Apprendi* should apply only to sentences above the statutory maximum, and not to submaximal sentences under nonstatutory guidelines.

There is an undeniable formalism here. The Guidelines significantly affect a defendant's actual term of imprisonment within the statutory range, they restrict the sentencing judge's discretion to impose certain sentences beneath the statutory maximum, and they do so based on judicial fact-finding that requires only a preponderance of evidence. The deepest challenge faced in Part III is to explain why some degree of formalism is inherent in *Apprendi* jurisprudence, and why the proposed distinction between statutory and nonstatutory sentencing rules presents the best available solution to the difficult problems that continue to trouble the Court.

65. See *Apprendi*, 530 U.S. at 490–91 n.16 (“If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute.”).

66. Although this may seem evident to some readers, I note that the Guidelines do not qualify as statutes because (with one recent exception discussed *infra* note 117) they do not pass the requirements of bicameral enactment and presentment for presidential veto. See U.S. CONST. art. I, § 7. Instead, the Guidelines are promulgated by the Sentencing Commission and submitted to Congress, and they take effect automatically unless “disapproved by Act of Congress.” 28 U.S.C. § 994(p) (2000).

As a postscript of sorts, Part IV analyzes the flurried events that set the stage for the *Booker* decision, in which the Court will decide the Guidelines' constitutional status. It is often true that the events giving rise to a case illuminate its significance, and *Booker* is no exception. Analysis of how the post-*Blakely* "crisis" emerged suggests that the Court must now confront the Guidelines cases at an institutional disadvantage, and the unusual incidents that followed *Blakely* provide a case study in how significant certain repeat players can be in constitutional rule making.

This Article not only suggests that the compressed circumstances surrounding *Booker* could be avoided in other cases, but also furnishes an illustrative step toward understanding the interrelationship among, and proper roles of, Supreme Court dissents, appellate courts' practice, governmental litigation, and the Supreme Court's certiorari practice. Insofar as the Supreme Court's constitutional decisions remain incomparably dominant in our legal system, the path from *Blakely* to *Booker* highlights certain safeguards that aid the Court's decision making process, and how such underappreciated safeguards can be tested.

II. *BLAKELY* AND THE POWER OF DISSENTS

A. *Blakely* and *Appendi*

A detail overlooked in current sentencing discussions is that, after *Appendi*, *Blakely*'s result was simple and required little new analysis.⁶⁷ In contrast to its splash in the public arena, the *Blakely* opinion begins with a modest self-image: "This case requires us to apply the rule we expressed in *Appendi v. New Jersey*: . . . '[A]ny 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.'⁶⁸ The opinion is short

67. This does not dispute that, as a historical matter, many were surprised by *Blakely*'s result. See, e.g., King & Klein, *supra* note 4, at 323–24 (explaining the authors' anecdotal impression "that judges and lawyers around the nation were stunned by the *Blakely* decision"). That surprise reflected the near-consensus view among courts and commentators that the Guidelines were constitutionally valid, see *supra* note 41 and accompanying text, and the popular assumption that the Washington statutory system cannot be distinguished from the federal nonstatutory system, see *supra* note 4.

68. *Blakely*, 124 S. Ct. at 2536 (citation omitted).

and straightforward, with over half devoted to refuting dissenting arguments that had previously been rejected in *Apprendi*.⁶⁹ Nonetheless, because numerous commentators have claimed that the *Blakely* decision spelled the Guidelines' doom,⁷⁰ our first step is to demonstrate that the Guidelines' constitutionality is as uncertain after *Blakely* as it was after *Apprendi* itself.

1. *Apprendi v. New Jersey*

Apprendi concerned a pair of New Jersey statutes. One set the maximum sentence for unlawful firearm possession at ten years.⁷¹ The other created a hate-crime enhancement that allowed judges to impose a twenty-year maximum sentence based on a preponderance of the evidence.⁷² Through those provisions, New Jersey's legislature could be seen as providing a "true" maximum sentence of twenty years for unlawful firearm possession. That is, the legislature authorized a twenty-year sentence for some convicted firearm defendants, but only allowed judges to apply the top half of that range to criminals who were motivated by discriminatory animus.

Apprendi held the New Jersey scheme unconstitutional, but what the Court did not hold also is important. The Court found nothing inherently unsound about New Jersey's twenty-year maximum sentence for unlawful firearm possession. Indeed, if New Jersey had passed a twenty-year maximum for all unlawful firearm possession, state judges presumably could have decided on their own to apply sentences greater than ten years exclusively to hate-criminals.

New Jersey's problem lay in its *method* of pursuing such goals. The *Apprendi* Court held that New Jersey could not define a crime with one maximum sentence, but authorize judges to impose a sentence greater than that.⁷³ The Court found that—in taking that second statutory step—New Jersey created a special

69. *Id.* at 2538–43; see also *id.* at 2536–37 nn.5–6.

70. See *supra* notes 3–4, 41 and accompanying text.

71. N.J. STAT. ANN. § 2C:39-4(a) (West 1995) (classifying unlawful possession of a firearm as a "crime of the second degree"); *id.* § 2C:43-b(a)(2) (setting the prison term for a "crime of the second degree" at "between five years and 10 years").

72. *Id.* §§ 2C:44-3(e), 2C:43-7(a)(3) (West 1995).

73. *Apprendi*, 530 U.S. at 490.

crime of hateful firearm possession, but impermissibly allowed the elemental finding of group-based animus to be made without the safeguard of jury trial beyond reasonable doubt.⁷⁴ In essence, the *Apprendi* Court found that the Fifth and Sixth Amendments bar a state from convicting defendants of one crime and sentencing them for another.

As should be clear, *Apprendi*'s key move was to interpret New Jersey's scheme as two formal steps, not as a functional whole authorizing twenty-year sentences for some, but not all, firearm violators. In *Apprendi*'s case, the judge found that the defendant fired bullets into an African-American family's home because he disliked having neighbors who were "black in color."⁷⁵ New Jersey's legislature had explicitly provided that such defendants, when convicted of unlawful firearm possession, should be eligible for a sentence higher than ten years.⁷⁶ The Constitution, however, prohibited the State from fulfilling its intent by exceeding the crime of conviction's statutory maximum.

2. *Blakely v. Washington*

In *Blakely*, Washington's statutory scheme was phrased differently from *Apprendi*'s hate-crime enhancement, but its constitutional dimensions were the same. Washington provided a statutory maximum for the defendant's crime of conviction, yet authorized a judicially determined sentence greater than that.⁷⁷ The Washington statutes' history is illustrative. Before 1981, Washington felonies were statutorily categorized as "Class A," "Class B," or "Class C," and the same maximum sentence applied to felonies in a class.⁷⁸ For example, all Class B felonies had a statutory maximum sentence of ten years,⁷⁹ and sentencing

74. *Id.* Similarly, in *Apprendi*'s precursor *Jones v. United States*, 526 U.S. 227 (1999), the Court construed the federal carjacking statute, contrary to its terms, as creating three different crimes, such that the elements of each must be presented in the indictment and to the petit jury. *Id.* at 229. The constitutional doubt that was avoided in *Jones* has now become the constitutional rule after *Apprendi*.

75. *Apprendi*, 530 U.S. at 469.

76. See N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995).

77. *Blakely*, 124 S. Ct. at 2534.

78. *Id.* at 2544 (O'Connor, J., dissenting).

79. WASH. REV. CODE ANN. § 9A.20.020(1)(b) (West 2000); cf. *State v. Walker*, 619 P.2d 699, 700 n.1 (Wash. Ct. App. 1980).

judges had broad discretion to impose any punishment below that maximum.

Over time, the state legislature was dissatisfied that different judges could use their individual discretion to assign similar sentences to defendants who engaged in different criminal conduct and different sentences to defendants whose criminal conduct was identical.⁸⁰ Washington thus enacted a Sentencing Reform Act.⁸¹ Under that statute, different felonies were assigned different offense seriousness levels that the sentencing judge combined on a two-dimensional grid with a defendant's offender score to produce a statutory "standard sentenc[ing] range."⁸² Also by statute, Washington provided an "exceptional sentence" greater than the standard sentencing range, if the judge found "substantial and compelling reasons justifying" such actions.⁸³ Even for exceptional sentences however, Washington's preexisting limits for particular classes of felony (*e.g.*, ten years for Class B) remained in effect.⁸⁴

The facts of *Blakely* exemplify how the Washington statutes worked. The defendant was indicted for second-degree kidnapping; he pleaded guilty and acknowledged the use of a firearm.⁸⁵ By

80. See David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME AND JUSTICE 71, 126–28 (Michael Tonry ed., 2001). Similar problems arose in other jurisdictions with respect to "discretionary sentencing" schemes. See, *e.g.*, S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1983 U.S.S.C.A.N. 3182, 3221 (Senate Report on the Federal Sentencing Reform Act of 1984's precursor); *Federal Criminal Law Revision: Hearing on H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, and H.R. 5703 Before the House Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong. 1179 (1984) (statement of Henry Schwarzschild, Director, Capital Punishment Project, American Civil Liberties Union) (providing statistics on the racial disparities in death penalty sentencing); H.R. REP. NO. 85-1946, at 6 (1958) (noting the "existence of widespread disparities in the sentences imposed by Federal courts"); 1938 ATT'Y GEN. ANN. REP. 6, 7 (criticizing "wide disparities and great inequalities in sentences imposed . . . for identical offenses involving similar states of facts"); ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 1:3, at 9–10 & nn.45–46 (2d ed. 1991) (collecting evidence of race- and gender-based disparities); MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5, 66 (1972) (decrying such disparities as "terrifying and intolerable for a society that professes devotion to the rule of law"); *Key Compromises*, *supra* note 17, at 5.

81. 1981 Wash. Laws, ch. 137 (codified at WASH. REV. CODE ANN. § 9.94A).

82. WASH. REV. CODE ANN. §§ 9.94A.120 (recodified at § 9.94A.505), 9.94A.310 (recodified at § 9.94A.510). For similarities in the content of the Washington and the federal sentencing regimes, see *supra* notes 80–97 and accompanying text.

83. WASH. REV. CODE ANN. § 9.94A.535 (providing an illustrative list of factors that may be considered in imposing an exceptional sentence).

84. See WASH. REV. CODE ANN. § 9.94A.420 (recodified at § 9.94A.599).

85. See *Blakely*, 124 S. Ct. at 2534; see also WASH. REV. CODE ANN. §§ 9A.40.030(1) (West 2000), 10.99.020(3)(p) (West 2002), 9.94A.125 (recodified at § 9.94A.602) (West

statute, conviction of second-degree kidnaping carried an offense seriousness level of V and an offender score of two.⁸⁶ Under Washington's grid, a conviction of second-degree kidnaping thus had a standard sentencing range of thirteen to seventeen months,⁸⁷ and firearm use increased that range by thirty-six months.⁸⁸ Because Blakely's plea agreement acknowledged that he used a firearm, his statutory sentencing range was forty-nine to fifty-three months.⁸⁹

Washington also provided by statute that, if the sentencing judge found that a second-degree kidnaper acted with deliberate cruelty, the judge could find a "substantial and compelling reason[]" for imposing an exceptional sentence of up to ten years.⁹⁰ In Blakely's case, the sentencing court made a *sua sponte* finding of deliberate cruelty and imposed an exceptional sentence of ninety months.⁹¹ Because ninety months was greater than second-degree kidnaping's fifty-three-month statutory maximum, Blakely claimed that his sentence violated *Apprendi*.⁹² The sentencing judge disagreed, and held that the only relevant statutory maximum was the ten years applicable to all Class B felonies.⁹³

3. Peas in a Pod

In both *Apprendi* and *Blakely*, the state sought to authorize different statutory maxima for defendants who, in the state's view, were convicted of the same crime. Both New Jersey and Washington claimed that, despite the maximum in the statute defining the crime of conviction, the true maximum sentence was what the judge could impose postenhancement.⁹⁴ The Supreme Court re-

2003).

86. WASH. REV. CODE ANN. § 9.94A.320 (recodified at § 9.94A.515) (West 2003).

87. See WASH. REV. CODE ANN. §§ 9.94A.510 (West 2003).

88. WASH. REV. CODE ANN. §§ 9.94A.310(3)(b) (recodified at § 9.94A.510) (West 2003).

89. *Blakely*, 124 S. Ct. at 2535.

90. WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (recodified at § 9.94A.535) (West 2003).

91. See *Blakely*, 124 S. Ct. at 2535.

92. See *id.* at 2536–37.

93. See *id.* at 2537.

94. Some have characterized *Blakely* as presenting for the first time the problem of dueling maximum sentence statutes. King & Klein, *supra* note 4, at 316. As discussed *supra*, I believe that the same problem arose in *Apprendi*, and again in *Ring*. Cf. King & Klein, *supra* note 4, at 324 (observing that the Supreme Court in *Ring* rejected "the state's argument that the statutory maximum sentence for first degree murder was death, instead looking at the effect of the state law in limiting a convicted murderer's sentence to

jected that argument and held that, whenever the legislature authorizes an increased sentence above the statutory maximum, it creates two crimes and must subject the aggravating element to jury trial and proof beyond reasonable doubt.⁹⁵

Washington, and the United States as *amicus curiae*, claimed that *Blakely* differed from *Apprendi*, but those arguments misconstrued *Apprendi*'s rule. Washington argued that its statutory scheme was valid because Washington judges retained discretion both to determine whether a case evinced "substantial and compelling reasons justifying an exceptional sentence" and to decide what counts as a "substantial and compelling reason."⁹⁶ With full respect to the litigants, one does not need hindsight to see why such discretion is constitutionally irrelevant. If New Jersey's *Apprendi* problem was authorizing sentences above the statutory maximum, that flaw would certainly persist if enhancements were imposed at the judge's option, or if they depended on findings of "hate crime or other appropriately aggravating factor." As the *Blakely* Court held: "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence."⁹⁷ As we shall see,⁹⁸ *Apprendi* rights are not about protecting judges' discretion to determine individual sentences, but about securing the criminal jury's constitutional role in conviction.

life unless additional facts were found"). The litigants in *Apprendi* were less than direct in articulating the dueling maximum issue because they sought to pretermitt, rather than satisfy, the application of any sort of statutory-maximum rule.

95. *Apprendi*, 530 U.S. at 504.

96. Brief for the State of Washington at 15–16, 21–26, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632) [hereinafter Respondent's Brief]; see also Brief for the United States as Amicus Curiae Supporting Respondent at 14–15, 17–18, 20–22, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632) (arguing that *Apprendi* applies only where the legislature specifies a factual finding that would authorize a sentence above the statutory maximum); *id.* at 18–20 (claiming that *Apprendi* applies only to factual findings, not matters of discretionary judgment).

97. *Blakely*, 124 S. Ct. at 2538. Even *Blakely*'s dissenters made little effort to distinguish the Washington and New Jersey regimes as a matter of principle, relying instead upon the damage and substantial costs that would arise, *id.* at 2544, 2546 (O'Connor, J., dissenting), and the Court's disregard for valuable interbranch dialogue, *id.* at 2550–51 (Kennedy, J., dissenting). See *id.* at 2551 (Breyer, J., dissenting) ("The Court makes clear that it means what it said in *Apprendi v. New Jersey*.").

98. See *infra* Part III.C.1.

Washington also asked the Supreme Court to defer to state courts' holdings that its Sentencing Reform Act did not create new statutory maxima, but merely structured judicial discretion.⁹⁹ The Court rejected that notion, repeating its earlier statement that state-law labels do not limit *Apprendi*'s constitutional substance.¹⁰⁰ Just as statutory names like "element" or "sentencing factor" do not control whether a particular finding requires indictment and trial by jury, the *Blakely* Court refused to credit state court rulings that Washington's statutes should be called something other than a statutory maximum sentence, thus escaping *Apprendi*'s rule.¹⁰¹ If *Blakely* has any abiding legal significance, it is for clarifying that the criteria for determining the relevant statutory maximum are governed by federal constitutional law, not state statutory law.¹⁰² In other respects, *Apprendi* and *Blakely* are nearly identical: each involved a defendant who was convicted of one crime and sentenced for another.

B. *Blakely's "Statutory Maximum"*

The parts of *Blakely* that have received the most public attention are two paragraphs explaining why *Blakely*'s statutory maximum was the fifty-three month maximum for second-degree kidnapping, not the ten-year maximum for Class B felonies:

99. See Respondent's Brief, *supra* note 96, at 22–23, 26–27, 31–32. Washington also claimed that *Apprendi* did not govern because the ten-year cap for Class B felonies restricts any otherwise applicable standard sentencing range. *Id.* at 19. That ten-year limit was irrelevant to *Blakely*'s sentence, however, and did not change the Court's determination that *Blakely*'s sentence was greater than the statutory maximum for second-degree kidnapping. See *Blakely*, 124 S. Ct. at 2537 ("[P]etitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty.'").

100. *Blakely*, 124 S. Ct. at 2539 (noting that "[n]ot even *Apprendi*'s critics would advocate this absurd result"); see also *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").

101. Cf. *Blakely*, 124 S. Ct. at 2547 (O'Connor, J., dissenting) (citing state statutes and a state court case as proof that "Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which [Blakely] was exposed").

102. Although the above text states the Court's dominant approach under *Apprendi* to the relationship between state and federal law, a sufficiently broad disdain for state legal characterizations might at some level conflict with *Ring*'s statement that "the Arizona court's construction of the State's own law is authoritative." *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes 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*. In other words, the relevant "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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).¹⁰³

Like similar passages in *Apprendi*, *Ring*, and *Harris*, the above-quoted paragraphs do not consider nonstatutory sentencing rules like the Guidelines. On the contrary, *Blakely*'s terms merely explain why the defendant's statutory maximum was fifty-three months instead of ten years. By verdict and by statute, *Blakely* was convicted of second-degree kidnapping, not "deliberately cruel kidnapping" or "exceptional kidnapping." The legislature defined the crime of conviction as "second-degree kidnapping," and the jury applied that definition in its verdict. The Court simply and correctly held that a jury's conviction for second-degree kidnapping (and "the facts reflected in [that] verdict") does not authorize the State to impose a sentence *greater than* that crime's fifty-three-month statutory maximum.¹⁰⁴ It is true that the Court offered a somewhat broader conceptual description of the term "statutory maximum." Such discussion, however, is best interpreted as focusing on the word "maximum," whose meaning was contested in *Blakely*, rather than "statutory," which was not. From that perspective, the above paragraphs' reasoning seems solid, uncontroversial, and very much in line with what "[earlier] precedents make clear."¹⁰⁵

103. *Blakely*, 124 S. Ct. at 2537–38 (footnote and citations omitted).

104. *Id.* at 2537

105. *Id.*

Admittedly, my interpretation of *Blakely* is not free of doubt, and it may be that the Court intentionally cast doubt on the Guidelines, as many other commentators seem to believe.¹⁰⁶ For example, the fact that *Blakely* mentioned the term “statutory” only occasionally might reflect an implicit view that any maximum, without a modifier, is constitutionally significant. Or that same rhetoric could simply confirm that the Court’s reasoning focused on the term “maximum.” What is most important, however, is to recognize that even if *Blakely*’s two paragraphs were designed to extend *Apprendi* to nonstatutory sentencing maxima, that extension is not only obscure, but almost wholly unexplained.

Despite the Court’s ambiguous language and absent analysis, some have characterized *Blakely* as implicitly equating statutory maxima and nonstatutory Guideline enhancements.¹⁰⁷ At best, that interpretation isolates the following sentences as dispositive: “[T]he relevant ‘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. . . . Had the judge imposed the 90-month sentence solely on the basis of [Blakely’s] plea, he would have been reversed.”¹⁰⁸ It is beyond dispute that federal judges, like Washington judges, must explain their sentencing decisions,¹⁰⁹ and federal adjustments to or departures from the defendant’s base offense level often rely on additional facts that are not elements of the crime of conviction.¹¹⁰ Furthermore federal judges, like Washington judges, cannot make any decision at sentencing, including factual findings, without explaining that decision’s basis or the resultant sentence could be reversed.¹¹¹

106. See *supra* notes 1, 3–4 and accompanying text.

107. E.g., *Booker*, 375 F.3d at 513; *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004); *United States v. Medas*, 323 F. Supp. 2d 436, 436 (E.D.N.Y. 2004); *United States v. Shamblin*, 323 F. Supp. 2d 757, 766 (S.D. W. Va. 2004); *United States v. Montgomery*, 324 F. Supp. 2d 1266, 1270 (D. Utah 2004); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1238–39 (D. Utah 2004).

108. *Blakely*, 124 S. Ct. at 2537–38.

109. See 18 U.S.C. § 3553(c) (2000) (“Statement of Reasons for Imposing a Sentence”).

110. GUIDELINES, *supra* note 20, § 1B1.3 (“Relevant Conduct (Factors that Determine the Guideline Range)”).

111. See *Blakely*, 124 S. Ct. at 2537–38; see also 18 U.S.C. § 3742(a)(3) (2000) (“Review of a sentence”).

Those similarities (explanation and appellate review), however, cannot have controlling weight without overlooking three aspects of the *Blakely* decision. First, with respect to text, although *Blakely*'s above-quoted passage purports to define "statutory maximum," the Guidelines, as a set of nonstatutory sentencing rules, necessarily fall outside any meaning of that term.¹¹² The Guidelines are issued by the Sentencing Commission, an independent entity in the judicial branch.¹¹³ Like various rules of procedure and administrative regulations,¹¹⁴ such Guidelines are submitted to Congress and may be disapproved.¹¹⁵ Therefore, the Guidelines do not comport with constitutional requirements of bicameral passage and presentment and simply cannot be called statutes.¹¹⁶

112. I believe that base offense levels do not indicate the "maximum" sentence authorized by the jury's verdict, *see infra* Part IV.C, but it is, in any event, clear that they are not statutory.

113. 28 U.S.C. § 991 (2000) ("There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission.").

114. 28 U.S.C. § 2074 (2000) ("Rules of procedure and evidence; submission to Congress; effective date"); 5 U.S.C. §§ 801–808 (2000) (providing for submission and consideration of certain agency regulations).

115. 28 U.S.C. § 994(q) (2000).

116. U.S. CONST. art. I, § 7, cl. 2. There is one possible exception to the rule that the Guidelines are not statutory maxima. By enacting the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. 108-21, 117 Stat. 650 (2003) [hereinafter PROTECT Act], Congress altered several important characteristics of the Guidelines. For example, the PROTECT Act eliminated certain grounds upon which judges could "depart downward" from the Guidelines specified range; the Act also granted more extensive appellate review, required reporting of district courts' downward departures, and changed the Sentencing Commission's seven-person membership from including "at least three judges" to including "no more than three judges." *See, e.g.,* Douglas A. Berman, *Deciphering a Rosetta Stone of Sentencing Reform*, 15 FED. SENTENCING REP. 307 (2003); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310, 310, 314 (2003). One commentator has argued that those changes render the guideline system sufficiently statutory, or at least sufficiently legislative, that the entire system should be subject to *Apprendi*'s procedural requirements. *See* Chanenson, *supra* note 4, at 23.

With respect to almost all of the PROTECT Act's provisions, I disagree that they affect the relevant *Apprendi* analysis. The fact that Congress has by statute altered structural elements of the Sentencing Commission, and has directed the Commission to revise nonstatutory rules, may render the Guidelines system more directly under legislative control and less politically independent. *See* 28 U.S.C. § 991 (2000). But none of those alterations converts any part of the overall system of nonstatutory Guidelines into an Act of Congress. Even though the Guidelines, like other administrative rules, are *authorized* and *enforced* by statute, that merely confirms that they function as "legislative rules *adopted by federal agencies*." *Stinson v. United States*, 508 U.S. 36, 45 (1993) (emphasis added). It does not signify that the Guidelines themselves are statutes.

By contrast, two provisions of the PROTECT Act did directly amend the Guidelines by

If, as some suggest, *Blakely* effectively declares the Guidelines unconstitutional, why would the Court use the term “statutory maximum,” as it has in every previous *Apprendi* case?¹¹⁷ Is there any definition of “statutory” that could encompass nonstatutory rules like the Guidelines?¹¹⁸ Is Justice Scalia in *Blakely* seeking (somewhat out of character) to redefine statutory beyond its traditional, constitutional meaning?¹¹⁹ Is the term a mistake, a vestige, or, in Judge Frank H. Easterbrook’s, terms, “a chuckle at the expense of other[s] . . . who took them seriously and thought that ‘statutory maximum’ might have something to do with statutes?”¹²⁰ Undoubtedly, some would argue that the statutory character of a sentencing rule is unimportant under *Apprendi*.¹²¹ But the moment one adopts such a theory, the term “statutory maximum” should be discarded, not defined. The majority opinion in *Blakely* is not clear, but its language seems to indicate that the Court has not gone that far.

statute. Each of those changes is indisputably statutory, regardless of their denomination as Guidelines, and I believe that one of the two might qualify as a statutory maximum governed by *Apprendi*. First, Congress assigned specific increases in a defendant’s offense level for trafficking and possessing images that involve sexual exploitation of minors. See PROTECT Act § 401(i). Even though those increases are undeniably statutory, they do not produce any maximum sentence and do not define any crime. See generally *supra* notes 17–32 and accompanying text (explaining how the Guidelines operate and how base offense levels are modified). Thus, I believe that such enhancements should not be covered by *Apprendi*.

Second, the PROTECT Act changed the base offense level for kidnaping under the Guidelines section 2A4.1(a) from level twenty-four to level thirty-two. See PROTECT ACT § 104(a)(1). One could argue that Congress did not really set the maximum sentence, because the precise number of months to be imposed cannot be calculated without reference to the Guidelines’ Sentencing Table, GUIDELINES, ch. 5, pt. A, which is not statutory. Nonetheless, in my view, Congress through this provision of the PROTECT Act statutorily prescribed the maximum sentence that a defendant may receive for kidnaping. And that statutory maximum operates just like the statutes enacted by New Jersey for unlawful firearm possession or by Washington for second-degree kidnaping. Cf. 18 U.S.C. § 1201(a), (d) (2000) (prescribing a twenty-year statutory maximum for kidnaping). Even if that particular provision of the PROTECT Act constitutes a statutory maximum, however, there is no basis for concluding that it somehow converts some or all other Guideline provisions from nonstatutory submaximal sentencing rules to statutory maxima.

117. See *infra* note 242 and accompanying text.

118. See *supra* note 116 (discussing the PROTECT Act, and explaining why statutory changes that manifest legislative control over the Guidelines do not change the Guidelines themselves into “statutes”).

119. Cf. *Booker*, 375 F.3d at 514 (stating that *Blakely* “redefin[ed] ‘statutory maximum’”).

120. *Id.* at 518 (Easterbrook, J., dissenting).

121. See *infra* text accompanying notes 130–137 (responding to such views).

Second, it is of no consequence to the Guidelines that *Blakely* interpreted *Apprendi* to bar any sentence greater than that authorized by the jury's verdict or by the facts reflected in that verdict¹²² because *Blakely* does not explain what sentence a jury's verdict authorizes.¹²³ In issuing a guilty verdict, the jury finds that the defendant committed all elements of a crime, and the maximum punishment authorized by the jury's verdict is the maximum attached to the crime of conviction. Before *Blakely*, it was undisputed orthodoxy that a defendant convicted of bank robbery under 18 U.S.C. § 2113(a) was convicted of *that statutory offense*, and that the jury's verdict constitutionally authorized any sentence up to the twenty-year statutory maximum.¹²⁴ From that perspective, the Guidelines, unlike Washington's statutory scheme, would not affect the maximum sentence that a judge may constitutionally impose. The Guidelines merely specify conditions for imposing particular sentences *below the statutory maximum*. Accordingly, although a sentencing judge may make additional findings that alter a defendant's sentence, and the sentence may be reversed if those findings are improper or misapplied,¹²⁵ neither the findings, their effect, nor the risk of reversal are constitutionally significant because the Guidelines do not authorize judges to "inflict[] punishment that the jury's verdict alone does not allow,"¹²⁶—punishment above the maximum, in the crime of conviction.

Does *Blakely* invite us to rethink such premises, perhaps concluding that federal crimes are defined by guideline base offense levels, not statutes? Does *Blakely* hold that, if there is no jury trial on amount, federal bank robbers are convicted of robbery under Guidelines section 2B3.1(a), with a statutory maximum of thirty-one to forty-one months, but if \$200,000 was stolen, the de-

122. As the Court noted in *Blakely*,

Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes 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*. . . . When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

124 S. Ct. at 2537 (citations omitted).

123. Compare *id.* at 2537, with *infra* notes 208–10 and accompanying text (describing such issues as *Apprendi*'s baseline problem).

124. 18 U.S.C. § 2113(a) (2000). See *infra* notes 200–03 and accompanying text.

125. See *infra* notes 204–07 and accompanying text.

126. *Blakely*, 124 S. Ct. at 2537.

fendants should be indicted and tried for robbery under Guidelines section 2B3.1(b)(7)(C) with a higher maximum?¹²⁷ To describe the Guidelines' base offense levels as statutory maxima would, to say the least, radically revise the terminology of federal criminal law. It would also transform current understandings of the maximum sentence that is authorized by a federal jury's verdict.¹²⁸

Although I will return to these issues in more detail, my present point is only that, despite popular perceptions, *Blakely* did not consider such questions and did not answer them. Instead, the Court simply restated and applied *Apprendi's* rule that a State may not define a crime (second-degree kidnaping) with one maximum sentence (fifty-three months), yet allow a judge to impose a greater sentence.¹²⁹ The fact that Washington and New Jersey used markedly different forms, labels, and mechanisms to implement their statutory maxima did not alter their statutes' effect, which was to create two separate crimes with two statutory maxima.¹³⁰ *Blakely's* maximum was fifty-three months, not ten years,¹³¹ just as *Apprendi's* maximum was ten years, not twenty,¹³² and *Ring's* was life imprisonment, not death.¹³³ Al-

127. See STITH & CABRANES, *supra* note 20, at 3 (arguing that "the Sentencing Commission has identified a multitude of new 'Guidelines crimes,' each a variant of one or more statutory crimes"). See generally *supra* notes 24–32 and accompanying text (discussing the Guidelines' application to 18 U.S.C. § 2113(a)).

128. The problem is not simply that applying *Apprendi* to the Guidelines would create and define maximum sentences for thousands of new crimes, where those Guideline provisions were previously thought to specify particular sentences within the much smaller field of statutory criminal prohibitions. The fact that a sentencing system might be complex is no argument against applying *Apprendi*, and such arguments properly failed to avail Washington in *Blakely*. See *Blakely*, 124 S. Ct. at 2556.

129. *Id.* at 2537 ("[T]he relevant '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.").

130. Cf. *Apprendi*, 530 U.S. at 494 ("[L]abels do not afford an acceptable answer. . . . [T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (quoting *State v. Apprendi*, 731 A.2d 485, 492 (N.J. Sup. Ct. 1999))). Note that the effect at issue is imposing "a greater punishment than that authorized by the jury's guilty verdict." *Id.* As shall be discussed, that statement does not deny that the jury's authorization is itself a formal concept. See *infra* Part III.C.

131. *Blakely*, 124 S. Ct. at 2534.

132. *Apprendi*, 530 U.S. at 468.

133. *Ring*, 536 U.S. at 597.

though the Court's language varies slightly, the two-step logic in each case is identical.¹³⁴

Third, it might seem particularly inapt to apply *Blakely*'s ambiguous language to the Guidelines because the majority explicitly stated that it "express[ed] no opinion" on that subject.¹³⁵ Pieces of the *Blakely* opinion, like pieces of *Apprendi*, doubtless could be read to invalidate the Guidelines (and mandatory minima as well). Nonetheless, the most defensible interpretation of *Blakely* as a whole is, as the opinion's terms suggest, that the Court merely reiterated and applied the reasoning that earlier "precedents make clear" concerning a State's ability to impose punishment greater than the crime of conviction's statutory maximum.¹³⁶ Those earlier precedents did not explain—in dicta or by implication—whether the same principle should govern the non-statutory Guidelines. Neither did *Blakely*.

C. *The Perils of Court-Watching*

To be sure, what many observers find interesting about *Blakely* is not its legal significance, but its value as a signal of the Court's future behavior in *Booker*. *Blakely* not only represents the Court's most recent *Apprendi* analysis, but the decision also was authored by Justice Scalia, whose vote will decide the Guidelines' fate.¹³⁷ Although one can seldom read the Court's collective mind, *Blakely* at least does not reveal a Court overeager to invalidate the Guidelines.

With some irony, the strongest basis for thinking that *Blakely* undermines the Guidelines is the vehemence of the four dissenting Justices.¹³⁸ Indeed, Judge Posner cited *Blakely*'s dissents and the majority's brief response as affirmative evidence of the Guidelines' infirmity.¹³⁹ Justice O'Connor's dissent was especially vocal

134. See *Blakely*, 124 S. Ct. at 2534–43.

135. *Blakely*, 124 S. Ct. at 2538 n.9.

136. *Id.* at 2543.

137. *Id.* at 2534.

138. Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Breyer dissented in *Blakely*. *Id.* at 2543–62 (O'Connor, J., dissenting).

139. *Booker*, 375 F.3d at 511 ("The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said, no it doesn't; it did not say that."); *id.* at 513 ("Justice Scalia, now speaking for a majority of the Court, in *Blakely*, though he replied to the dissenting Justices at length,

in rejecting the majority's claim that *Blakely* did not address the Guidelines. Writing for herself and three colleagues, Justice O'Connor repeatedly suggested that, whether intended or not, *Blakely* implied that the Guidelines were unconstitutional.¹⁴⁰ In a section that her colleagues did not join, Justice O'Connor's was more dramatic:

It is no answer to say that today's opinion impacts only Washington's scheme and not . . . the Federal Guidelines. The fact that the Federal Guidelines are promulgated by . . . the Judicial Branch is irrelevant to the majority's reasoning. . . .

[T]he Federal Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate.¹⁴¹

Other dissenting opinions were milder, but each expressed similar concern for the Guidelines' post-*Blakely* future.¹⁴²

Given the *Blakely* majority's choice not to address the Guidelines, however, one might wonder why the dissents' predictions matter much. After all, *Blakely*'s dissidents are the same jurists who disagreed with *Apprendi* itself and who at that time predicted that mandatory minima and determinate sentencing would quickly be invalidated.¹⁴³ Especially because *Blakely*'s dissents reiterate prior arguments that *Apprendi* held the Guidelines unconstitutional, their predictions about the future warrant skepticism.¹⁴⁴ In *Apprendi*, the majority explicitly refused to address the

did not say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines.”).

140. *Blakely*, 124 S. Ct. at 2543 (O'Connor, J., dissenting) (“The legacy of today’s opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries.”) (emphasis added); *id.* at 2546 (O'Connor, J., dissenting) (“Under the majority’s approach, any fact that increases the upper bound on a judge’s sentencing discretion is an element of the offense.”); *id.* at 2548–49 (O'Connor, J., dissenting) (“The consequences of today’s decision will be as far reaching as they are disturbing. . . . Numerous other States have enacted guidelines systems, as has the Federal Government. Today’s decision casts constitutional doubt over them all.”) (citations omitted).

141. *Id.* at 2549–50 (O'Connor, J., dissenting) (citations omitted).

142. *Id.* at 2251 (Kennedy, J., dissenting) (“To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution.”); *id.* at 2561 (Breyer, J., dissenting) (“Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today’s case dispels that illusion. . . . Perhaps the Court will distinguish the Guidelines, but I am uncertain how.”).

143. See *supra* notes 11–17 and accompanying text.

144. Compare *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting) (“[I]n light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court’s . . . rules in terms of sentencing schemes invalidated by

Guidelines¹⁴⁵ and described the dissents as inaptly "treat[ing] us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of [*Apprendi*] on the federal Sentencing Guidelines."¹⁴⁶ Given the *Apprendi* Court's summary response five years ago, it is predictable that the Court would only reply briefly to the same arguments' rehearsal in *Blakely*.

Another reason that *Blakely*'s dissenters might misperceive the decision's scope is that the deciding vote in the pending guideline cases (one way or another) will be *Blakely*'s author, Justice Scalia.¹⁴⁷ Few would rely too heavily on a Scalian dissent to predict the scope of a majority opinion by Justice O'Connor; in many respects, no two justices are more different. To anticipate the Court's behavior in controversial cases, it is often important to identify the fifth swing vote and analyze the issues from that justice's perspective. Here, the situation differs from the norm mainly because of the justice in question.

The *Apprendi/Blakely* majority—Stevens, Scalia, Souter, Thomas, and Ginsburg—do not typically vote together in close cases,¹⁴⁸ and it is already clear that they do not agree on the nature and sweep of *Apprendi*. The Court's decision in *Harris v. United States* illustrates that the fifth, narrowest vote on such issues is Justice Scalia's.¹⁴⁹ In *Harris*, the Court considered whether *Apprendi* should apply to mandatory minima, and thus whether *McMillan v. Pennsylvania*¹⁵⁰ should be overruled.¹⁵¹ Although Justice Stevens's *Apprendi* opinion reserved the question, his *McMillan* dissent suggested that he would have voted to strike down mandatory minima.¹⁵² Likewise, Justice Thomas's

today's decision will likely be severe."), and *id.* at 551-52, with cases cited *supra* note 41 (discussing cases upholding the Guidelines after *Apprendi*).

145. *Apprendi*, 530 U.S. at 497 n.21; accord *Blakely*, 124 S. Ct. at 2538 n.9.

146. *Apprendi*, 530 U.S. at 497 n.21.

147. See *infra* notes 154-57.

148. During the 2000-2002 Terms, for example, those Justices did not vote together in any of the Court's sixty-two decisions that were decided 5-4. See *The Statistics*, 117 HARV. L. REV. 480, 485 (2003); *The Statistics*, 116 HARV. L. REV. 453, 458 (2002); *The Statistics*, 115 HARV. L. REV. 539, 544 (2001).

149. See generally *Harris*, 536 U.S. at 545-72 (illustrating Justice Scalia's willingness to join only Part III of a four-part plurality opinion).

150. 477 U.S. 79 (1986).

151. *Harris*, 536 U.S. at 550.

152. *McMillan*, 477 U.S. at 95-104 (Stevens, J., dissenting); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) ("[I]n my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sen-

concurrence, which the majority cited favorably, stated that *Apprendi*'s adverse "consequence . . . [for] *McMillan* should be plain enough."¹⁵³ No one in the *Apprendi* majority disagreed with Justice Thomas's opinion, and Justice Scalia joined most of its analysis except the section discussing *McMillan*.¹⁵⁴ Nevertheless, the fifth vote in *Harris* for preserving mandatory minima was Justice Scalia, who forced the rest of *Apprendi*'s majority into dissent.¹⁵⁵ Justice Thomas noted in frustration that only a plurality of the Court would even admit that *Apprendi* and *Harris* could be reconciled.¹⁵⁶ Although Justice Scalia is apparently alone in thinking that both *Apprendi* and *Harris* are correct, his is the vote that matters most.

Later discussion will show *Harris*'s importance to any theory of *Apprendi* jurisprudence,¹⁵⁷ but even at a superficial level, *Harris* helps explain why *Blakely* might read as it does. The Justice who decided who would write the Court's opinion was Justice Stevens, the majority's most senior member. In cases where the result rests on an unstable majority, opinions are often assigned to the Justice whose views are narrowest or most uncertain, thereby reducing risks that the majority could splinter in reasoning. Such assignments also mitigate the risk a swing voter might switch sides, because judges sometimes are most committed to opinions that they themselves have written. Justice Scalia's authorship of *Blakely* fits that pattern. A similar signal is the lack of concurring opinions in *Blakely*. On the one hand, that might indicate a consensus among the majority that Justice Scalia's simple words were enough. Or the five may have avoided discussing the Guidelines because, as a five-vote majority, there was nothing on which all five could agree.

tence . . ."). Indeed, it seems possible that Justice Stevens's opinion in *Apprendi* submerged the Justice's own personal views in order to hold a fifth vote for the majority.

153. *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring).

154. *Id.* at 499, 519–23.

155. See Bibas, *supra* note 33, at 81 (observing that Justice Scalia's vote probably was not motivated by stare decisis concerns).

156. *Harris*, 536 U.S. at 583 (Thomas, J., dissenting) ("Justice Breyer concurs in the judgment but not the entire opinion of the Court This leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding, and at least one Member explicitly continues to reject both *Apprendi* and *Jones*."). (citations omitted).

157. See *infra* notes 214–38 and accompanying text.

The Court knew that it could have written an opinion in *Blakely* that would have resolved the Guidelines' constitutional status.¹⁵⁸ Yet the Court did not. Why? If the Court had wished to decide the Guidelines' constitutionality in 2004, or any other year after *Apprendi*, there was a large pool of defendants seeking certiorari on that issue. Why would the Court allow thousands of federal sentences to be imposed, year after year, under conditions that the majority viewed as fundamentally unlawful? Could judges who care so much for jury rights care so little for remedying ongoing constitutional violations?¹⁵⁹ More directly, why not take a federal companion case if *Blakely* was intended to sound the Guidelines' knell? *Blakely*'s procedural history confirms that the Court had ample opportunities to select a companion case if it wished. *Blakely*'s petition for certiorari was discussed at three of the Court's conferences (September 29, October 10, and October 17, 2003); the respondent's merits brief was filed on January 23, 2004; argument was heard on March 23, 2004; and the Court's opinion did not issue until June 24, 2004.¹⁶⁰ Even if the Court had somehow underestimated *Blakely*'s relevance to the Guidelines when certiorari was granted, there were several months when that relationship was abundantly clear.¹⁶¹

158. See *infra* Part III.A–IV.B (articulating two theories of *Apprendi*, neither of which was mentioned in *Blakely*, that would invalidate the Guidelines). It is useful, but not sufficient, to note that the Guidelines were not formally before the Court. Cf., e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (noting, in a case that involved the qualified immunity of federal officials, not state officials, that “it would be ‘untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution against federal officials’”) (second alteration in original) (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

159. This is not an argument concerning the legal authority of the Court's denials of certiorari. The Court has unrestrained discretion to deny review in any case where six Justices are amenable to doing so; such denials of certiorari are nonprecedential and are necessarily unsteady indicators of what the Court may choose to do in future cases. See, e.g., ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 301 (8th ed. 2002). For example, with respect to the Guidelines, there was no conflict among state or federal courts until *Blakely*, and such conflict can often be an important factor in the decision to grant certiorari. See generally SUP. CT. R. 10 (listing such conflicts as, “neither controlling nor fully measuring the Court's discretion, [but] indicat[ing] the character of the reasons the Court considers”). My narrow point is simply that any four Justices who were especially eager or aggressive in seeking to invalidate the Guidelines had abundant opportunity, and exigent constitutional reason, to do so sooner rather than later.

160. See Supreme Court Docket, at <http://www.supremecourtus.gov/docket/02-1632.htm> (last visited Apr. 2, 2004).

161. Indeed, Justice Breyer's dissent stated that, given *Blakely*'s effect on “tens of thousands of criminal prosecutions, including federal prosecutions,” he “would not proceed further piecemeal” but rather “would call for further argument on the ramifications of the

For those of us outside the Court's walls, such questions cannot have clear answers. But they do illustrate that the strongest conclusion from *Blakely*'s context confirms its ambiguous text: for reasons known only to the Court, the majority deliberately opted to resolve *Blakely* without explicitly or implicitly determining the Guidelines' constitutionality.¹⁶² Thus, as a matter of legal principle, *Blakely* was no earthquake;¹⁶³ it was at most a preliminary tremor, and even to those with a prognosticator's eye, *Blakely*'s signs (as is often true) are robust chiefly in their ambiguity.

III. APPENDI'S PRINCIPLE

Recognizing that *Blakely* neither decided nor implied a decision regarding the Guidelines opens the door for a fresh analysis of *Appendi* rights and what they should mean for federal sentencing. Also, as a base practical matter, if the *Booker* Court invalidates the Guidelines, Part II shows that *Blakely* and its predecessors provide no articulated support for that decision regarding nonstatutory sentencing rules.

This Part takes the next step, looking beyond *Blakely* for principled guidance. To understand whether *Appendi* should require indictment and jury trial for facts that enhance sentences above nonstatutory baselines, one must develop a solid view of *Appendi* itself. Justice Scalia and other members of the Court have divided and oscillated in their descriptions of *Appendi* rights. And although academics have generated substantial work concerning the history and consequences of *Appendi*'s progeny,¹⁶⁴ fewer have

concerns [he had] raised. . . . [T]hat was not the Court's view." *Blakely*, 124 S. Ct. at 2562 (Breyer, J., dissenting). It bears note that a decision to take a federal companion case would have required only four votes, although a vote for reargument would have required five. See STERN ET AL., *supra* note 159, at 732.

162. There are those, including Justices O'Connor and Breyer, who might criticize the Court for invalidating *Blakely*'s state sentence without addressing the important questions that arise under the federal system. See O'Connor *Disgusted*, *supra* note 50; *Blakely*, 124 S. Ct. at 2562 (Breyer, J., dissenting).

Such criticism must yield somewhat if *Blakely*'s silence was due to frictions among the five-Justice majority. Although much is made of the federal system's current chaos, circumstances would almost certainly have been worse if the Court had considered the Guidelines' constitutionality and failed to produce a majority opinion altogether.

163. 16 FED. SENTENCING REP. (titling the volume "The *Blakely* Earthquake").

164. See, e.g., *supra* notes 4, 31; Stephanos Bibas, *Appendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003);

attempted a broad theoretical account of *Apprendi* rights,¹⁶⁵ and almost no one has done so after *Harris*,¹⁶⁶ which significantly changed the relevant landscape. Thus, for context's sake, before exploring my own view of *Apprendi* rights, I will consider two competing theories and explain why they seem unconvincing.

A. A Model of Substantive Rights

The first theory, which could be called a “substantive interpretation” of *Apprendi*, would assign the jury a primary role in determining the actual amount of punishment a defendant receives. For such a theory, juries would find beyond a reasonable doubt all facts that deprive the defendant of any marginal increment of liberty, and defendants would be protected against the judicial power to impose any punishment without resort to a jury’s findings.

No jurist has endorsed such a strong vision of *Apprendi* rights, though its intuitive attractiveness derives from a practical focus on what matters to defendants in the real world. For the jury’s finding of guilt to be inextricably connected with the actual level of punishment imposed¹⁶⁷ would maintain a “necessary link be-

Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Joshua A. T. Fairfield, *To Err is Human: The Judicial Conundrum of Curing Apprendi Error*, 55 BAYLOR L. REV. 889 (2003); Michael Goldsmith, *Reconsidering the Constitutionality of Guidelines After Blakely: A Former Commissioner’s Perspective*, 2004 B.Y.U. L. REV. 935 (2004); Erik Lilliquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621 (2004); Marcia G. Shein & Matthew Doherty, *The Guidelines: A Troubling Historical Perspective*, 51 FED. LAW. 30 (2004).

165. See, e.g., Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1331–35 (2002); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 487 (2002); B. Patrick Costello, Jr., Comment, *Apprendi v. New Jersey: “Who Decides What Constitutes A Crime?” An Analysis of Whether A Legislature Is Constitutionally Free to “Allocate” An Element of An Offense to An Affirmative Defense or A Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205 (2002).

166. But cf. J. Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENTENCE REP. 83 (2002); Hendrix, *supra* note 41; Jane A. Dall, Note, *“A Question for Another Day”: The Constitutionality of the U.S. Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617 (2003).

167. Cf. *Harris*, 536 U.S. at 576 (Thomas, J., dissenting) (“Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?”).

tween punishment and crime,"¹⁶⁸ and would effectively assign the jury responsibility for determining both. Arguably, without such a firm relationship between verdict and sentence, the jury's role in the criminal decisional process would lose importance.¹⁶⁹ Additionally, a strong link between guilt and punishment would serve a defendant's interest in providing notice, because the factual elements found by the jury must also appear in the indictment.¹⁷⁰ In operative terms, a substantive interpretation of *Apprendi* would find a constitutional violation whenever the jury's verdict rests on one set of facts, but the defendant's sentence is, in any part, based on different facts found by a judge. As should be clear, the substantive interpretation would invalidate the Guidelines because many defendants' sentences are affected by judges' independent, postconviction determinations.¹⁷¹

Despite its simplicity and attention to real-world punishment, judges and scholars have not advocated the substantive interpretation because it contradicts the United States's history of judicial fact-finding. Although some early criminal laws set fixed punishments for criminal conduct,¹⁷² many statutes have used a discretionary sentencing system,¹⁷³ under which a jury's verdict determines guilt and the judge assigns any sentence within a broad range specified by the statutory crime of conviction.¹⁷⁴

168. *Id.*

169. *Cf. Jones*, 526 U.S. at 243–44 (“If a potential penalty might rise from 15 years to life on a nonjury determination, the jury’s role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.”).

170. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (proposing that “elements” subject to indictment and jury trial should identify all facts necessary to impose a particular “kind, degree, or range of punishment”).

171. *See supra* notes 19–23 and accompanying text (explaining how sentencing under the Guidelines typically operates).

172. *See, e.g., An Act for the Punishment of Certain Crimes Against the United States*, ch. 9, 1 Stat. 112 (1790); *United States v. Grayson*, 438 U.S. 41, 45 (1978) (“In the early days of the Republic, . . . [e]ach crime had its defined punishment.”).

173. Kate Stith & Jose A. Cabranes, *Judging Under the Guidelines*, 91 NW. U. L. REV. 1247, 1248–49 (1997); *see also* Act of April 30, 1790, ch. 9, §§ 7, 22, 1 Stat. 112, 113, 117 (authorizing a sentence for manslaughter of up to three years’ imprisonment and fines up to \$1000, and authorizing a sentence for obstruction of process of up to one year and \$300).

174. By contrast, the term “determinate sentencing” refers to any sentencing scheme where the statutory sentencing range available to defendants convicted of the same crime is subdivided by rule. The Guidelines are the paradigmatic example of determinate sentencing; even they, however, allow for judicial discretion within the sentencing range prescribed by the sentencing table (e.g., forty-one to fifty-one months).

The Supreme Court discussed the constitutionality of discretionary sentencing in *Williams v. New York*.¹⁷⁵ The Court explained that, unlike juries, which are limited by heightened evidentiary burdens and deciding the narrow issue of guilt, the sentencing judge in a discretionary system is allowed "to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."¹⁷⁶ "[B]oth before and since the American colonies became a nation, . . . a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law" in defining the crime of conviction.¹⁷⁷ Under discretionary sentencing, judges consider numerous facts other than the crime of conviction's elements, including the defendant's socially valuable projects, apparent malice, projected recidivism, penitence, prior criminal acts, and much else.¹⁷⁸ Each or all of those facts could form indispensable, legally authorized components of a judge's decision to impose an increased sentence, and none of them has any necessary relationship to facts found by the jury in issuing its verdict.¹⁷⁹

Although the above text focuses on discretionary sentencing by judges, similar problems arise in the context of indeterminate sentencing, whereunder the judge specifies a possible range of sentences for the defendant, but the actual time of release is set by executive parole officers based on rehabilitation. See generally STITH & CABRANES, *supra* note 20, at 18-22 (describing the history and function of the federal parole system, which existed from 1910 until the Sentencing Reform Act of 1984).

175. 337 U.S. 241 (1949). The defendant in *Williams* was convicted of murder, and although the jury recommended a life sentence, the judge imposed the death penalty based on "the shocking details of the crime," the defendant's "thirty other [unconvicted] burglaries," his "morbid sexuality," and his "menace to society." *Id.* at 244.

176. *Id.* at 247; accord *id.* at 251 ("In determining whether a defendant shall receive a . . . sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.").

177. *Id.* at 246 (footnote omitted).

178. *Id.* at 250 n.15 (outlining the Administrative Office's form probation report, which included information regarding the defendant's "(1) Offense; (2) Prior Record; (3) Family History; (4) Home and Neighborhood; (5) Education; (6) Religion; (7) Interests and Activities; (8) Health (physical and mental); (9) Employment; (10) Resources; (11) Summary; (12) Plan; and (13) Agencies Interested").

179. Some might question whether the logic of *Williams* remains valid today. The Court supported the need for individualized sentences in part by reference to the then-

To see discretionary sentencing's details, imagine a bank robber who pleads guilty to an offense with a statutory sentence of five years to life. In supporting the plea bargain, the prosecution proves only (as the hypothetical statute requires) that the defendant forcibly removed money from a bank. At sentencing, however, the prosecution offers evidence that the defendant used a machine gun, took hostages, tried to kill a security guard, and had previously committed several similar robberies.¹⁸⁰ Imagine that the sentencing judge's opinion explains that five to seven years would have been appropriate in a garden variety bank robbery, but this crime's seriousness deserved more. Moreover, imagine the judge's on-record calculation that, as a general rule in her courtroom, any robbery involving a hostage warrants at least fifteen years, any attempted machine gunning earns an additional ten years, and the defendant's criminal history merits six years more. Our hypothetical defendant is thus sentenced to thirty-eight years imprisonment—thirty-one years above what the judge would have imposed without her additional findings and sentencing rules—based largely on facts that were never presented in the indictment, found by a jury, or proved beyond reasonable doubt. Nonetheless, under well-established modern doctrine, there is no *Apprendi* problem in sight.¹⁸¹

Discretionary sentencing's strong historical pedigree rebuts any claim that the Constitution requires a detailed, active role for

prevalent goals of punishment: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 248. However, the fact that federal sentencing no longer adheres to reformation and rehabilitation is irrelevant to the constitutional permissibility of individualized sentences. Although retribution and incapacitation now represent more modern goals of punishment, those penological theories also may require the use of broad contextual facts in determining a particular defendant's sentence. *See, e.g.*, 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

180. To complete the scenario, one could also imagine evidence that the defendant was a recovered drug abuser, who was a decorated military veteran of the first Iraq War, and was so repentant of her crime that she had become a strong participant and role model in antidrug and anticrime organizations. To incorporate such mitigating facts would not alter any of the text's conclusions.

181. *Cf. Harris*, 536 U.S. at 560 (plurality opinion) ("It does not matter, for the purposes of the constitutional analysis, that . . . the 'State provides' that a fact 'shall give rise both to a special stigma and to a special punishment.' Judges choosing a sentence within the range do the same, and '[j]udges, it is sometimes necessary to remind ourselves, are part of the State.'") (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (citations omitted)).

juries in sentencing. There is no serious question that the Constitution allows defendants to be convicted of a crime with a broad statutory range, and the Constitution allows judges under discretionary sentencing to impose any sentence within that range based on facts, proved by a preponderance of evidence, that are not elements of the offense. A judge's jury-free sentencing discretion would persist even if she explicitly recited factual findings to support her chosen sentence,¹⁸² or if the judge chose to apply a routine sentence in all cases without aggravating evidence at sentencing. Indeed, all judges within a jurisdiction could choose, in their individual discretion, to use the same routine sentence and the same grounds for imposing a larger sentence.¹⁸³ Even in relatively formal, systematic incarnations, discretionary sentencing remains constitutionally valid.

The fact that discretionary sentencing is not only permissible, but *incontestably* permissible, must temper the norms typically offered to support *Apprendi*'s rule. Although it is commonplace to say that juries must find "every fact which is legally essential to the punishment [imposed],"¹⁸⁴ for example, this statement means less than it seems. For defendants, the phrase "legally essential" greatly limits *Apprendi*'s practical import.¹⁸⁵ Defendants wish to

182. Under pre-Guidelines discretionary sentencing, it was "firmly established . . . that the appellate court ha[d] no control over a sentence which [was] within the limits allowed by a statute." *Dorszynski v. United States*, 418 U.S. 424, 441 (1974) (quoting *Gurera v. United States*, 40 F.2d 388, 340-41 (8th Cir. 1930)); *id.* ("[I]f a judge imposed a sentence within that range, his exercise of discretion . . . was not subject to challenge [on appeal]."); *id.* at 440 n.14 ("[T]he 'discretion of the judge . . . in [sentencing] matters [was] virtually free of substantive control or guidance.'") (first alteration in original) (quoting Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 916 (1962)).

183. In 1958, Congress attempted a voluntary solution to sentencing disparities. Under 28 U.S.C. § 334(a), Congress authorized the creation of judicial sentencing councils and institutes under the Judicial Conference. Such entities were designed to formulate "objectives, policies, standards, and criteria for sentencing," 28 U.S.C. § 334(a), which might lead sentencing judges toward "a desirable degree of consensus as to the types of sentences which should be imposed," S. REP. NO. 85-2013 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3891, 3892. Such advisory institutions were widely viewed as insufficient to control disparities in criminal punishment. *See, e.g.,* FRANKEL, *supra* note 80, at 61-68; Irving R. Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 257, 270 (1962). But no one ever suggested that the institutes and councils would have been *unconstitutional* if all federal judges had chosen the sentencing standards thus promulgated.

184. *Blakely*, 124 S. Ct. at 2536 n.5 (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 50-56 (2d ed. 1872)); *accord Apprendi*, 530 U.S. at 476-83, 489-90 n.15.

185. *Cf. Jones*, 526 U.S. at 248 ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that

know the sentence they will receive if convicted. Their interest in knowing a hypothetical sentence that they might receive is derivative, regardless of whether such data are presented as a maximum, a minimum, or a range. Notice of a statutory maximum is nearly worthless if all sentences are imposed far below that maximum, notice of a minimum is likewise empty if actual sentences lie well above it, and knowledge of one's range of punishment is useful only if that range is small, or if one knows the distribution of sentences therein.¹⁸⁶

Under discretionary sentencing, to convict a defendant of a crime with a broad statutory range is merely preliminary to the sentencing phase, where more important decisions are made regarding the defendant's actual punishment.¹⁸⁷ For our hypothetical bank robber,¹⁸⁸ the jury's verdict, and the facts proffered to support her guilty plea, yielded little information or notice about the actual sentence imposed. The practical details of punishment were knowable only based on the evidence offered by the prosecution, the judge's findings, and any rule-based or discretionary decisions by the court at sentencing. In sum, although a defendant's interest in avoiding significant judicial sentence enhancements may tend to support the existence of *Apprendi* rights, discretionary sentencing shows that it is not a value that *defines* those rights. Indeed, if the Supreme Court were to adopt some variant of the substantive theory, the legal consequences could be immense. Not only would the Guidelines fall, but even discretionary sentencing, which has been a longstanding hallmark of United States sentencing law, would be suspect.¹⁸⁹

B. *A Model of Judicial Discretion*

A more sophisticated theory for invalidating the Guidelines appears in Justice Thomas's *Apprendi* concurrence (which Justice

general issue and have no intention of questioning its resolution.”).

186. For additional criticism of notice as a driving value in *Apprendi* jurisprudence, see King & Klein, *supra* note 31, at 1485–86.

187. *Cf. id.* at 1509 (“[I]n the late eighteenth and early nineteenth centuries came the continued decline of mandatory penalties in favor of judicial discretion to set sentences within a range set by the legislature. For such crimes, jurors [and defendants] could only guess what sentence would follow [the] conviction.”) (footnote omitted).

188. See *supra* notes 180–81 and accompanying text.

189. See *supra* notes 173–88 and accompanying text.

Scalia joined in part)¹⁹⁰ and his *Harris* dissent (which Justices Stevens, Souter, and Ginsburg joined).¹⁹¹ Unlike the substantive theory of *Apprendi*, Justice Thomas would embrace discretionary sentencing, but in so doing, he must depart from the practical consequences that matter most to criminal defendants. Instead, Justice Thomas's model centers on the range of available punishment, i.e., the scope of judicial discretion that applies at sentencing. That judicial-discretion model guards defendants only against adverse sentencing decisions that occur pursuant to rules.

1. *Apprendi*'s Concurrence¹⁹²

190. *Apprendi*, 530 U.S. at 499–524 (Thomas, J., concurring).

191. *Harris*, 536 U.S. at 572–83 (Thomas, J., dissenting).

192. As a brief note on methodology, Justice Thomas's *Apprendi* opinion relies heavily on historical materials that were not compiled in any brief or modern scholarship. That history is not analyzed in detail here, because it provides neither a theoretical account of *Apprendi* rights, nor direct answers concerning the Guidelines' constitutionality. Nonetheless, one should mention that Justice Thomas's overall characterization of the record is overstated: "A long line of essentially uniform authority . . . stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule [regarding statutory maxima] that the Court adopts today." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). In *Harris*, the Solicitor General indicated several flaws in Justice Thomas's analysis concerning mandatory minima, Brief for the United States at 32–36, *Harris v. United States*, 536 U.S. 524 (2002) (No. 00-10666), and Justice Thomas did not respond to those criticisms or reassert his argument's historical merit. *E.g.*, *Harris*, 536 U.S. at 574 (Thomas, J., dissenting) ("According to the plurality, the historical practices underlying [*Apprendi*] . . . do not support extension . . . to facts that increase a defendant's mandatory minimum sentence. Such fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny."); *id.* at 579 (Thomas, J., dissenting) ("Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.") (emphasis added).

Moreover, Justice Thomas's reliance on statements from late-nineteenth century treatises, which did not identify federal constitutional differences between jury-bound elements and judicial sentence enhancements, seems at least suspect as evidence to confirm founding-era understandings. See *Apprendi*, 530 U.S. at 510–19 (Thomas, J., dissenting) (citing 1 JOEL PRENTISS BISHOP, *LAW OF CRIMINAL PROCEDURE* 50 (2d ed. 1872), 1 JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* 49 (4th ed. 1895), 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON CRIMINAL LAW* (5th ed. 1872)); 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE* 54 (stating, without explanation, that judicial consideration of aggravating factors to increase a defendant's sentence "is an entirely different thing from punishing one for what is not alleged against him"). Even if the Constitution did incorporate established principles of common-law history, all of Justice Thomas's common-law authorities concerning his "broader" interpretation of *Apprendi*'s rule regarding statutory maxima arise decades after the Bill of Rights' ratification. Compare *Apprendi*, 530 U.S. at 502–03 (discussing *Commonwealth v. Smith*, 1 Mass. 245 (1804), which concerned a statutory maximum), with *id.* at 502–06 (discussing cases from the 1840s through the 1870s), and *id.* at 507 (discussing *Commonwealth v. Welsh*, 4

Justice Thomas described the fundamental question in *Apprendi* as “what constitutes a ‘crime.’”¹⁹³ In turn, he defined “crime” by reference to “elements,” which include “every fact that is by law a basis for imposing or increasing punishment One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.”¹⁹⁴

Justice Thomas’s definition thus uses two phrases to describe the same idea. Under one iteration, Justice Thomas would require jury trial for any fact that is “by law a basis for . . . increasing punishment.”¹⁹⁵ Of course, the term “by law” has a special meaning in this context,¹⁹⁶ because Justice Thomas would not invalidate any discretionary sentencing systems.¹⁹⁷ Justice Thomas, instead, views *Apprendi* as providing a limited right against *determinate* sentencing enhancements, that is, a right against provisions that attach punishment to facts *by rule*, not as a matter of unchanneled *discretion*. The Guidelines would be invalid under a judicial-discretion model because statutory and nonstatutory

Va. 57 (1817), which concerned a statutory maximum, and *Smith v. Commonwealth*, 14 Serg. & Rawle 69 (Pa. 1826), which addressed no issue relevant to *Apprendi*), and *id.* at 507–19 (discussing cases from the 1840s through the 1960s). For more extended substantive discussion of Justice Thomas’s historical materials, see Bibas, *supra* note 33, at 79, King & Klein, *supra* note 31, at 1474–77, and Priester, *supra* note 41 at 910–11.

193. *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring); *Harris*, 536 U.S. at 575 (Thomas, J., dissenting).

194. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring); *accord*, e.g., *id.* at 502 (“[A] fact that is by law the basis for imposing or increasing punishment is an element.”); *id.* at 506 (“[I]f a statute increased the punishment of a common-law crime . . . based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment.”); *id.* at 508 (noting that a “fact is an element because it increases the punishment by law”); *id.* at 510 (“[T]he indictment must . . . contain an averment of every particular thing which enters into the punishment.”) (alterations in original) (quoting 1 BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, *supra* note 192, at § 540); *id.* at 515 (“[A] crime includes any fact to which punishment attaches.”); *id.* at 521 (“If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution’s entitlement—it is an element.”).

195. *Id.* at 501–02; *see*, e.g., *id.* at 521 (describing elements of a crime as any fact that by law is the basis for punishment).

196. *Cf. supra* notes 184–89 and accompanying text (interpreting “legally essential” in a similar fashion).

197. Thus, Justice Thomas differentiates between *Apprendi*’s rule concerning “what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment,” and “constitutional constraints [that] apply . . . to the imposition of punishment within the limits of that entitlement.” *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). From the defendant’s point of view, however, the dominant similarity between the two is that each can result in a longer term of imprisonment.

rules affect judges' discretion the same; that is why several Justices have described the Guidelines as "hav[ing] the force and effect of laws."¹⁹⁸

To focus on *any* increase in punishment by law creates three problems. First, it is not clear as a normative matter why the Constitution should greater protect defendants subject to rule-based sentencing than it does defendants subject to discretion-based sentencing. Imagine two judges, one operating in a discretionary sentencing jurisdiction and the other using the Guidelines, who confront identical defendants convicted of identical statutory crimes. The two might impose the same sentence, rely on the same factual findings, use the same postconviction evidence to prove the same uncharged conduct, and apply the same evidentiary standards. Under a judicial-discretion model, the discretionary scheme's sentence would be upheld, but the guidelines sentence would be struck down.

From the two defendants' perspective, that result is anomalous because the loss of liberty in each case is the same, and so are the factual findings that produce such loss. Moreover, each system seems to incorporate an equally limited role for the jury as a gatekeeper over the defendant's punishment.¹⁹⁹ Why should the Constitution treat the two sentencing regimes differently? How can it be that discretionary sentencing better comports with due process and jury trial rights? Neither Justice Thomas nor his academic supporters have addressed such questions, and no inherent danger in punishment by law—by rule—appears that would merit special constitutional safeguards.

Second, a judicial-discretion model like Justice Thomas's may be hard-pressed to determine what types of sentencing rules might violate the Fifth and Sixth Amendments. For example,

198. *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)); *accord* *United States v. Watts*, 519 U.S. 148, 160 (1997) (Stevens, J., dissenting); *see also* 18 U.S.C. § 3553(b) (2000) (providing that a district court, except in cases of child crimes and sexual offenses, "shall impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

199. *Cf. Jones*, 526 U.S. at 243–44 ("If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping . . .").

does the difference between permissible discretion and impermissible rules turn on the relevant norm's content or origin?²⁰⁰ Imagine the following scenarios for a bank robber with a statutory sentencing range of five years to life: (1) An individual judge imposes a sentence of thirty-eight years. (2) The judge explains that her "normal" sentence for bank robbery is five to seven years, but this defendant's violent and dangerous conduct deserves thirty-eight years. (3) The judge explains that, in her court, she always imposes fifteen years above "normal" for crimes with hostages, ten years for crimes with attempted machine gunning, and six years for defendants with multiple prior offenses; thus, this defendant receives thirty-eight years. (4) The judge imposes a thirty-eight-year sentence, explaining that every court in the jurisdiction, including hers, follows the above system, with narrowly defined exceptions for extraordinary circumstances. (5) The system of rules is promulgated by a group of judges, who enforce it upon one another through ordinary appellate channels. (6) A congressionally organized Sentencing Commission in the judicial branch issues the rules.

Option (1) is a clearly valid application of ordinary discretionary sentencing,²⁰¹ but beyond that, it is hard to see where any useful line might lie. If Justice Thomas's "*Apprendi* right" is one that guarantees purely individualized sentencing, (2) or (3) might be invalid. If the right protects individual judges' discretion, aggregation under (4) or (5) might be problematic.²⁰² If judges are allowed to surrender their discretion, problems might emerge only when Congress institutionally structures discretion under (6). There are plausible policy arguments for each or all of the above distinctions. Such incidents of organization and operation, however, seem remote from the Fifth and Sixth Amendments' predominant concerns, and no jurist has sought to explain why constitutional rights should turn on seemingly minor details.²⁰³

200. Cf. H. L. A. HART, *THE CONCEPT OF LAW* 81 (2d ed. 1994) (describing legal rules based on their content and function); HANS KELSEN, *PURE THEORY OF LAW* 193–95 (Max Knight trans., 2d ed. 1970) (identifying legal rules by their structural relationship to a basic norm); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 1–2 (2d ed. 1980) (characterizing the four problems under any systematic theory of law as existence, identity, structure, and content).

201. See *supra* notes 174–82 and accompanying text.

202. Cf. *supra* note 183 (discussing judicial councils and institutes under 28 U.S.C. § 334(a)).

203. Cf. *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (criticizing the Court's

As an alternative to content- or origin-based criteria for rules, a judicial-discretion theory might look to identify certain enforcement mechanisms that give sentencing rules their impermissibly mandatory character. Four possibilities appear. One would turn on legislative labels, such that the Guidelines would be valid if they were literally rephrased as persuasive authority but were otherwise kept the same. A second would focus on appellate review, invalidating any regime where the sentencing judge could be reversed for imposing a sentence outside the rules;²⁰⁴ thus, the Guidelines could be saved if Congress maintained their mandatory tone but repealed only the provision for appellate review.²⁰⁵ After such amendment, the Guidelines would lack any enforcement other than the sentencing judge's oath and conscience. Would such formally unenforceable, but technically mandatory, guidelines qualify as unconstitutional restrictions on judicial sentencing discretion?

A third approach would count even informal coercion as a source of rules. Possible examples include a system where adherence to hortatory Guidelines are a litmus test for confirmation hearings, and judges' noncompliant decisions are reported to Congress for criticism.²⁰⁶ Congress also might require judges to proffer detailed explanations to justify departures from otherwise persuasive Guidelines. Such political and bureaucratic coercion

rule as imposing unnecessary constitutional hurdles "simply because it is the legislature, rather than the judge, that constrains the extent to which [various] facts may be used to impose a sentence within a pre-existing statutory range").

204. This view that reversal is constitutionally significant might find support in *Blakely's* definition of a statutory maximum, 124 S. Ct. at 2537, which is discussed above. See *supra* notes 91–109 and accompanying text.

205. See 18 U.S.C. § 3742 (2000) ("Review of a Sentence").

206. Cf. 28 U.S.C. § 476 (requiring a semiannual report to Congress of certain delayed matters on each judge's docket). The PROTECT Act, see *supra* note 116, exemplifies the political possibility of informal coercion. Section 401(h) requires the chief judge of each federal district to report and to explain every sentence issued within her district that departs from the otherwise applicable Guidelines range. The "identity of the sentencing judge" must also be included in those reports. *Id.*; cf. PROTECT Act, *supra* note 116, § 401(1)(2)(B)(iii) (providing for reports by the Attorney General concerning departures, also including "the identity of the district court judge"). Chief Justice Rehnquist, in remarks to a group of federal judges, noted the potential force of the PROTECT Act's reporting requirements: "[T]he collection of such information on an individualized judge-by-judge basis . . . could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties." Hon. William H. Rehnquist, Remarks of the Chief Justice to the Federal Judges Ass'n Bd. of Directors Mtg. (May 5, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html (last visited Apr. 2, 2005).

might seem trivial in some circumstances, but in others they could easily mimic the force of substantive appellate review.

Finally, one might identify rules by looking directly at their practical effects. Under that approach, it might be important whether every judge in fact follows the Guidelines, regardless of how the rules are phrased or enforced. No one can know whether any or all of the above factors would be relevant in Justice Thomas's assessment of whether a rule has impermissibly restricted judicial discretion. But it is at least certain that, if the Court adopted a judicial-discretion model as authoritative, future cases might render the model's practical details almost as difficult to identify as its normative basis.²⁰⁷

A final problem with Justice Thomas's proposed rule against rule-bound sentence enhancements is his failure to explain how such principles relate to the jury's verdict. In general terms, this could be called *Apprendi*'s "baseline problem."²⁰⁸ Every increase must be an increase above some baseline, and the constitutional standard prescribed by *Apprendi* is the sentence authorized by the jury's verdict.²⁰⁹ Although Justice Thomas seems to assume that any rule-bound fact that boosts punishment above a judicially normal sentence is an increased sentence,²¹⁰ that assumption is controversial and undefended. Because the judicial-discretion model does not indicate how to determine the maximum sentence authorized by a jury's verdict, nor why the jury's authorization should turn on a sentencing judge's range of discre-

207. A slightly different possibility would be to interpret Justice Thomas's phrase "by law" not as a standard against rules, but only against rules that contain legislatively specified content. One might then argue that aggravators in a discretionary system are not a basis for increasing a sentence by law, because the judge is allowed to choose which types of conduct warrant additional punishment. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). *Blakely*'s lesson is otherwise. There, the Court easily and correctly held that a legislature cannot escape *Apprendi*'s rule by failing to specify which particular facts authorize a sentence above the statutory maximum: "Whether the judge's authority to impose an enhanced sentence depends on finding a specific fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." *Blakely*, 124 S. Ct. at 2538.

208. See *infra* Part III.C for further discussion.

209. See *supra* note 63–64 and accompanying text.

210. For arguments that the proper baseline for determining what a jury's verdict authorizes is the statutory maximum of the crime of conviction, see *supra* notes 194–208 and accompanying text. *But cf.* *Bibas*, *supra* note 31, at 1134 n.249, 1182–83 (claiming that the jury's verdict does not authorize any particular amount of punishment).

tion, its standard for increasing punishment lacks a necessary component.

Justice Thomas's alternate definition of *Apprendi* rights would attach constitutional safeguards to any fact that increases the "punishment to which the prosecution is by law entitled for a given set of facts."²¹¹ Those words seem unhelpful, however, because one cannot discern what prosecutorial entitlement means in this context. For example, how could the prosecution be entitled to any level of punishment other than the sentence that a particular defendant deserves, i.e., the sentence that the judge actually imposes in an individual case? That sense of entitlement cannot be what Justice Thomas has in mind, however, because the United States's history of discretionary sentencing allows judges, not only juries, to determine particular sentences in particular cases.²¹² The prosecution's entitlement must refer not to the actual amount of punishment that a defendant receives, but to the permissible range of punishment available as a matter of judicial discretion. Therefore, under both iterations, Justice Thomas's definition of elements implicitly characterizes *Apprendi* rights as incorporating a basic opposition to sentencing rules and a corresponding preference for judicial discretion. That viewpoint poses serious problems as a matter of principle and practical reason alike.²¹³

2. *Harris's* Dissent

Although Justice Thomas's theory concerning the significance of a range of punishment initially appeared in a part of his *Apprendi* concurrence that no other Justice joined, the theory was importantly clarified by his discussion of mandatory minima in *Harris*.²¹⁴ The *Harris* dissent merits special attention because, in being joined by Justices Stevens, Souter, and Ginsburg, it best ar-

211. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

212. *See id.* at 472-73 (Thomas, J., dissenting) (accepting that practice as valid).

213. *See supra* notes 176-84 and accompanying text.

214. Incidentally, Justice Scalia's concurring opinion in *Apprendi's* precursor, *Jones v. United States*, also seemed to endorse a range-based analysis: "[I]t is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Jones*, 526 U.S. at 253 (Scalia, J., concurring).

ticulates the views of those Justices who will probably vote to invalidate the Guidelines in *Booker*.

Mandatory minima posed a difficult, and ultimately divisive, issue for *Apprendi*'s majority. On one hand, the practical effects of mandatory minima argued against their constitutionality; for many crimes and defendants, to change the statutory minimum would yield a much higher sentence than would a changed maximum. Also, an altered minimum affects the lowest and least culpable stratum of criminal defendants, who tend to inspire greater sympathy, while maxima are significant only for the most culpable criminals, who have been judged to deserve extraordinarily long sentences. If *Apprendi* had held that juries should find all important components of a defendant's sentence, modern minima would almost certainly qualify.²¹⁵ But we have seen that *Apprendi* cannot require all important facts to be found by the jury without invalidating discretionary sentencing.²¹⁶ Where a statutory range is broad, the sentencing judge's factual findings and judgments are often the most important determinant of the defendant's sentence, yet such findings are valid even though their factual bases may not be alleged in an indictment or proved to a jury.²¹⁷

215. At least one scholar has explicitly argued that the Court's decision to uphold mandatory minima in *Harris* is inconsistent with both *Apprendi* and *Blakely*. See Barkow, *supra* note 4, at 312 ("There is little logic to support the coexistence of *Harris* and *Blakely*. Facts that trigger a heightened maximum sentence and those that dictate a heightened minimum sentence both seem to fall under the rationale of *Apprendi*.").

[H]ow does the jury act as any more of a circuit-breaker against the machinery of the state if it makes a determination that the defendant committed some generally described behavior that could theoretically yield a maximum sentence, but, in fact, the defendant's sentence is determined by "a judicial inquisition into the facts of the crime the State *actually* seeks to punish" with a mandatory minimum sentence? . . . [A]t the very least, the jury must apply all laws that dictate punishment on the basis of particular factual findings, regardless of whether that punishment alters a floor or a ceiling.

Id. at 313; accord Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 106–16 (2003).

216. Cf. *Harris*, 536 U.S. at 549 ("After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements.").

217. *Id.* at 562 (plurality opinion) ("Judges . . . have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed]' the penalty above what the law has provided for the acts charged.") (quoting 1 BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, *supra* note 192, at 54).

On the other hand, certain aspects of *Apprendi* recommended upholding mandatory minima. A basic problem with sentencing above the statutory maximum is that the defendant receives punishment above what the jury authorized. Thus, a defendant who wrongly receives a supermaximal punishment is, without more, entitled to a lesser sentence. Not so with statutory minima. A defendant facing an altered minimum could have received the same sentence regardless of a raised minimum. For a bank robber whose statutory sentencing range is five years to life, if the judge applies a seven-year mandatory minimum for discharging a firearm and imposes a sentence of seven years, that same punishment could have been imposed without the mandatory minimum. Likewise, for a bank robber who receives twelve years, it is often irrelevant whether the statutory minimum was five years or seven. If an appellate court were to reverse a defendant's sentence based on an erroneous mandatory minimum, the trial judge could impose exactly the same sentence without further action by the jury. This is not because *Apprendi* errors concerning mandatory minima are harmless,²¹⁸ and the argument does not depend on what the judge would have done absent the raised minimum. Rather, the fact that the sentence could have been the same illustrates that the defendant's punishment was authorized by the jury's conviction. Thus, there is no *Apprendi* problem at all.

Harris upheld mandatory minima and noted that, "[s]ince sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the 'heaviest punishment' they face if convicted."²¹⁹ In dissent, Justice Thomas (joined by Stevens, Souter and Ginsburg) elaborated arguments from his *Apprendi* concurrence. Without questioning "judicial discretion to impose 'judgment *within the range*

218. See FED. R. CRIM. P. 52(a) ("Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

219. *Harris*, 536 U.S. at 562 (plurality opinion) (quoting 1 BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, *supra* note 192, at 54).

Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime . . . by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum . . . for the jury's verdict has authorized the judge to impose [that sentence] with or without the [additional] finding.

Id. at 557 (plurality opinion).

prescribed by statute,” Justice Thomas insisted that criminals have a “constitutional right to know . . . those circumstances that will determine the applicable *range of punishment* and to have those circumstances proved beyond a reasonable doubt.”²²⁰ Justice Thomas acknowledged that defendants theoretically could receive the same punishment regardless of a changed minimum,²²¹ yet he proclaimed that “[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed,” because any change in the minimum sentence necessarily “constitut[es] an increased penalty.”²²²

From a practical viewpoint, Justice Thomas’s argument is illogical. To raise the floor of a defendant’s minimum sentence does not necessarily cause greater punishment, because the defendant’s sentence might have been equal to or greater than the elevated minimum in any event.²²³ The common-sense intuition that a defendant is made worse off by an increased minimum assumes—and is valid proportionate to—a probability that the defendant would otherwise receive a sentence below that increased minimum. For example, if a defendant’s sentence were determined by a random number generator, an increased minimum sentence would increase the average expected sentence. But individuals’ sentences are not numerically random. Some defendants may have a realistic chance of receiving a minimal or near-minimal sentence, depending on, *inter alia*, prosecutorial selectivity, conviction rates, criminal statutes, and the method of calculating punishment. Other defendants with extremely serious

220. *Harris*, 536 U.S. at 577 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 481) (second emphasis added).

221. *Id.* at 578 (Thomas, J., dissenting).

222. *Id.* at 579–80 (Thomas J., dissenting). Justice Thomas also alluded briefly (as he did in *Apprendi* itself) to a substantive vision of *Apprendi*, objecting that, “under the decision today, . . . key facts *actually responsible for fixing* a defendant’s punishment need not be charged in an indictment or proved beyond a reasonable doubt.” *Id.* (emphasis added). “[T]he defendant [under *Harris*] cannot predict the judgment from the face of the felony.” *Id.* at 578–80 (Thomas, J., dissenting). Such objections are by their terms inconsistent with discretionary sentencing, however, which has exactly those results. See *supra* notes 86–95 and accompanying text.

223. That is perhaps why Justice Thomas provides empirical analysis of actual sentences imposed under the federal statute at issue in *Harris*. 536 U.S. at 578 (Thomas, J., dissenting). Despite that contingent factual analysis, it seems clear that Justice Thomas’s primary reasoning rests on principles that are independent of the distribution of sentences in actual practice. Cf. *id.* at 579 (“[O]ur fundamental constitutional principles cannot alter depending on degrees of sentencing severity.”).

offenses have no realistic chance of a near-minimum sentence. It is, thus, wholly case-dependent whether an increased statutory minimum will make any particular defendant worse off, and if so, by how much.²²⁴

Justice Thomas's analysis becomes more sensible if one sees that he is focused, not on a defendant's actual punishment, which the mandatory minimum may not affect, but on the hypothetical range of available sentences. That theoretical difference takes on special importance for mandatory minima. In *Apprendi* and *Ring*, the constitutional right at stake was one against unduly harsh sentences and unjustified deprivations of life or liberty.²²⁵ That was not at issue in *Harris* because the defendant could have received the same sentence without the increased minimum.²²⁶ Therefore, Justice Thomas was forced to characterize all *Apprendi* jurisprudence as concerning, not increased sentences, but effects on the *range of sentencing*, regardless of whether the increase affected floor or ceiling, and regardless of whether the defendant's actual sentence would change.²²⁷ Justice Thomas asserted a constitutional parallel between granting judges discretion to sentence above the statutory maximum and stripping discretion to sentence below the statutory minimum.²²⁸ That parallel would have barred a sentencing judge from imposing any statutory rule that affects the otherwise applicable range of discretion available. To be specific, if a bank robber's statutory sentence were five-to-life, and the sentencing judge applied a seven-year minimum because a firearm was discharged, Justice Thomas's logic would find a constitutional violation (albeit a harmless one) even if the judge explicitly indicated that she would have imposed seven years' imprisonment in any event.

Justice Thomas's interpretation of *Apprendi* rights had not been considered in the Court's prior cases, and it was rejected by

224. To repeat for clarity, none of this is to deny that, in the current federal system, mandatory minima make an enormous difference in the sentences of a substantial number of defendants, especially including those who occupy the lower end of the applicable statutory sentencing range. Cf. Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003) (quoted in 16 FED. SENTENCING REP. 126, 127) ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.").

225. *Apprendi*, 530 U.S. at 476-77; *Ring*, 536 U.S. at 597.

226. *Harris*, 536 U.S. at 557.

227. *See id.* at 572-83.

228. *See id.* at 574.

the Court's decision in *Harris*.²²⁹ Because the fifth vote, Justice Scalia, did not write, one must look to Justice Anthony Kennedy's plurality opinion, which Scalia joined in full.²³⁰ The plurality's critical step was to distinguish between the sentence imposed by the judge and the maximum authorized by the jury's verdict. "When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the [sentencing] range, the grand and petit juries already have found all the facts necessary to authorize . . . the sentence."²³¹ Additional judicial fact-finding, on whatever standard of proof, is irrelevant. "The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*."²³² The plurality quoted Justice Scalia's *Apprendi* concurrence:

[B]ecause . . . the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less" than that.²³³

229. The result in *Harris* also contradicts the substantive model of *Apprendi* rights. See discussion *supra* Part III.A.

230. The plurality's opinion on these points did not draw five votes because Justice Breyer refused to agree that *Apprendi* and *Harris* could be reconciled. *Harris*, 536 U.S. at 569–572 (Breyer, J., concurring in part and concurring in the judgment). Because Justice Breyer's vote to uphold the Guidelines is beyond doubt, his disagreement with the plurality's reasoning is not material for present purposes, and it does not affect the operative authority of *Harris*'s analysis.

Professor Bibas plausibly speculates that Justice Scalia may have decided to vote to uphold mandatory minima only after conference. See Bibas, *supra* note 33, at 81. If true, that suggestion cuts two ways. On one hand, Justice Kennedy's plurality opinion may have proved more persuasive to Justice Scalia than he expected. On the other hand, as a late-comer to the majority's point of view, Justice Scalia may not have scrutinized every detail of the opinion as carefully as he might have. In any event, just as Justice Scalia's vote in *Harris* rejected certain language from *Apprendi*, his vote in *Blakely* rejected certain language from *Harris*.

231. *Harris*, 536 U.S. at 565 (plurality opinion).

232. *Id.*

233. *Id.* at 566 (plurality opinion) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much

"Within the range authorized by the jury's verdict . . . the political system may channel judicial discretion . . . by requiring defendants to serve minimum terms after judges make certain factual findings."²³⁴

Under Justice Thomas's *Harris* analysis, the Guidelines would obviously be unconstitutional. Although the Guidelines are rules of the Sentencing Commission, not Congress, they certainly limit sentencing judges' discretion,²³⁵ and when most commentators say that there is no difference between the Guidelines and statutory sentencing rules, that is what they seem to mean.²³⁶ Their point has some appeal. As the state of Washington argued in *Blakely*, judges often had more discretion under the State's statutory system than the Guidelines would provide in similar circumstances.²³⁷ In *Harris*, however, where the judicial-discretion model would have had a clear impact, Justice Thomas found no fifth vote. Whether owing to theoretical problems or to difficult line-drawing,²³⁸ that failure suggests that the judicial-discretion model may not present a workable model for *Apprendi* rights, and

higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

Id.

234. *Id.* at 567 (plurality opinion).

235. See *Stinson v. United States*, 508 U.S. 36, 54 (1993) (describing the Guidelines as akin to "legislative rules adopted by federal agencies"); *accord Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., dissenting) (describing the Guidelines as "hav[ing] the force and effect of laws") (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)); *United States v. Watts*, 519 U.S. 148, 160 (1997) (Stevens, J., dissenting).

236. See, e.g., *supra* notes 3, 4.

237. Respondent's Brief, *supra* note 96, at 24–26, 34; cf. *Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack [than Washington's scheme].").

The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

Id. at 2550 (citations omitted).

238. See *supra* notes 158–96 and accompanying text.

no commentator has yet offered a satisfactory theoretical defense of Justice Thomas's approach.

C. *A Model of Jury Authorization*

There is a third interpretation of *Apprendi* that would uphold the Guidelines and require heightened procedures only where a defendant's sentence exceeds what the jury's verdict authorized. Under this "jury-authorization" approach, if a sentence, however calculated, lies within what the jury authorized, there is no *Apprendi* violation. The Court has repeatedly invoked the concept of jury authorization as critical to the *Apprendi* inquiry,²³⁹ but neither the Court nor any commentator has explained what such authorization means or how to determine its scope.²⁴⁰ To discern what a jury authorized is the only solution to the baseline problem that underlies all *Apprendi* jurisprudence.²⁴¹

In my view, the crime of conviction's statutory maximum marks the maximum sentence that is authorized by the jury's verdict. That conclusion finds nominal support in the Court's re-

239. See *Blakely*, 124 S. Ct. at 2538 (explaining that *Apprendi* problems arise when "the jury's verdict alone does not authorize the sentence"); *Ring*, 536 U.S. at 605 ("[F]acts increasing punishment beyond the maximum authorized by a guilty verdict standing alone . . . must be found by a jury."); *id.* at 611–12 (Scalia, J., concurring) (noting the constitutional problem of "state and federal legislatures [that] adopt 'sentencing factors' . . . that increase punishment beyond what is authorized by the jury's verdict"); *id.* at 613 (Kennedy, J., concurring) (observing that "the finding of an aggravating circumstance expos[ing] the defendant to a greater punishment than that authorized by the jury's verdict" . . . *Apprendi* makes clear, . . . cannot be reserved for the judge.").

[A]ny fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum . . . for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

Harris, 536 U.S. at 557 (plurality opinion); see also *id.* at 564–67 (discussing *Apprendi*'s rule regarding findings to convict a crime versus findings to increase a sentence); *Apprendi*, 530 U.S. at 491 n.16 ("If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute."); *id.* at 494 n.19 ("[T]he relevant inquiry is . . . does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

240. Some scholars have sought to discard discussions of what punishment the jury's verdict authorizes. See Bibas, *supra* note 31, at 1134 n.249, 1182–83. Such works, however, may be best understood as making policy arguments based on the jury's ignorance of their decisions' practical consequences.

241. See *supra* notes 208–13.

peated reference to statutory maxima and the maximum prescribed by the legislature,²⁴² but again, the Court has never explained why it matters that the maximum punishment for criminal conduct should be legislative in nature, rather than judicial or executive. This section seeks to fill those gaps.

It bears preliminary note that a jury-authorization model would avoid several problems that bother substantive and judicial-discretion theories of *Apprendi* rights. For example, focusing on statutory maxima explains why discretionary sentencing is permissible: All judicial findings in a discretionary sentencing system, by definition, operate beneath the maximum prescribed by statute.²⁴³ Likewise, a jury-authorization theory avoids any need to probe deep meanings of judicial discretion or to explain why *Apprendi* rights turn on such discretion.²⁴⁴ Under the jury-authorization approach, the relatively simple inquiry is whether

242. See, e.g., *Blakely*, 120 S. Ct. at 2536 (“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.” (quoting *Apprendi*, 530 U.S. at 490) (emphasis added); *id.* at 2537 (defining statutory maximum for *Apprendi* purposes); *Ring*, 536 U.S. at 589 (noting that defendants “are entitled to a jury determination of any fact on which the *legislature* conditions an increase in their maximum punishment”) (emphasis added); *id.* at 605 (“[I]f the *legislature* defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime . . .”) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)) (alterations in original) (emphasis added); *Harris*, 536 U.S. at 549 (“Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts.”); *id.* (“After the accused is convicted, the judge may impose a sentence within a range *provided by statute*, basing it on various facts relating to the defendant and the manner in which the offense was committed.”) (emphasis added); *id.* at 563 (noting that *Apprendi* limited *McMillan*’s holding “‘to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict’”) (quoting *Apprendi*, 530 U.S. at 487 n.13); *id.* at 565 (“[T]he facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”); *Apprendi*, 530 U.S. at 481 (disclaiming any view “that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case”); *id.* at 494 n.19 (“[W]hen the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized *statutory sentence*, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.”) (emphasis added); *id.* at 495 (“The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant’s very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.”).

243. See *supra* notes 174–80 and accompanying text (describing the concepts and practices of discretionary sentencing).

244. See *supra* notes 194–214 and accompanying text.

a statute has attached a maximum sentence to a criminal act. If so, then to increase a defendant's sentence beyond that maximum—as a matter of either rule or discretion—violates the defendant's right to indictment and jury trial beyond reasonable doubt.

1. Exposition

The first step is to recognize that only statutes can create or alter federal crimes. The analytical structure of *Apprendi* depends on the presence of two crimes, not just one, and the two-step analysis at *Apprendi*'s core indicates that, when the legislature defines a crime, that statutory definition is constitutionally important.²⁴⁵ Legislative definitions of crimes are what link maximum sentences with criminal conduct, and such maxima cannot be supplemented thereafter by judicial sentence enhancements.²⁴⁶ To impose a super-maximal sentence effectively defines a new crime, and constitutional protections appertain to each of that new crime's elements.

The importance of statutory definitions under federal law is clear even from *Apprendi*'s precursor, *Jones v. United States*.²⁴⁷ In *Jones*, the Court construed a carjacking statute as having created multiple aggravated offenses, which required indictment and jury trial of their aggravating facts.²⁴⁸ In the Court's view, Congress effectively crafted separate crimes by imposing different statutory maximum sentences for different criminal conduct.²⁴⁹ Importantly, all members of the Court agreed that indictment and jury trial were necessary if and only if Congress had created two crimes; the only controversy was whether Congress had done so.

When *Apprendi* elevated *Jones* from statutory construction to constitutional law, the Court required jury trial of all facts that increase punishment above the crime of conviction's statutory maximum. *Apprendi* held that the New Jersey legislature's two statutory maxima created two crimes, and that defendants could not be convicted of the lesser offense but sentenced for the greater

245. See *supra* notes 71–95 and accompanying text.

246. *Apprendi*, 530 U.S. at 490–497.

247. 526 U.S. 227 (1999).

248. *Id.* at 251–52.

249. *Id.*

one.²⁵⁰ After *Apprendi*, any statute with the effect of defining a crime has constitutional significance, regardless of its name, and regardless of whether another legal provision purports to set a greater "true maximum sentence."²⁵¹

Because the Guidelines are not statutes,²⁵² they cannot define or redefine federal crimes.²⁵³ Congress has unique authority to define federal crimes by statute, and federal courts can neither proscribe criminal conduct nor change the terms of a crime that Congress has defined.²⁵⁴ The executive branch, likewise, lacks such power, and constitutional problems persist regardless of whether courts or administrators act through quasi-legislative rules or case-by-case discretion.²⁵⁵ Congressional statutes stand alone in defining criminal conduct even though, from many perspectives, nonstatutory crimes could be issued with broad notice and could be applied to defendants just like statutory crimes.²⁵⁶

As for the Guidelines, the Sentencing Commission is an independent agent within the judicial branch,²⁵⁷ and Congress did not

250. *Apprendi*, 530 U.S. at 494.

251. See *supra* notes 95–103 and accompanying text.

252. Cf. *supra* note 116 (discussing PROTECT Act).

253. See GUIDELINES, *supra* note 20, § 5G1.1(a); 28 U.S.C. § 994(a) (2000) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code).

254. Cf. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) ("[U]nder our constitutional system . . . federal crimes are defined by statute rather than by common law.").

[I]t would not follow that the Courts of [the federal] Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

United States v. Hudson & Goodwin, 11 U.S.(1 Cranch) 32, 33 (1812).

255. See *supra* notes 191–238 and accompanying text.

256. The reservation of legislative power to define crimes and set maximum punishments is by no means the only instance of separated powers in criminal law. Judges cannot prosecute defendants, and legislatures cannot condemn them, even though certain functional aspects of those prosecutions and judgments might be acceptable if performed by entities within the proper branch—judicial. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (observing that "Congress' decision to create an independent rule-making body to promulgate sentencing Guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary"). All of this demonstrates only that criminal law, including sentencing, is an area where the formal lines of constitutional authority may be sharply drawn and strictly applied.

257. 28 U.S.C. § 991(a) (2000) (establishing "an independent commission in the judicial branch of the United States").

empower the Commission to alter statutory definitions of crimes.²⁵⁸ Indeed, there is some doubt whether Congress could constitutionally have done so, any more than it could have assigned the power to define crimes to the Department of Justice or the General Accounting Office.²⁵⁹ For example, unlike the statutory definitions of greater and lesser crimes in *Appendi*, *Ring*, and *Blakely*,²⁶⁰ the Sentencing Commission lacks structural authority to alter 18 U.S.C. § 2113(a) by creating lesser included offenses like bank robbery without evidence of amount.²⁶¹ The Sentencing Commission also lacks authority to modify the twenty-year maximum punishment provided by 18 U.S.C. § 2113(a), despite the Guidelines' legal limits upon judicial discretion within that statutory range.²⁶²

To me, it makes no sense to describe the Guidelines' base offense level as redefining a defendant's crime of conviction.²⁶³ A defendant who pleads guilty only to the statutory terms of bank robbery under 18 U.S.C. § 2113(a) is not convicted of any lesser included Guidelines offense. Thus, to increase a defendant's sentence above the Guidelines' base offense level does not exceed the maximum for the crime of conviction. Everything that occurs under the Guidelines, including all judicial fact-finding, is intended to, and does in fact, operate beneath the congressionally prescribed maximum punishment for the crime of conviction.²⁶⁴

258. 28 U.S.C. § 994(a) (2000) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code).

259. *But cf.* Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47 (1998) (proposing, without explicitly discussing separation of powers principles, that the Department of Justice should be granted regulatory law-making power akin to administrative agencies).

260. *See supra* notes 35, 71–72, 86–94 and accompanying text.

261. *See generally supra* notes 24–30 (discussing 18 U.S.C. § 2113(a) and GUIDELINES, *supra* note 20, § 2B3.1).

262. *See, e.g.*, 18 U.S.C. § 3553(b) (2000) (requiring courts to impose a sentence within a range set by the Guidelines and Congress); *Edwards v. United States*, 523 U.S. 511, 515 (1998) (requiring only that the ultimate guideline sentence lies within the statutory limits relevant to the crime of conviction); *accord Harris*, 536 U.S. at 560 (plurality opinion); *Williams v. New York*, 337 U.S. 241, 246 (1949).

263. *See supra* notes 240–43 and accompanying text.

264. *See* GUIDELINES, *supra* note 20, § 5G1.1(a)–(c) (2004); *see also* 28 U.S.C. § 994(a) (2000) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code). The one exception to the text's description is discussed *supra* note 117.

Before *Blakely*, the courts of appeals had all adopted the above analysis in rejecting *Apprendi* challenges to the Guidelines.²⁶⁵ Under the conventional narrative, Congress chose high maximum sentences for some crimes, which in turn produced broad sentencing ranges.²⁶⁶ Then Congress asked the judicial branch, through the newborn Sentencing Commission, to restrict individual judges' discretion to choose sentences within those statutory sentencing ranges.²⁶⁷ The judiciary's nonstatutory involvement in sentencing policy, however, was never thought to alter the underlying statutory crimes for which sentences were imposed.²⁶⁸

The pre-*Blakely* narrative retains force. It is constitutionally permissible for an individual judge to make case-by-case factual findings at sentencing (provided they do not result in a super-maximal sentence), a judge could use her own set of sentencing rules, and several or all judges could use the same rules.²⁶⁹ What

265. See *supra* note 41 and accompanying text.

266. For example, a sentence for robbery, depending on the circumstances of the commission of that crime, can carry a punishment ranging from thirty-three months to life imprisonment. See GUIDELINES, *supra* note 20, § 2B3.1 (2004); *id.* ch. 5, pt. A (2004).

267. Judges must increase the offense level for the crime of robbery if certain aggravating factors, such as bodily injury, are present. *Id.* § 2B3.1(3)(A)–(E) (2004).

268. In *Mistretta v. United States*, the Court upheld the Sentencing Commission against separation of powers objections. 488 U.S. 361, 380–412 (1989). Justice Scalia dissented on the ground that the Sentencing Commission impermissibly “exercise[d] no governmental power other than the making of laws.” *Id.* at 413–27 (Scalia, J., dissenting). Presumably, Scalia’s objection would have been even stronger had he also believed that the Commission was making laws that were, in effect, redefining crimes.

269. See *supra* notes 200–04 and accompanying text. Perhaps certain judicial-discretion theorists would object if sentencing rules were enforced by appellate courts instead of trial courts on their own. See *supra* notes 202–03 and accompanying text (describing such circumstances as Option (5)). As discussed above, however, the constitutionality of judicial sentencing rules should not turn on such details for Fifth and Sixth Amendment purposes. See *supra* note 203 and accompanying text.

Incidentally, Justice Scalia’s separation of powers objection might also apply to rules issued by courts of appeals because they might, in his view, arrogate the legislative power to make the laws. *Mistretta*, 488 U.S. at 413. Justice Scalia’s separation of powers objection has no legal connection to constitutional claims under the Fifth and Sixth Amendments. Some court-watchers, however, might suggest that Justice Scalia’s *Mistretta* dissent revealed that he would relish any chance to overturn the Guidelines, regardless of the technical ground asserted. See, e.g., King & Klein, *supra* note 4, at 316–17 & n.17 (noting that Justice Scalia is “on record that the Federal Sentencing Guidelines are unconstitutional”).

That, of course, is possible, but, without undue digressions into guesswork, three contrary thoughts bear mention. First, in opinions after *Mistretta*, Justice Scalia has appeared ready to apply the Guidelines on their own terms, without regard for his view concerning their constitutionality. See, e.g., *Buford v. United States*, 532 U.S. 59 (2001) (affirming a district court’s application of the Guidelines’ career offender provision, GUIDELINES, *supra* note 20, § 4B1.1 (2004)); *Edwards v. United States*, 523 U.S. 511, 514 (1998) (affirming a district court’s application of the Guidelines’ crack provision in evaluat-

is important is not whether the Sentencing Commission's Guidelines resemble edicts of a "super-judge."²⁷⁰ Unlike a super-judge, the Commission obviously does not decide individual cases. Nevertheless, the Commission lies within the judiciary and, like every entity other than Congress, lacks authority to alter the statutory rules that define crimes and set maximum punishments.²⁷¹

The unique significance of statutory sentencing rules derives not only from *Apprendi*'s terms and separation of powers jurisprudence, it also concerns the fundamental nature of jury rights. The jury must convict a defendant for any sentence to be imposed,²⁷² and a jury's conviction for one crime does not authorize punishment beyond the maximum authorized for the crime of conviction.²⁷³ The statutory maximum for the crime of conviction thus sets the harshest punishment allowed by the jury's verdict.²⁷⁴

ing relevant conduct that the jury's verdict did not directly support); *Lewis v. United States*, 523 U.S. 155, 180 (1998) (Scalia, J., concurring in the judgment) (agreeing explicitly with the majority's decision to remand the case for sentencing under the Guidelines).

Second, Justice Scalia's dilemma in *Booker* may be similar to that in *Ring*, where the Court interpreted Arizona's rules concerning aggravating factors. 536 U.S. at 609. Justice Scalia noted that many States had adopted such procedural mechanisms in response to the Supreme Court's death penalty jurisprudence. In Justice Scalia's view, that jurisprudence "had no proper foundation in the Constitution," and he expressed reluctance to "magnify [such] burdens . . . on the States" by requiring that aggravating factors be proved beyond reasonable doubt. *Id.* at 610 (Scalia, J. concurring). Scalia's opinion in *Ring* nonetheless followed his views of *Apprendi*, not his collateral views regarding the context to which it was applied. It is more than possible that, whichever way Scalia votes in *Booker*, that decision will represent his newly minted view of *Apprendi* rights, not a reheated recitation of his dissent in *Mistretta*.

Third, Scalia's analysis under *Mistretta* would imply invalidating the Guidelines as a whole, and it is unclear whether the *Harris* dissenters would accept that result.

270. *Booker*, 375 F.3d at 512.

271. See, e.g., *Mistretta*, 488 U.S. at 395 (holding that "in placing the Commission in the Judicial Branch, Congress . . . does nothing to upset the balance of power among the Branches").

272. See, e.g., *Bibas*, *supra* note 31, at 1182 ("There is no sense in which a jury verdict authorizes any particular level of punishment. The verdict simply writes a blank check for legislators and judges to fill in.").

273. See *supra* notes 122–28 and accompanying text.

274. Although judges seldom, if ever, allow juries to know their verdict's sentencing consequences, see, e.g., *Shannon v. United States*, 512 U.S. 573, 586–87 (1994) (declining to allow juries to learn about range of possible punishments); *Bibas*, *supra* note 31, at 1134 n.249, 1182–83; King & Klein, *supra* note 31, at 1508–13; Sherry F. Colb, *A Significant Decision That May Not Matter: The Supreme Court Holds That Only Juries, Not Judges, Can Make The Factual Determinations That Increase Sentences*, at <http://writ.findlaw.com/colb/20040629.html> (June 29, 2004) (last visited Apr. 2, 2005), that does not change the

From that viewpoint, *Apprendi* reveals a simple but important relationship among the jury's verdict, the statutory maximum, and the sentence imposed. The crime of conviction is the link between culpable conduct and a maximum sentence—without that statutory provision, there could be no federal crime at all.²⁷⁵ The jury applies the crime of conviction's statutory definition in finding a defendant guilty—without that verdict, no guilt could be established and no punishment imposed. Yet the jury's verdict consists of and depends upon the crime of conviction's statutory definition—in every detail, that statute is the predicate for the jury's conviction, and it articulates that verdict's maximum consequence.²⁷⁶ In the moment that a jury votes to convict, the verdict and the statutory definition merge, and the two together are what limit the punishment that may thereafter be imposed.

The jury-authorization model's distinctive feature is its link to the jury verdict's constitutional meaning. The right to trial by jury bars any other agent from convicting a defendant,²⁷⁷ but a jury's guilty verdict also *authorizes* other governmental agents to determine and impose punishment.²⁷⁸ The question "how much punishment?" is the profound issue that *Apprendi*'s progeny must address. Under the jury-authorization model, the Constitution is satisfied if the sentence imposed lies below the statutory maximum, and it makes no difference how judicial discretion is used (or limited) in imposing a submaximal sentence.²⁷⁹ For purposes of jury rights, the Guidelines are like mandatory minima: After the jury convicted under the relevant statute, the defendant could

systematic function of a jury's verdict as a prerequisite to imposing legally permissible punishment. It simply means that, for contestable policy reasons, the jurors may exercise their constitutional function without full knowledge of their verdict's practical consequences.

275. See *supra* note 243 and accompanying text.

276. See *supra* note 243 and accompanying text.

277. See, e.g., *United States v. Lovett*, 328 U.S. 303, 317 (1946) (noting that criminal defendants "must be tried by an impartial jury").

278. See, e.g., 18 U.S.C. §§ 3551(a), 3553(a)(2) (2000) (requiring courts, not a jury, to sentence a criminal defendant after conviction).

279. See, e.g., *Apprendi*, 530 U.S. at 481.

[N]othing . . . suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.

See, e.g., *id.*

have received the exact same sentence regardless of applicable nonstatutory sentencing rules.²⁸⁰

Any sentence consistent with the statutory crime of conviction is, by that fact, authorized by a jury's conviction for that statutory crime, and that is why *Apprendi* should not apply to the Guidelines. To be clear, this is not a question of legislative intent or labels. As *Apprendi* instructed, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment *than that authorized by the jury's guilty verdict*."²⁸¹ Thus, if the Commission had effective power to "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," i.e., by the statutory crime of conviction, such actions would be unconstitutional.²⁸² The Commission, however, lacks such power in form and effect. The Guidelines do not alter the crime of conviction prescribed by Congress, they do not change the statutory requirements for a guilty verdict thereunder, and they do not change the maximum punishment authorized by the statute and the jury's verdict.²⁸³

Incidental to its theoretical merits, the jury-authorization model finds indirect support in two aspects of the Supreme Court's *Blakely* opinion. First, Justice Scalia's majority opinion conflicts, at least in part, with the judicial-discretion approach. Washington defended its statutory scheme by arguing that, because the trial judge retained discretion to depart from *Blakely*'s fifty-three-month standard sentencing range even on grounds unenumerated in any statute, it was not a true statutory maximum.²⁸⁴ Although Washington's statutory scheme did retain some level of judicial discretion, that discretion did not change the result. In reply to dissents, Justice Scalia correctly explained that the Sixth Amendment "is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."²⁸⁵ Likewise, the Sixth Amendment is not a *guarantee* of judicial power, and it is constitutionally irrelevant that nonstatutory Guidelines, by restricting judicial discretion, may result in a

280. See *supra* note 219 and accompanying text.

281. *Apprendi*, 530 U.S. at 494 (emphasis added).

282. *Id.*

283. See *supra* notes 253–69 and accompanying text.

284. Respondent's Brief, *supra* note 96, at 10–14.

285. *Blakely*, 124 S. Ct. at 2540.

base offense level that is lower than the maximum authorized by the statute.

To restrict judicial discretion is, without more, neither a constitutional virtue nor a vice. Nonstatutory constraints on judicial discretion do not change a crime's statutory definition or maximum. Such limits also do not alter the maximum sentence authorized by a jury's verdict. Once attention is focused exclusively upon defining the province of the jury, it becomes clear that the jury's role is to authorize, by guilty verdict, criminal punishment not greater than the crime of conviction's statutory maximum.

In *Apprendi*, Justice Scalia wrote that, after a valid conviction, the Constitution allows defendants to receive far less than the statutory maximum through the "mercy of a tenderhearted judge," early release due to a "tenderhearted parole commission," or a commutation by a "tenderhearted governor."²⁸⁶ Although the Guidelines are seldom accused of being tenderhearted, the principle is the same. Under the Guidelines, "the criminal will never get *more* punishment than he bargained for when he did the crime."²⁸⁷ Put more precisely, no defendant will receive a greater punishment than what the defining statute authorizes upon a jury's conviction.

Second, the Court has repeatedly affirmed modern legislatures' ability to limit and structure the discretion of sentencing judges,²⁸⁸ and the *Blakely* Court similarly disclaimed "find[ing] determinate sentencing schemes unconstitutional."²⁸⁹ Instead, the Court purported to address how determinate sentencing systems "can be implemented in a way that respects the Sixth Amendment."²⁹⁰ That suggestion would seem illusory, and perhaps dis-

286. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

287. *Id.*

288. *Harris*, 536 U.S. at 558 (plurality opinion).

In the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's fact-finding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence.

Id.

289. *Blakely*, 124 S. Ct. at 2540 (alteration in original) (quoting Respondent's Brief, *supra* note 96, at 34).

290. *Id.* Any tension is superficial as between this attention to form and manner and *Apprendi*'s statement that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. The latter inquiry was whether the "required finding expose[s] the defen-

ingenuous, if determinate sentencing cannot be implemented without placing in the indictment all facts that cause a greater sentence than the defendant's base offense level and proving them to a jury beyond reasonable doubt. The cornerstone of determinate sentencing regimes is a judge's rule-bound responsibility for making postconviction findings and prescribing an appropriate sentence.²⁹¹ Such systems could hardly function if every postconviction finding that increased a sentence above nonstatutory base offense levels had to appear in the indictment and be proved to a jury beyond reasonable doubt. What would a judge determine at sentencing, the ministerial results of the jury's findings, or findings that only reduce a defendant's sentence? Either result would seem extraordinary in light of Justice Scalia's assertion that he did not find determinate sentencing schemes unconstitutional.²⁹² By contrast, a jury-authorization theory yields a simple and elegant rule for identifying which determinate sentencing schemes are unconstitutional. Invalid systems are ones that effectively prescribe one statutory maximum, attached to lesser crime, yet allow imposition of a greater sentence under what is in effect the statutory definition of a second, greater crime. *Appendi*, *Ring*, and *Blakely* all involved such unconstitutional schemes, but the Guidelines do not.

dant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* The question of what the jury's verdict authorizes is necessarily formal, at least in part. See *supra* notes 194–208 and accompanying text.

291. *But cf.* KAN. STAT. ANN. § 21-4716(b) (Supp. 2003) (reacting to state Supreme Court decision by providing that "any fact that would increase the penalty for a crime beyond the statutory maximum . . . shall be submitted to a jury and proved beyond a reasonable doubt"); KAN. STAT. ANN. § 21-4716(b)(3) (Supp. 2003) (allowing the court "in the interests of justice" to reserve questions regarding such facts for determination at postconviction sentencing proceedings); King & Klein, *supra* note 4, at 319 (discussing Kansas's solution to its *Appendi* problems). Of course, Kansas is not bound by the federal indictment requirement, which has not been incorporated against the States. See *Hurtado v. California*, 110 U.S. 516, 538 (1884). Also Professor Bibas has argued that the process of indictment itself can significantly alter the practical dynamics of criminal sentencing. See Bibas, *supra* note 31, at 1142–43. More importantly, the current meaning of determinate sentencing is that judicial rules are applied to allocate a sentence from the applicable range for criminals convicted of the same crime. To attempt the Kansas approach on a federal scale would treat each base offense level under the Guidelines as a separate crime, with a small discretionary range of sentences remaining for judicial decision. Whether that system is good or bad as a policy matter, it bears only a modest resemblance to current understanding of determinate sentencing.

292. *Blakely*, 124 S. Ct. at 2540 (quoting Respondent's Brief, *supra* note 96, at 34).

2. Objections

Opposition to a jury-authorization model derives from its arguably formalist preoccupation with statutes. The critique's sharpest form, advanced by Judge Posner, claims that applying *Apprendi* to congressional statutes, but not Guidelines, would absurdly imply that "an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature."²⁹³ How can the Commission do by guideline what Congress cannot by statute?

Judge Posner adopts a flawed premise.²⁹⁴ The jury-authorization model would commend different constitutional analysis for statutory and nonstatutory judicial rules precisely *because of* Congress's unique authority to define crimes and prescribe statutory maxima. One need not suggest that the Commission is more responsible or authoritative than Congress.²⁹⁵ On the contrary, it is what the Commission cannot do that creates the constitutional difference, and that is why the congressionally prescribed maximum should govern for constitutional purposes. The statute-based judicial-authorization principle presents an otherwise elusive baseline for determining the maximum punishment that the jury has authorized, and that is the constitutional standard against which an impermissibly increased sentence shall be measured.²⁹⁶

No judicial rule, despite its practical and legal force in limiting judicial discretion, can create lesser included offenses where Congress has not done so. If a jury convicts a defendant of bank robbery under 18 U.S.C. § 2113(a), with a twenty-year maximum sentence, that is the crime of conviction, and that is the maximum sentence. Not more, but also not less. The judicial branch may create rules that constrain judges' discretion and reduce some defendants' expected sentence, but such an entity cannot lower a federal crime's statutory maximum, nor can it redefine the statutory crime of conviction.²⁹⁷ Thus, it cannot reduce the

293. *Booker*, 375 F.3d at 512.

294. See *supra* notes 191–218 and accompanying text.

295. *Booker*, 375 F.3d at 512.

296. See *supra* notes 208–14 and accompanying text.

297. With imagination, one might conceive of other institutions whose rule-bound decisions might affect individuals' sentences. For example, a discretionary sentencing regime could disallow judges from imposing any sentence within the statutory range greater than

maximum sentence authorized by the jury's guilty verdict. As our age's most renowned judicial pragmatist, Judge Posner assumes that what a sentencing rule does should be measured by its effect on defendants and judicial discretion, but each of those is a problematic basis for interpreting *Apprendi*.²⁹⁸

A simple version of Justice Posner's critique might more directly ask how it can matter whether a particular rule is applied by statute or by guideline, when the effects on defendants and judges are the same? In response, the reasons that substantive effects on defendants and limits on judicial discretion lack weight under *Apprendi* bear repetition: From a defendant's perspective, discretionary sentencing could permissibly impose punishment in any case (or, with imagination, in every case) identical to the sentence imposed under the Guidelines. On the facts of *Apprendi*, for example, New Jersey's legislature could permissibly raise the statutory maximum for unlawful firearm possession to twenty years, and state judges could in every case (at the legislature's suggestion) apply the top half of that range only after themselves finding that the offense qualified as a hate crime. It seems equally clear that *Harris* would allow New Jersey, after raising the statutory maximum to twenty years, to impose a statutory minimum of ten years for hate crimes. These hypotheticals illustrate that neither defendants' freedom from judicial punishment, nor judges' freedom from binding rules, is a defining principle for identifying *Apprendi* rights.

Both versions of the formalist critique rest on the undefended assumption that *Apprendi* rights are defined by practical effects on defendants' liberty or judges' discretion, but the jury-authorization model rejects that assumption.²⁹⁹ Moreover, we have seen that the judicial-discretion model confronts its own problems of formalism in defining what count as binding sentencing rules.³⁰⁰ Formalism is not always a fatal flaw in criminal practice,³⁰¹ and, if one is to choose among shades of formalism, the

what the prosecutor requests. Under that hypothesis, even if prosecutors were in turn governed by administrative rules, implemented through extrajudicial fact-finding, etc., those executive rules would not alter the statutory maximum, the statutory crime of conviction, or the maximum sentence authorized by the jury's verdict.

298. See *supra* notes 125–91 and accompanying text.

299. See *supra* Part III.C.

300. See *supra* notes 194–98 and accompanying text.

301. Cf. *Patterson v. New York*, 432 U.S. 197, 221–25 (1977) (Powell, J., dissenting)

jury-authorization model has the virtue of being rooted in constitutional separation of powers and a direct interpretation of what guilty verdicts mean.

Indeed, for an overly vigorous critic of the jury-authorization model, *Apprendi* itself could be derided as formalist because it applies differently to regimes with the same effect for defendants and sentencing judges.³⁰² *Apprendi*'s dissenters have continuously attacked the Court's jurisprudence as formalistic.³⁰³ Although such analysis might lead one to reject *Apprendi* as a whole,³⁰⁴ it should not lead one to invalidate the Guidelines. For reasons described herein, I believe that *Apprendi* remains constitutionally important even under the relatively narrow approach prescribed by the jury-authorization model. For any one who does not share that view, the task is to defend the substantive or judicial-discretion models described above, or to construct a new and better theoretical approach to *Apprendi* rights.

From one perspective, to accuse *Apprendi* of formalism is just another way to say that the case protects different values. *Apprendi* does not exist to shelter and protect defendants from judicially determined punishment (the substantive model), nor does it exist to ensure individual judges' predominance in determining punishment (the judicial-discretion model).³⁰⁵ Instead, *Apprendi* is a slimmer rule that requires a connection between the legislature's definition of a crime, a jury's verdict of conviction, and the maximum that may be imposed for that crime. In Justice Scalia's terms, *Apprendi* is not a "mere procedural formality," designed to benefit criminal defendants, but is "a fundamental reservation of power in our constitutional structure."³⁰⁶ It is a systemic rule that preserves the jury's importance in authorizing a defendant's

(deriding the Court's jurisprudence concerning affirmative defenses as indefensibly "formalistic"); *Blakely*, 124 S. Ct. at 2536 & n.5.

302. *But cf.* King & Klein, *supra* note 31, at 1485–88, 1498 (defending a relatively narrow view of *Apprendi* against charges of formalism).

303. *Apprendi*, 530 U.S. at 523–54 (O'Connor, J., dissenting); *id.* at 555–66 (Breyer, J., dissenting), *cf.* *Blakely*, 124 S. Ct. at 2547 ("[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision.") (O'Connor, J., dissenting).

304. *See* Bibas, *supra* note 31, at 1123–48.

305. Note that, from this perspective, the two competing theories lie in direct tension with one another, which may be why jurists have not explicitly attempted to synthesize the two.

306. *Blakely*, 124 S. Ct. at 2538–39.

maximum sentence, but also respects legislative authority to define the maximum punishment for criminal conduct and to structure judicially imposed sentences beneath that statutory maximum.

Apprendi may not yield profound substantive rights for criminal defendants, but I believe it remains a landmark in constitutional law for at least one important reason. As Justice Scalia's concurrence explains, had *Apprendi* been decided otherwise—allowing a defendant to be convicted of one crime and punished above that crime's maximum sentence—the right to a jury trial would be entirely contingent on legislative preference.³⁰⁷ Justice Scalia dared the dissenters to articulate a different constitutional view of jury rights:

What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.³⁰⁸

In my view, that challenge stands unmet; thus, until a better theory emerges—or until jury rights are conceded to be a matter for legislative choice—the jury-authorization model stands as a principled explanation of the Fifth and Sixth Amendments and the Court's recent cases, with roots in constitutional separation of powers, discretionary sentencing, legislative power to define crimes and prescribe maximum punishments, and full constitutional respect for a jury's decision to convict.

IV. *BOOKER* AND PRESSURE-COOKED CONSTITUTIONAL RULES

Amidst significant uproar, the Court in *Booker* will decide whether the Federal Guidelines are constitutional. We have already considered that question's merits,³⁰⁹ but the process that

307. *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring); accord *Jones v. United States*, 526 U.S. 227, 244 (1999) (recognizing the danger that “an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury’s function to a point against which a line must necessarily be drawn”).

308. *Apprendi*, 530 U.S. at 498–99.

309. See *supra* Part III.

generated the outcry also merits note. The public's reaction is partly driven by legal issue's magnitude, but it also stems from the chaos that has followed *Blakely*. From circuit conflict, to congressional declaration, to expedited Supreme Court argument, there is a sense that the trip from *Blakely* to *Booker* has tested, if not jumped, the rails of ordinary constitutional adjudication, and one might doubt whether such circumstances yield an optimal environment for crafting rules of such social and political importance.

Conventional wisdom has obscured such questions. For most commentators, *Blakely*'s merits and its chaos go hand in hand. Some hail *Blakely*-inspired disruptions as inevitable growing pains through which the Guidelines' unconstitutionality will appear.³¹⁰ Others revile such events as a natural disaster that has rumbled since *Apprendi* and has now emerged in full force.³¹¹ From both viewpoints, systemic disarray is the upshot of constitutional principle, so that (aside from an opposite result in *Blakely* or *Apprendi*) the current upheaval could not be helped.

This Article demonstrates that *Booker*'s result is not inevitable, and the jury-authorization approach suggests that post-*Blakely* confusion was anything but natural. Pre-*Blakely* cases demonstrate that *Apprendi* did not require such upheaval,³¹² and *Blakely* said little more than its precursor.³¹³ Thus, whatever rendered the uneven path from *Blakely* to *Booker*, it is due—not to those cases' substantive content—but to institutional actors' choices along the way.

This Part analyzes forces that contributed to the post-*Blakely* crisis. Although the public hue has drawn attention to an important constitutional case, it has also required the Court to decide issues of constitutional law under an unusually compressed schedule. Regardless of how the Court decides the pending Guideline cases, it is apt to examine recent events for broader lessons about legal institutions' behavior, and this case study in constitutional rule making yields insights for constitutional decision mak-

310. See, e.g., Berman, *supra* note 4, at 307.

311. See, e.g., *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting) ("What I have feared most has now come to pass: Over 20 years of sentencing reforms are all but lost, and tens of thousands of criminal judgments are in jeopardy.").

312. *Apprendi*, 530 U.S. at 496–97.

313. See *supra* Part II.A.

ing outside the sentencing sphere, revealing how similar jurisprudential crises might be avoided in the future.

Perhaps the best way to proceed is to analyze two hypotheses, imagining first that *Booker* were to adopt the jury-authorization model and upholds the Guidelines, and then that the Court were to strike down the Guidelines. Under the first scenario, the *Blakely* majority's ambiguity in defining "statutory maximum" might be criticized for generating such extraordinary and unnecessary excitement.³¹⁴ On the other hand, the Court may have its excuses. For example, some Justices might have expected a more muted reaction to *Blakely*, akin to the courts of appeals' response to *Apprendi*'s loose language.³¹⁵ Also, the Court's clarity might have been muddled by the inability of a five-vote majority to agree on what should be said about the Guidelines.³¹⁶ Such factors may not fully exculpate the *Blakely* majority, but modern Supreme Court practice is fraught with ambiguities, especially when the Court decides a case but leaves important issues unresolved.³¹⁷

Two other institutional actors bear close attention. First, the *Blakely* dissenters' strong words and postdecision comments³¹⁸ were unconstrained by bureaucratic needs to attract votes. Yet such rhetoric was the first and perhaps greatest cause of the post-*Blakely* fracas. There is of course a wide range of reasonable views on the proper role of judicial dissents.³¹⁹ But *Blakely*'s dissenters might have been well-served to maintain a more meas-

314. *But cf. supra* notes 77–93 and accompanying text (arguing that the most natural reading of that passage would not affect the Guidelines).

315. *Apprendi*, 530 U.S. at 496–97.

316. *See* text accompanying notes 60–61.

317. At least one commentator seems generally to praise the Court when it leaves ambiguities unresolved under such circumstances. *See* CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–5 (1999). Others take a more skeptical view. *See* Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, MICH. L. REV. (forthcoming 2004).

318. *See, e.g., Blakely*, 124 S. Ct. at 2549–50 (O'Connor, J., dissenting); *id.* at 2551 (Kennedy, J., dissenting); *id.* at 2561 (Breyer, J., dissenting); O'Connor *Disgusted*, *supra* note 50.

319. *See, e.g.,* CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2004); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431–32 (1986); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

ured tone in discussing the Guidelines' constitutionality, an issue of obvious importance and uncertain result. If the Court's highest dissenting tradition traces to Louis Brandeis, John Marshall Harlan, Oliver Wendell Holmes, and others, whose strong words coincided with a principled change in favor of their views,³²⁰ the dramatic tones struck in *Blakely* only gave shelter to the dissenters' enemies, which is why arguments against the Guidelines' constitutionality cite *Blakely*'s dissents as primary proof.³²¹ Perhaps the *Blakely* dissenters were trying to persuade a swing voter to force a decision regarding the Guidelines, draw public attention, or just vent after another battle's loss. It is clear, however, that the dissents' unintended consequences have tended to tip the balance *against* their legal position, and Justice O'Connor's characterization of the Court's decision making as "disgust[ing]"³²² only worsened that effect. Whatever one's views regarding the optimal pitch of filed dissents, it is rare for Justices so vigorously to criticize their colleagues in public speeches, and that is almost certainly good for the Court as an institution.³²³

A second factor that spurred post-*Blakely* disarray was the quick and bold reactions of certain courts of appeals. *Blakely* was decided on June 24, 2004.³²⁴ The timeline of subsequent events is telling and easily overlooked. On July 9, 2004, only ten business days after *Blakely* and three days after argument, Judge Posner issued an opinion for the Seventh Circuit finding the Guidelines unconstitutional.³²⁵ On July 14, Judge Merritt did likewise for the Sixth Circuit,³²⁶ followed by Judge Paez for the Ninth Circuit on

320. See, e.g., *New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

321. See *supra* note 139 and accompanying text.

322. *O'Connor Disgusted*, *supra* note 50.

323. An extraordinary example that proves the point is *Bush v. Gore*, 531 U.S. 98 (2001). Academics have issued largely negative characterizations of the Court's work in this case. See, e.g., *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* (Ronald Dworkin, ed. 2002); *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman, ed. 2002); *RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein, eds. 2002). But the controversies surely would have raged higher if the dissenting Justices themselves had openly criticized the decision in circuit conferences or other public fora.

324. *Blakely*, 124 S. Ct. at 2531.

325. *Booker*, 375 F.3d at 508.

326. *United States v. Montgomery*, No. 03-5256 (6th Cir. July 14, 2004), *vacated for*

July 21,³²⁷ and by Judges Lay and Bright for the Eighth Circuit on July 23.³²⁸ On July 12, the Second Circuit certified the Guidelines' constitutionality to the Supreme Court and requested that the Supreme Court hold expedited briefing and argument during its summer recess.³²⁹

On July 21, at the highwater mark of opposition to the Guidelines (with the aforementioned five circuits refusing to apply them), the Acting Solicitor General sought expedited Supreme Court review, which the Court granted in part.³³⁰ The pressure for a quick decision abated somewhat when three of the five circuits reversed course,³³¹ and some courts pursued alternate sentencing (assigning sentences both with and without the Guidelines' instruction) in order to ease any transition if the Guidelines were struck down.³³² By that time, however, the Supreme Court's hurried briefing and argument schedule was already set.

Aside from the merits of the post-*Blakely* appellate decisions,³³³ their most remarkable characteristic is speed. Those who have studied or practiced in the federal system know that such fast decisions from any circuit would be noteworthy—such swiftness from five circuits is almost unheard of. Acknowledging departure from normal procedure, Judge Posner explained his Court's need for speed as follows: "We have expedited our decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of [*Blakely*]." ³³⁴

reh'g en banc, 2004 WL 1562904 (6th Cir. July 19, 2004), *dismissed*, 2004 WL 1637660 (6th Cir. July 23, 2004).

327. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

328. *United States v. Mooney*, No. 02-3388 (8th Cir. July 23, 2004), *vacated for reh'g en banc*, 2004 WL 1636960 (Aug. 6, 2004).

329. *United States v. Peneranda*, 375 F.3d 238, 248 (2d Cir. 2004); *cf.* *United States v. Mincey*, 380 F.3d 102, 103 (2d Cir. 2004) (*per curiam*) (upholding the Guidelines pending the Supreme Court's decision in *Booker*).

330. *See* Supreme Court Docket, at <http://www.supremecourtus.gov/docket/04-105.htm> (last visited Apr. 2, 2005).

331. *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (*en banc*) (upholding the Guidelines' constitutionality); *Mincey*, 380 F.3d 102 (*per curiam*); *Mooney*, 2004 WL 1636960. The Ninth Circuit also has a pending petition for *en banc* and panel rehearing in *Ameline*.

332. *Koch*, 383 F.3d 436 (*en banc*); *Hammoud*, 378 F.3d at 426 (*en banc*).

333. *See supra* notes 324–34 and accompanying text.

334. *Booker*, 375 F.3d at 510.

One may easily admire the diligence of Judge Posner and of his dissenting colleague, Judge Easterbrook. But Judge Posner's explanation has two weaknesses. First is historical context. After *Apprendi*, defendants in every court of appeals, including the Seventh Circuit, filed challenges to the Guidelines' constitutionality. Every court of appeals rejected those claims,³³⁵ and no court of appeals sought to hear argument and decide the issue within two weeks. Why should there be an unexpected rush now to embrace a legal theory that the appellate courts, and the Supreme Court's certiorari practice, had unanimously ignored for five years since *Apprendi* issued? If anything, a quick decision is less necessary now than when *Apprendi* was decided, because the Supreme Court has held that *Apprendi* rights can be forfeited and are not retroactive,³³⁶ thereby limiting the number of defendants with valid constitutional claims and mitigating the risk of any avalanche of pending cases before the courts of appeals.

Second, despite its opinion's rhetoric, the Seventh Circuit did not in fact provide adequate "guidance to the district judges . . . who are faced with . . . motions for resentencing in the light of [*Blakely*]." ³³⁷ Although the opinion explained that the Guidelines were unconstitutional, it did not guide district courts on what to do next—whether to apply the Guidelines as hortatory, apply the Guidelines where they do not enhance sentences, resort to discretionary sentencing, or pursue some other option. Judge Posner suggested that his court could "hardly attempt to resolve such issues on this appeal; the parties have not briefed or argued them."³³⁸ But that only explains why any guidance to district courts in *Booker* did not serve the function that purported to require extraordinary dispatch.

Admittedly, my critique of the lower courts' procedural actions is not wholly disjoined from my view of the merits. The Seventh Circuit's haste, and that of other courts, partly owes to certain judges' belief that *Blakely* clearly and obviously held the Guidelines unconstitutional—a belief I do not share.³³⁹ Yet even those

335. See *Apprendi*, 530 U.S. at 496–97.

336. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003); *United States v. Cotton*, 535 U.S. 625 (2002).

337. *Booker*, 375 F.3d at 510.

338. *Id.* at 514.

339. See *supra* Part III.A.

courts' appraisal of the merits may have been influenced by the uncommon speed of the process, which also compressed the litigants ability to prepare. Complexities often seem simpler when time is short.

Two other motives bear note. First, Judge Posner expressed apparent interest in forcing constitutional questions regarding the Guidelines into the Supreme Court,³⁴⁰ and the Second Circuit's certification decision manifests similar sentiments.³⁴¹ It is certainly rare for judges to push their cases onto the Supreme Court's docket, and, indeed, one may doubt whether they should. The modern shift toward discretionary certiorari jurisdiction (as opposed to appeals of right) incorporates a congressional policy that the Supreme Court should have broad authority and discretion to determine its own caseload.³⁴² Naturally, there are rare circumstances that require lower courts to act quickly in response to exigent circumstances.³⁴³ But *Booker* did not present such circumstances any more than did *Apprendi* itself.

The desire for quick review more likely stemmed from a sense among lower appellate courts that *Blakely*'s silence regarding the Guidelines left unfinished business that the Supreme Court should have addressed. If any appellate judges truly sought to aid the Supreme Court in accomplishing its work, however, they ignored that previous cases in the federal system had for several years generated ample certiorari petitions raising that issue. The Supreme Court needed no further help.

More probably, the appellate courts were subtly criticizing the Court's narrow approach in *Blakely*. Judge Posner must have known that his opinion might cause significant controversy and might encourage other courts to decide quickly, perhaps agree-

340. *Booker*, 375 F.3d at 510 ("We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution."); *id.* at 513 ("If our decision is wrong, may the Supreme Court speedily reverse it."); *cf. id.* at 521 (Easterbrook, J., dissenting) ("Today's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon.").

341. *Peneranda*, 375 F.3d at 238.

342. See RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1552-55 (5th ed. 2003) (outlining the historical development and purposes of certiorari jurisdiction).

343. See generally *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (addressing the constitutionality of the Bipartisan Campaign Reform Act of 2002 in the year before an election, despite significant delay by the three-judge district court).

ably, to his approach. The quick release of the Seventh Circuit's opinion assured its position as an intellectual and political resource for other judges inclined to invalidate the Guidelines. The more judges to follow the Seventh Circuit's approach invalidating the Guidelines, the quicker the Court would have to act, and indeed, that scenario is just what happened.³⁴⁴

Another potential factor in some judges' decisions might be their antipathy toward the Guidelines, which limit judicial power and often require extraordinarily harsh sentences. As one commentator put it: "The most public, steady, and compelling criticism of the guidelines has come from federal judges. . . . Judges [have spoken] early and often about their displeasure with the sentencing rules."³⁴⁵ Although Judges Bright, Lay, and Merritt have been vocal, well-recognized critics of sentencing policy for years,³⁴⁶ it is not evident that any other appellate judge involved

344. See *supra* Parts II.A, III.B.2.

345. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236 (2004); accord STITH & CABRANES, *supra* note 20, at 5 n.12 (collecting dozens of sources where "[j]udges have published . . . articles, essays, and letters that express deep criticism of the Guidelines regime").

346. See, e.g., *United States v. Flores*, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., dissenting) (urging judges to "[l]et your opinions disclose[] . . . the injustice in the sentencing . . . decisions you are obligated to impose by Congressional mandate and/or the Sentencing Guidelines," and declaring that "the time has come for major reform in the system"); *id.* at 766 n.7 & 768 (quoting nine other opinions exemplifying Judge Bright's criticism of guideline sentencing); *United States v. Silverman*, 976 F.2d 1502, 1525-30 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) (arguing that the Guidelines' "relevant conduct" rule violates separation of powers, the right against self-incrimination, and rights to notice, grand jury indictment, and confrontation of witnesses); *United States v. Wise*, 976 F.2d 393, 413 (8th Cir. 1992) (Lay, J., dissenting) (noting "the fundamental fairness missing from the Federal Sentencing Guidelines. Unless Congress and the Sentencing Commission intend to abandon the Constitution of the United States altogether, [the combination of Fifth and Sixth Amendment objections] points up one of the more fundamental weaknesses inherent in the application by district courts of the Sentencing Guidelines."); *United States v. Baker*, 961 F.2d 1390, 1393 (8th Cir. 1992) (Bright, J., concurring) ("This case is another example of rigid guidelines producing inequity and injustice in sentencing, and demonstrates a need for the reformation, if not the abolishment, of Guideline sentencing."); *United States v. Brewer*, 899 F.2d 503, 513, 515 (6th Cir. 1990) (Merritt, C.J., dissenting) (criticizing mandatory Guidelines as "a prescription for injustice because district judges can no longer prevent the imposition of inappropriately harsh sentences," and predicting that "such a rigid system of sentencing can only end in failure because it gives one side in the competitive process too much power"), *overruled in part by* *Koon v. United States*, 518 U.S. 81 (1996); Donald P. Lay, *Judge Myron Bright*, 83 MINN. L. REV. 225, 227 (1998) ("[Judge Bright] shares a common disdain with Judge Heaney and me for the inequities and harsh sentences that have evolved from the United States Federal Sentencing Guidelines."); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1761-62 (1992) ("[T]he guidelines continue to increase the number of men and women incarcerated in our federal prisons, resulting in abhorrent social and economic costs. . . . [They] have done nothing more than provide a negative contribution to a serious

with post-*Blakely* decisions has strong views about the Guidelines. Much less could one suggest that such predilections affected any court's decision about timing or otherwise. My more limited point is that appearances often matter, and, if the Guidelines are upheld, the speed and merits of the recent court of appeals' decisions could be reexamined in a critical light. The possibility of that reexamination, combined with the ample opportunity that existed for more measured consideration, recommended a more patient approach allowing appellate and certiorari practice to run at a more normal pace.

The Guidelines' constitutionality raises issues of uncommon importance and complexity. A shortened time frame reduces the institutional resources that judges and litigants can bring to bear, and although justice delayed has familiar disadvantages, the current rush to judgment may also be less than ideal.

Thus far, we have imagined that the *Booker* Court were to uphold the Guidelines. On the opposite assumption—that the Court were to invalidate the Guidelines—two other actors' behavior comes into focus. One is the federal government, whose litigation tactics unintentionally fed the post-*Blakely* frenzy. Of particular note is the government's decision to support the State of Washington as an *amicus curiae*, and the government's gratuitous prediction that, if Washington lost *Blakely*, “[i]t is . . . not certain that this Court would ultimately conclude that the differences between the Washington system and the federal Guidelines are of constitutional magnitude.”³⁴⁷ Such words seem mild in the abstract, but to the *Booker* Court, they risk signaling a self-fulfilled

societal problem.”); Gilbert S. Merritt, *A Straightforward Proposal To Reform Sentencing Guidelines*, 5 Fed. Sentencing Rep. 233, 234 (1993) (proposing change in order to “create a fairer, less harsh system that reintroduces rehabilitation and flexibility”); see also, e.g., JoLee Adamich et al., *The Selected Cases of Myron H. Bright: Thirty Years of His Jurisprudence*, 83 MINN. L. REV. 239, 259–60 (1998) (“Judge Bright has been a regular and vocal critic of the Guidelines, particularly with respect to their application in the context of non-violent drug-related offenses. . . . Judge Bright’s criticism has been frank and open.” (footnote omitted)); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge’s Dilemma*, 23 LAW & SOC. INQUIRY 823, 841 n.17 (1998) (“Donald Lay, a senior circuit judge, has criticized the federal sentencing guidelines extensively in print. Lay faults the commission for its severity, its rigidity, its failure to consult with judges, and for straying from its congressional mandate . . .”).

347. Brief for the United States as Amicus Curiae Supporting Respondent at 29–30, *Blakely* (No. 02-1632); see also *id.* at 9 (“[I]t is uncertain whether [any] distinctions would be sufficient if this Court applied *Apprendi* here, since the United States Sentencing Guidelines have the force and effect of law, and it is theoretically possible to calculate a guidelines sentence based on the facts reflected in the jury verdict alone.”).

forecast of defeat. No appraisal of *Blakely's* litigation tactics can escape the distortions of hindsight, but the jury-authorization theory in Part IV and the doctrinal analysis in Part III suggest that the government could have kept its powder dry, or at least could have used different language to mitigate risks that a loss in *Blakely* would seem unduly important for the Court in *Booker*.

A final institution warranting attention is the Supreme Court itself, and in particular its practice regarding petitions of certiorari. The Court's decisions regarding certiorari often escape attention, but those decisions should be subject to significant criticism if *Booker* holds the Guidelines unconstitutional. As discussed previously, the Court has for years denied the petitions of federal defendants who sought to challenge the Guidelines on *Apprendi* grounds.³⁴⁸ If those denials caused thousands of defendants to be sentenced under an unconstitutional scheme, and caused thousands of other defendants (as appeals became final) to forego any challenge to such sentences, then the Court's consistent refusal to grant certiorari would seem hard to understand.³⁴⁹

Perhaps the best explanation for the Court's pre-*Blakely* denials of certiorari is that one or more Justices were at the time uncertain about the Guidelines' constitutional status. Absent a circuit conflict, the Court is often justified in avoiding questions, even important ones, where the Justices are unsure of the result. When certiorari was granted in *Blakely*, however, the landscape changed. Similarities between the content of Washington's system and the Guidelines illustrated that the Guidelines constitutionality could be implicated, and the possibility of avoiding the question became increasingly remote. At the time certiorari was granted and while *Blakely* was pending, the Court had ample opportunity to grant certiorari in a federal companion case, which would have directly raised the Guidelines' constitutionality, if the Court believed that the nonstatutory Guidelines and Washing-

348. See *supra* note 41 and accompanying text.

349. The Supreme Court often does not grant certiorari unless the decisions of two or more lower courts conflict—which did not occur until after *Booker* was decided. See *supra* note 159 and accompanying text. The Court's preference to hear cases of interjurisdictional conflict is by no means a hard and fast rule, however. See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301, 2305 (2004) (granting certiorari, despite the absence of any circuit conflict, to review the Pledge of Allegiance's constitutionality, an issue of "obvious importance"). And, without more, that preference should not have stopped the Court from hearing one of the hundreds of Guidelines cases that passed through the docket after *Apprendi*.

ton's statutes walked in constitutional lockstep.³⁵⁰ Just as the *Blakely* Court could have avoided authoring its suggestive language regarding statutory maxima if it planned to uphold the Guidelines,³⁵¹ there was no reason for the Court to be so coy in its certiorari practice if that same language was (as other commentators believe) intended to spell the Guidelines' doom.

Although the discussion in this Part uses alternate hypotheses as a narrative technique to highlight the conduct of different entities, most of the institutional lessons that emerge are independent of what the Court ultimately decides in *Booker*.³⁵² For example, a more restrained judicial role would be commendable for the dissenting justices and the courts of appeals regardless of whether their substantive analysis proves correct and the Guidelines are struck down. Similarly, the government's *Blakely* brief could have been more moderate regardless of the result in *Booker*. By placing too many eggs in *Blakely*'s basket, the government may have jeopardized its efforts to distinguish the Guidelines from Washington's failed statutory system.

The disruption that arose from *Blakely* to *Booker* derives from a combination of actions undertaken by various repeat players in the federal judicial system, in a context where the Court's jurisprudence was so recent and dynamic that tentativeness would have been appropriate. The dissenters' strong rhetoric and Justice O'Connor's public comments initiated a media spectacle; the lower federal courts, led by their most prominent judge, immediately validated those fears; and government lawyers continued to

350. A different rationale that sometimes justifies the Court's decision not to grant certiorari is allowing the issue to percolate in the United States courts of appeals, so that the Court may reach its own conclusions with the benefit of other judges' assessments. Such reasoning would ring hollow here, because, just as the Court has received numerous petitions for certiorari, it also has received reasoned decisions on this issue from every circuit. See *supra* note 41. The only new question is how the courts of appeals should react to the ambiguities of the *Blakely* opinion. Because that question lies within the Supreme Court's unique competence, it is hard to see much benefit in gaining outside judges' interpretations of the Court's own language and subtext.

351. See *Appendix*, 530 U.S. at 498–99.

352. The Supreme Court's certiorari practice is an exception. As discussed *supra* Part III.C.1, if *Booker* strikes down the Guidelines, then the Court's denials of certiorari seem highly questionable. On the other hand, if *Booker* upholds the Guidelines, there is nothing unseemly about the Court's decision to wait until an appropriate federal case arose.

litigate, trying to ignore the United States's line in the sand that was drawn (and stepped over) in *Blakely*.³⁵³

Other courts, commentators, and practitioners have now joined the fray, and discussions have largely turned to what should happen *after* the Court invalidates the Guidelines, with less attention to *whether* the Court should do so, and if so why. This Article has analyzed both of those latter questions, but in doing so, it has also suggested that the chaotic events since *Blakely* do not derive from inevitable natural forces. They are a product of interrelated institutional choices, many of which stretched or exceeded the limits of the relevant actors' proper role. To recognize the existence and importance of such decisions may be the first step toward discussing the most suitable ways to cope with perennial problems of incomplete constitutional rules and undertheorized Supreme Court decisions, both of which *Blakely* illustrates.³⁵⁴

It might seem unfortunate that the constitutionality of the Guidelines, and in many respects the future of federal criminal law, must now be decided under such turbulent and accelerated circumstances, and the chain of post-*Blakely* events reveals how some participants in the federal appellate system could have ameliorated the crisis. That illustration, in turn, identifies the importance of adherence to institutional roles in our system of constitutional rule making.

353. *But cf.* King & Klein, *supra* note 4, at 320 (presenting anecdotal evidence that "[s]ome prosecutors may not vigorously defend the [Department of Justice's] position . . . that *Blakely* does not apply" to the Guidelines).

354. The work of two eminent scholars confirms such projects' abiding importance. Professor Cass Sunstein has argued for a theory of "minimalism," under which the Supreme Court does and should decide cases "narrowly" and "shallowly." See generally SUNSTEIN, *supra* note 319; Cass R. Sunstein, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, at 9. The difficulty with such judicial methodologies is that they create the sorts of theoretical and administrative gaps that have caused such problems in the *Blakely* context.

Similarly, Professor Bickel drew attention to the Court's ability to avoid deciding certain difficult questions using jurisdictional and technical maneuvers, including manipulation of certiorari practice, that he grouped under the name passive virtues. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-83 (2d ed. 1986). See generally Alexander M. Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40 (1961). The questions raised in the text suggest that similar issues arise for other federal courts, and that the virtues and vices of passivity, action, minimalism, and maximalism vary significantly with context. A general theory of such variations has not been developed.

V. CONCLUSION

At the very least, the path from *Blakely* to *Booker* has made for captivating judicial theater. The current scene has three main characters. One is Justice Stevens, *Apprendi*'s author and architect, for whom the Sentencing Revolution embodies a longstanding opposition to mandatory minima³⁵⁵ and a broad concern for robust and fair criminal procedures.³⁵⁶ Second is Justice Stephen Breyer, who drafted and defended the Guidelines as an original member of the Sentencing Commission. The Guidelines constitute his most significant product to date and a major part of his legacy in American law. Third is Justice Scalia, *Blakely*'s author, who will decide which of his colleagues prevails. For Justice Scalia, *Booker* presents a jurisprudential tension. He has long opposed the Guidelines on separation of powers grounds,³⁵⁷ yet similar separation of powers principles might recommend upholding those Guidelines against Fifth and Sixth Amendment challenges.³⁵⁸ Justice Scalia authored *Blakely*, which has been credited (and blamed) with threatening the Guidelines, but he is also well-known for seeking simple rules. The jury-authorization theory would provide such a rule, and also would avoid propelling courts into detailed substantive oversight of criminal law.

Of course, we cannot know what will happen. But it is important that neither the intra-Court drama, nor the immense social and political consequences in the balance, should submerge the basic constitutional questions presented, questions that merit more careful theoretical and doctrinal analysis than they have received. This Article has sought to show that the most important

355. See *McMillan v. Pennsylvania*, 477 U.S. 79, 95–103 (1986) (Stevens, J., dissenting).

356. See, e.g., *Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting) (arguing that a “three-strikes” sentence under California violates Eighth Amendment standards of proportionality); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (holding that the Eighth Amendment prohibits prolonged use of a “hitching post” to restrain convicts); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals is unconstitutional); *Mickens v. Taylor*, 535 U.S. 162, 179–84 (2002) (Stevens, J., dissenting) (arguing that the Sixth Amendment requires courts to investigate conflicts of interest of which they reasonably should have known).

357. See *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

358. For a similar dilemma that Justice Scalia confronted in applying *Apprendi* to the Arizona death penalty, see *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring), and *supra* note 193.

issue remains unanswered after *Blakely*: Whether nonstatutory sentencing rules are constitutionally regulated by *Apprendi*. Its theory of *Apprendi* rights, which is consistent with discretionary sentencing, which has historically granted judges the authority to control actual punishment and with legislative primacy to define crimes and their maximum punishment, stands as an open challenge for future interpretations of *Apprendi*.³⁵⁹ Whether the Court in *Booker*, or academics thereafter, will meet that challenge remains to be seen.

359. Cf. *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (chastising *Apprendi*'s dissenters for their failure to produce a "coherent alternative").