

CONCEPTUALIZING *BOOKER*

Douglas A. Berman[†]

The Supreme Court's decision in *United States v. Booker*¹ appears to be a two-headed monster and a conceptual monstrosity. In *Booker*, dual 5-4 majorities issued dueling opinions in which the Supreme Court first held that the operation of the federal guidelines as mandatory sentencing rules violated the Sixth Amendment *jury* trial right,² but then crafted a remedy that rendered the guidelines advisory and thus greatly enhanced the sentencing power of *judges*.³ Read independently, each majority opinion in *Booker* seems conceptually muddled; read together, the two *Booker* rulings seem almost conceptually nonsensical.

Yet, viewed from a functional perspective, the *Booker* decision makes more conceptual sense than it may appear. Though a deeply fractured Supreme Court has not been able to work together to forge a clear sentencing jurisprudence, some sound sentencing concepts can be identified within both majority opinions in *Booker*. And, critically, discovering *Booker's* conceptual essence has important implications for future sentencing jurisprudence and for the appropriate approach to federal guideline sentencing after *Booker*.

As explained in Part I of this Article, *Booker* comes into sharper conceptual focus when located within broader stories about sentencing reform and constitutional jurisprudence. Indeed, reflecting on sentencing history and recent reforms reveals a simple idea that helps unlock the conceptual mystery presented by *Booker*. This idea is that sentencing is a distinct enterprise in the criminal justice system—and thus should permit a distinct constitutional structure—if and only when sentencing decision-makers are exercising reasoned judgment.

Building on this foundation, Part II of this Article will explain how the two parts of the *Booker* opinion can be conceptually harmonized around the idea that broad judicial power at sentencing can be justified if and only when judges are exercising reasoned judgment. In other words, Part II will

[†] William B. Saxbe Designated Professor of Law, Moritz College of Law at The Ohio State University.

1. 543 U.S. 220 (2005).

2. *See id.* at 225–44 (opinion in part for the Court by Justice Stevens, with Justices Scalia, Souter, Thomas, and Ginsburg joining this opinion).

3. *See id.* at 244–71 (opinion in part for the Court by Justice Breyer, with Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg joining this opinion).

explain that *Booker*'s conceptual core—what we might call the tao of *Booker*—is best understood not in terms of vindicating the role of juries and the meaning of the Sixth Amendment's jury trial right, but rather in terms of vindicating the role of judges and the meaning of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment.

Part III of this article will then briefly explore some implications of this conceptual vision of *Booker*. As explained in this Part, conceptualizing *Booker* as a decision vindicating the role of judges exercising reasoned judgment at sentencing has important implications for the Supreme Court's still developing Sixth Amendment jurisprudence and, also, for how lower courts should approach federal guideline sentencing after *Booker*.

I. APPRECIATING *BOOKER*'S BACKGROUND

A. *The Distinctive Nature of Sentencing Within the Rehabilitative Ideal*

The idea that helps make conceptual sense of *Booker*—namely that sentencing is distinctively about the exercise of reasoned judgment—would have seemed quite obvious before modern reforms when the dominant philosophy of sentencing was the so-called “rehabilitative ideal.”⁴ From the late nineteenth-century and throughout the first three-quarters of the twentieth-century, trial judges in both federal and state systems were given nearly unfettered discretion to impose any sentence from within broad statutory ranges provided for criminal offenses.⁵ Such broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the

4. See, e.g., J. L. MILLER ET AL., SENTENCING REFORM 1–6 (1981); SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 5–6 (1985). See generally FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3–7 (1981) (discussing the “dominance” and “almost unchallenged sway of the rehabilitative ideal” through the late 1960s).

5. See, e.g., Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995) (“Subject only to statutory maximums and the occasional minimums, judges had the authority to sentence convicted defendants either to probation (and under what conditions) or to prison (and for what maximum term).”); see also *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (discussing the “wide discretion” given to federal judges in ascribing sentences during this time).

rehabilitative prospects and progress of each offender.⁶ The rehabilitative ideal was often conceived and discussed in medical terms: offenders were described as “sick” and punishments aspired to “cure the patient.”⁷ Sentencing judges and parole officials were thought to have unique insights and expertise in deciding what sorts and lengths of punishments were necessary to best serve each criminal offender’s rehabilitative potential.⁸ During this period, sentencing was necessarily conceived and understood to be a distinctive enterprise requiring the exercise of reasoned judgment: sentencing judges and parole officials, aided by complete information about offenders and unfettered discretionary authority, were expected to craft individualized, rehabilitation-oriented sentences “almost like a doctor or social worker exercising clinical judgment.”⁹

In 1949, the Supreme Court constitutionally approved this philosophical and procedural approach to sentencing in *Williams v. New York*.¹⁰ The trial judge in *Williams* sentenced to death a defendant convicted of first-degree murder, despite a jury recommendation of life imprisonment, relying upon information of illegal and unsavory activities by the defendant that was not presented at trial but appeared in a pre-sentence report.¹¹ In rejecting a claim that *Williams* had a right to confront and cross-examine the witnesses against him, the Supreme Court stressed that “[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence[.]”¹² and the Court spoke approvingly of judges and parole

6. See, e.g., Andrew von Hirsch, *The Sentencing Commission’s Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (Andrew von Hirsch et al. eds., 1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender’s need for treatment.”). See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9–22 (1998) (reviewing the early history of federal sentencing and the link between the rehabilitative ideal and discretionary sentencing practices).

7. See PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 163 (1967) (describing offenders as “patients”); see also Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016–18 (1991) (discussing the medical model and its “powerful sway within the criminal justice system”).

8. See STITH & CABRANES, *supra* note 6, at 19–21 (describing view of parole officials as experts in assessing an offender’s rehabilitation); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005) (describing vision of judge as the sentencing “expert” in a rehabilitative sentencing system).

9. *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 (D. Mass 2004) (citing Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 421 (1999)).

10. 337 U.S. 241 (1949).

11. See *id.* at 242–44. For a full discussion of the various “facts” relied upon by the sentencing judge in *Williams*, see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 528–31 (1993).

12. *Williams*, 337 U.S. at 247–48.

boards exercising broad discretion in service to the “prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.”¹³

The Supreme Court justified its ruling in *Williams* by stressing the distinctive nature of trials and sentencings. Trials are “concerned solely with the issue of guilt of a particular offense,” but a sentencing judge “is not confined to the narrow issue of guilt.”¹⁴ Rather, explained the Court:

[A judge’s] task within fixed statutory or constitutional limits is 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. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.¹⁵

The *Williams* Court suggested that sentencing under the rehabilitative ideal with distinctive procedures had benefits for offenders as well as for society. The Court stressed that “modern changes [justified by the rehabilitative model of sentencing] have not resulted in making the lot of offenders harder.”¹⁶ Rather, explained the Court, “a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.”¹⁷

Thus, for the *Williams* Court, the rehabilitative ideal not only justified entrusting judges with enormous sentencing discretion, but also counseled against the application of trial procedures which could harmfully impact the exercise of this discretion. In the Court’s view, once guilt was established at a traditional criminal trial, sentencing experts should be able to gather all possible information from all possible sources to facilitate the exercise of reasoned judgment in crafting a rehabilitation-oriented sentence. The *Williams* Court reiterated this point as it concluded its opinion: “The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon

13. *Id.* at 247.

14. *Id.*

15. *Id.* (citation omitted).

16. *Id.* at 249.

17. *Id.*

their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.”¹⁸

Of course, *Williams* was decided before the Supreme Court began “revolutionizing” criminal procedure by expansively interpreting the Constitution to provide criminal defendants with an array of procedural rights.¹⁹ Nevertheless, throughout the 1960s and 1970s, as numerous pre-trial and trial rights were being established for defendants, the Supreme Court continued to cite *Williams* favorably and continued to suggest that sentencing was to be treated differently—and should be far less procedurally regulated—than a traditional criminal trial.²⁰ Though the Supreme Court did ensure that defendants had a right to an attorney at sentencing hearings and suggested defendants also had a right to discovery of evidence that could impact a sentence,²¹ the Court did not formally extend other protections of the Bill of Rights to the sentencing process. And, in its discussion of sentencing process and practice, the Supreme Court continued to stress the importance of sentencing decision-makers having broad access to information to enable the exercise of reasoned judgment in crafting rehabilitation-oriented punishments.

For example, in 1978, the Supreme Court in *United States v. Grayson*²² approved a sentencing judge’s consideration of a defendant’s false testimony by stressing that the defendant’s testimony was “probative of his prospects for rehabilitation.”²³ The *Grayson* court highlighted that a fundamental component of the rehabilitative model of sentencing was to

18. *Id.* at 250–51 (emphasis added).

19. The application and extension of considerable procedural rights to criminal defendants has been called the “criminal procedure revolution” and is often associated with the work of the Warren Court in the 1960s. *See, e.g.*, BUREAU OF NATIONAL AFFAIRS, *THE CRIMINAL LAW REVOLUTION 1960-1968* (1968); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L.J.* 1 (1995). For a fascinating set of recent articles reflecting on the criminal justice decisions of the Warren Court, see Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 *OHIO ST. J. CRIM. L.* 1 (2005).

20. *See, e.g.*, *Chaffin v. Stynchcombe*, 412 U.S. 17, 21–25 (1973) (reviewing *Williams* while stressing “the need for flexibility and discretion in the sentencing process”); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (favorably citing *Williams* while stressing “[t]he freedom of a sentencing judge to consider the defendant’s [post-conviction] conduct” in imposing a sentence); *see also id.* at 742 (Black, J., concurring in part and dissenting in part) (noting that the Supreme Court has “continued to reaffirm” *Williams* and its “reasons for refusing to subject the sentencing process to any [significant procedural] limitations, which might hamstring modern penological reforms”).

21. *See Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel); *Brady v. Maryland*, 373 U.S. 83 (1963) (right to discovery of evidence helpful to the defense).

22. 438 U.S. 41 (1978).

23. *Id.* at 50–52.

permit “judges and correctional personnel . . . to set the release date of prisoners according to *informed judgments* concerning their potential for, or actual, rehabilitation and their likely recidivism.”²⁴ Favorably discussing *Williams*, the Court asserted that the “evolutionary history of sentencing . . . demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant’s whole person and personality.”²⁵ The *Grayson* Court thus reaffirmed the relationship between the rehabilitative ideal and allowing judges to exercise reasoned judgment at sentencing, and it translated these insights into the procedural principle that at sentencing “a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.”²⁶

Similarly, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*,²⁷ a 1979 case in which offenders sought greater procedural rights in parole release determinations, the Supreme Court spoke again about the exercise of judgment in sentencing decision-making. In *Greenholtz*, the Court stressed that decisions about parole necessarily involve “a predictive judgment as to what is best both for the individual inmate and for the community” in which the “entire inquiry is, in a sense, an ‘equity’ type judgment that cannot always be articulated in traditional findings.”²⁸ Emphasizing that decisions about parole are “necessarily subjective in part and predictive in part”²⁹ and involve a “discretionary assessment of a multiplicity of imponderables,”³⁰ the *Greenholtz* Court held that the Constitution did not require the adoption of all traditional trial procedures for parole decision-making.³¹

In sum, through cases like *Williams*, *Grayson* and *Greenholtz*, we see the Supreme Court embrace a number of important conceptual ideas and procedural realities along with the rehabilitative model of sentencing and corrections. The rehabilitative ideal not only justified entrusting judges and parole officials with broad sentencing discretion, but also called for these

24. *Id.* at 46–47 (emphasis added).

25. *Id.* at 53.

26. *Id.* at 50 (quoting from *United States v. Tucker*, 404 U.S. 443, 446 (1972)); *see also* *Roberts v. United States*, 445 U.S. 552, 556 (1980) (reaffirming as a “fundamental sentencing principle” that “a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”) (quoting *Grayson*, 438 U.S. at 50, and *Tucker*, 404 U.S. at 446.).

27. 442 U.S. 1 (1979).

28. *Id.* at 8.

29. *Id.* at 13.

30. *Id.* at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert: Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

31. *Id.* at 13–14.

sentencing decision-makers to be free from any procedural rules which might work to limit the sound exercise of their discretion. And, critically, the bedrock and enduring justification for permitting a distinctive constitutional structure at sentencing was to enable sentencing decision-makers, in the words of the *Williams* court, to exercise “their judgment toward a more enlightened and just sentence.”³²

B. Modern Reforms and the Transformation of Sentencing

While the theory and procedures of the rehabilitative model of sentencing were being sanctioned by the Supreme Court, they were being questioned in other quarters. Through the 1960s and 1970s, criminal justice researchers and scholars were growing concerned about the unpredictable and disparate sentences that highly discretionary sentencing systems could produce. Evidence suggested that broad judicial sentencing discretion was resulting in substantial and undue differences in the lengths and types of sentences meted out to similar defendants,³³ and some studies found that personal factors such as an offender’s race, gender and socioeconomic status were impacting sentencing outcomes and accounted for certain disparities.³⁴ Troubled by the disparity and discrimination resulting from highly discretionary sentencing practices—and fueled by concerns over increasing crime rates and powerful criticisms of the entire rehabilitative model of punishment and corrections³⁵—many criminal justice experts proposed broad reforms in order to bring greater consistency and certainty to the sentencing enterprise.³⁶

32. *Williams v. New York*, 337 U.S. 241, 251 (1949).

33. See, e.g., Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977) (reviewing studies and asserting that “the data on unjust sentencing disparity have indeed become quite overwhelming”); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 (1990) (detailing studies showing widespread, unwarranted sentencing disparities).

34. See William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359–62 (1991) (reviewing studies revealing the impact of racial discrimination at sentencing); Nagel, *supra* note 33, at 895–97 and nn.73–84 (discussing empirical studies documenting sentencing impact of race, gender, socioeconomic class and other status characteristics).

35. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (Ne. Univ. Press 1986) (1976); JAMES Q. WILSON, THINKING ABOUT CRIME (1975). See generally ALLEN, *supra* note 4, at 7–20 (discussing “wide and precipitous decline of penal rehabilitationism” as a foundational theory for the criminal justice system).

36. See, e.g., DAVID FOGEL, “. . . WE ARE THE LIVING PROOF . . .”: THE JUSTICE MODEL FOR CORRECTIONS (1975); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, MODEL SENTENCING AND

Calls for reform were soon heeded. Through the late 1970s and early 1980s, a few state legislatures structured sentencing decision-making through the passage of determinate sentencing statutes which abolished parole and created presumptive sentencing ranges for various classes of offenses.³⁷ And, in 1978, the Minnesota legislature charted a new sentencing reform path by creating the Minnesota Sentencing Guidelines Commission to develop comprehensive sentencing guidelines.³⁸ Pennsylvania and Washington followed suit by creating their own distinctive forms of sentencing commissions and sentencing guidelines in 1982 and 1983, respectively.³⁹ Soon thereafter, the federal government joined this reform movement through the passage of the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop guidelines for federal sentencing.⁴⁰ And throughout the next two decades, many more states adopted some form of structured sentencing either through the enactment of mandatory sentencing statutes or by creating sentencing commissions to develop comprehensive guideline schemes.⁴¹

CORRECTIONS ACT (1979); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); VON HIRSCH, *supra* note 35; *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974) (stressing need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment). *See generally* ALFRED BLUMSTEIN ET AL., 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 126-43 (1983) (describing forces behind early reforms); MILLER ET AL., *supra* note 4, at 6-12 (noting that sentencing reform was "stimulated by perceptions of increasing crime, unwarranted differences in sentences, and ineffective rehabilitation programs").

37. *See* Michael H. Tonry, *Sentencing Reform Impacts*, DOJ ISSUES & PRAC. IN CRIM. JUST. 1, 77-85 (1987); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 14-17 (1996) [hereinafter STRUCTURED SENTENCING] (discussing move to determinate sentencing in various jurisdictions).

38. *See* 1978 Minn. Laws ch. 723 (enabling statute). *See generally* DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988) (discussing the operations of Minnesota's Sentencing Guidelines Commission and the state's enactment and early experiences with sentencing guidelines).

39. *See* 204 PA. CODE § 303 (1982) (codified at 42 PA. CONS. STAT. ANN. § 9721 (West 1982)); WASH. REV. CODE ANN. § 9.94A.905 (West 1988). *See generally* A Summary of the Minnesota, Washington, and Pennsylvania Guidelines, in THE SENTENCING COMMISSION AND ITS GUIDELINES app. at 177-88 (Andrew von Hirsch et al. eds., 1987) (reviewing major components of guidelines developed in Minnesota, Washington, and Pennsylvania).

During the early 1980s, various systems of sentencing guidelines also emerged in Utah, Maryland, Florida, and Michigan, although permanent sentencing commissions were not established in these states until years later. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT. REP. 69, 70 (2000) (providing table summarizing development of sentencing guidelines systems).

40. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

41. *See* DALE PARENT ET AL., NATIONAL INST. OF JUSTICE, MANDATORY SENTENCING 1 (1997) (noting that "[b]y 1994, all 50 States had enacted one or more mandatory sentencing

Though there is considerable variation in the form and impact of these structured sentencing reforms, the overall transformation of the sentencing enterprise throughout the United States over the past three decades has been remarkable.⁴² There has been a true “sentencing revolution” in which the highly-discretionary indeterminate sentencing systems that had been dominant for nearly a century have been replaced by a diverse array of sentencing structures that now govern sentencing decision-making and shape sentencing outcomes.⁴³

Significantly, this sentencing revolution has worked a major transformation of the sentencing enterprise both as a matter of theory and as a matter of practice. As a matter of *theory*, rehabilitation is no longer the sole or even a primary goal at sentencing: many jurisdictions moved to structured sentencing systems and abolished the institution of parole as part of an explicit rejection of the rehabilitative ideal that had been dominant for nearly a century.⁴⁴ Though jurisdictions adopting new sentencing structures did not typically articulate a clear new sentencing philosophy, the enacted reforms demonstrated enhanced concerns about more consistently imposing “just punishment” and deterring the most harmful crimes.⁴⁵ As a matter of *practice*, structured sentencing reforms have tended to make sentencing determinations more offense-oriented and fact-driven. The sentencing instructions to judges in new statutes and guidelines typically focus on offense conduct, often require defined sentencing outcomes based solely on

laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders”); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) (surveying state sentencing guideline systems).

42. See Marc L. Miller, *Sentencing Reform “Reform” through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* 121 (Michael Tonry ed., 2004) (“Sentencing has undergone more reform over the past several decades than any other area of criminal justice, and perhaps as much reform as any area of the law.”); see also Tonry, *supra* note 5, at 169 (“If a time machine were to transport a group of state and federal judges from 1970 to a national conference on sentencing in 1995, most would be astonished by a quarter century’s changes.”).

43. See generally Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233 (2005) (discussing transformation of issues and concerns in sentencing theory and practice over the last 30 years).

44. See generally Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005); Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA’s New Sentencing Standards*, 78 JUDICATURE 189, 189–92 (1995); Tonry, *supra* note 43; see also ALLEN, *supra* note 4, at 7–20 (discussing “wide and precipitous decline of penal rehabilitationism” as a foundational theory for the criminal justice system).

45. See Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, 2005 CHI. LEGAL F. 1, 11–13 (2005) [hereinafter Berman, *Reconceptualizing*]; see also Frase, *supra* note 44; Tonry, *supra* note 43.

facts relating to the offense, and limit directly or indirectly the opportunity for judges to make their own case-specific sentencing assessments.⁴⁶

Consider, for example, the Pennsylvania Mandatory Minimum Sentencing Act of 1982, which was at issue in the Supreme Court case of *McMillan v. Pennsylvania*.⁴⁷ That Act provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses.⁴⁸ The Act clearly was not enacted in service to the rehabilitative model of sentencing; rather, in the words of the Pennsylvania Supreme Court, the state legislature was seeking “to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns.”⁴⁹ And, tellingly, the Pennsylvania Mandatory Minimum Sentencing Act tied specific sentencing consequences to fact-finding about offense conduct, namely visible firearm possession. The Act thus limited the extent to which a judge could exercise reasoned judgment at sentencing: if the mandatory minimum sentence was triggered by a finding of visible firearm possession, the judge could not impose a lower sentence regardless of his assessment of other aspects of the offense or offender.

Though often more nuanced than Pennsylvania Mandatory Minimum Sentencing Act of 1982, most modern sentencing reforms likewise operate to transform sentencing decision-making into a more trial-like enterprise in which objective fact-finding and not reasoned judgment has become central to a judge’s work at sentencing. Reflecting on these developments, U.S. District Judge Nancy Gertner has effectively articulated the ways in which the sentencing revolution has worked a major transformation of the enterprise of sentencing:

Under a sentencing system whose goal was rehabilitation, crime was seen as a “moral disease”; the system delegated its cure to “experts” like judges. Each offense carried a broad range of potential sentences; the judge had the discretion to pick any sentence within the range. In order to maximize the information available to the judge, and to minimize constraints on her discretion, sentencing procedures were less formal than trial

46. See generally Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005).

47. 477 U.S. 79 (1986).

48. See *id.* at 81–82 n.1 (quoting provisions and describing operation of Pennsylvania’s Mandatory Minimum Sentencing Act).

49. *Commonwealth v. Wright*, 494 A.2d 354, 362 (1985).

procedures. No one challenged judges' sentencing procedures as somehow undermining the Sixth Amendment's right to a jury trial precisely because judge and jury had "specialized roles," the jury as fact finder, the judge as the sentencing expert. However flawed a judge's decision might be, it was not the case that he or she was usurping the jury's role.

Twentieth[-]century determinate sentencing regimes, however, changed the landscape and have appropriately raised Sixth Amendment concerns. In determinate regimes, facts found by the judge have fixed consequences—the judge finds x drug quantity, the result is y sentencing range. In this regard, the judge is "just" another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences.⁵⁰

Appreciating the import and impact of this transformation of the sentencing enterprise sheds valuable light on some judicial complaints about modern sentencing reforms. For example, in the federal system before *Booker*, when the guideline sentencing process focused almost exclusively on fact-finding about the defendant's crime and criminal history, judges often were heard to complain that the guidelines created "a mechanistic administrative formula,"⁵¹ which made sentencing a task involving no more than "filling in the blanks"⁵² and converted them into "rubber-stamp bureaucrats" and "judicial accountants" in the sentencing process.⁵³ In light of the transformation in the sentencing process wrought by modern reforms,

50. Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT'G REP. 83, 84 (2002) (footnote call numbers omitted); see also *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 (D. Mass. 2004) (noting that, after a prosecutor makes a variety of discretionary charging and bargaining choices, the judge's role is "transformed to 'just' finding the facts, now with Commission-ordained consequences").

51. *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring); see also *United States v. Justice*, 877 F.2d 664, 666 (8th Cir. 1989) (suggesting that, under the Guidelines, sentencing has been relegated to a "mechanical process").

52. *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988); see also *United States v. Swapp*, 719 F. Supp. 1015, 1026 (D. Utah 1989) (complaining that guideline sentencing is "sentencing by the numbers"); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293–94 (1986) (criticizing "the Commission's sentencing by the numbers approach" as "too depersonalized, too complicated, too punitive, and too burdensome of application").

53. John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551–52 (1993) (quoting Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) (discussing judicial complaints that "the Guidelines [have] wiped away the human element from the sentencing process")); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99–100 (1988) (calling Guidelines "a complex parlor game"); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992).

it should be clear that, through these grumblings, federal judges were not merely lamenting the reduction of their sentencing power; rather, they were expressing frustration that guideline reforms had turned sentencing decision-making into a more trial-like enterprise in which directed fact-finding and not reasoned judgment became central to their work at sentencing.

C. *A New (Tardy) Constitutional Sentencing Jurisprudence*

1. The Persistence of “Old World” Thinking

As noted before, throughout the 1960s and 1970s as numerous pre-trial and trial rights were being established for defendants, the Supreme Court continued to cite *Williams* favorably and continued to suggest that sentencing was to be treated differently—and should be far less procedurally regulated—than a traditional criminal trial.⁵⁴ But as the sentencing revolution started transforming the sentencing enterprise, the justifications for these rulings were greatly diminished: as sentencing became a more trial-like enterprise, sentencing decision-making logically should have come to incorporate more trial-like procedural protections. Nevertheless, into the 1980s and 1990s—despite an obvious shift in sentencing philosophies and structures, and despite the Supreme Court’s prior approval of limited procedural rights at sentencing resting upon a now repudiated rehabilitation-oriented sentencing philosophy—the Supreme Court continued to cite *Williams* favorably and repeatedly ruled that criminal sentencings were to be subject to far less procedural regulation than criminal trials.

The Supreme Court’s 1986 decision in *McMillan v. Pennsylvania*⁵⁵ was a key moment in the initial (non)evolution of the Court’s modern sentencing jurisprudence. As noted before, *McMillan* involved a constitutional challenge to a Pennsylvania statute which provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses.⁵⁶ The Supreme Court in *McMillan* rejected the defendant’s argument that the Constitution required treating the fact of firearm possession as an offense element with the

54. See cases cited *supra* note 20.

55. 477 U.S. 79 (1986).

56. See *id.* at 81–82 n.1.

traditional trial procedures of proof beyond a reasonable doubt and the right to a jury.

In an opinion that largely echoed the decision of *Williams* without any revised *justifications*, the *McMillan* Court stressed that “it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.”⁵⁷ The *McMillan* Court rejected the claim that visible possession of a firearm must be treated procedurally as an element by stating simply that Pennsylvania’s statute “gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.”⁵⁸ The Court even rebuffed the suggestion that the Due Process Clause at least required that visible firearm possession be proved by clear and convincing evidence: citing *Williams* for the proposition that “[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all,” the Supreme Court resisted “constitutionalizing burdens of proof at sentencing.”⁵⁹ Coining the term “sentencing factor,” the *McMillan* Court simply asserted, without any conceptual discussion of sentencing theories or procedures, that Pennsylvania’s decision to dictate the “precise weight” of possession of a firearm at sentencing “has not transformed against its will a sentencing factor into an ‘element’ of some hypothetical ‘offense.’”⁶⁰

57. *McMillan*, 477 U.S. at 85 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). The *McMillan* Court’s discussion of these matters, and its emphasis on state authority to define crimes and attendant procedures, drew heavily on two cases from a decade earlier, *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson*, 432 U.S. 197, in which the Supreme Court struggled to define limits for how states could structure affirmative defenses in the application of criminal laws. According to the *McMillan* court, the upshot of these cases was a rejection of “the claim that whenever a State links the ‘severity of punishment’ to ‘the presence or absence of an identified fact’ the State must prove that fact beyond a reasonable doubt.” *McMillan*, 477 U.S. at 84. See generally Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 269–72 (2001) (discussing holdings and the import of *Mullaney* and *Patterson* in the Supreme Court’s sentencing jurisprudence); Kate Stith, *Crime and Punishment Under the Constitution*, 2005 SUP. CT. REV. 221, 226–29 (2004) (same).

58. *McMillan*, 477 U.S. at 88.

59. *Id.* at 91–92.

60. *Id.* at 89–90. Notably, Justice Stevens delivered a passionate dissent in *McMillan*. Stressing the significance of the fact that Pennsylvania’s statute “automatically mandates a punishment” for visible firearm possession, Justice Stevens argued that “a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties.” *Id.* at 96 (Stevens, J., dissenting). Justice Stevens asserted that “[o]nce a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.” *Id.* Consequently, according to Justice Stevens, because the mandatory minimum statute “describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, . . .

In the wake of *McMillan*, as progressively more jurisdictions adopted forms of structured sentencing through guideline systems or mandatory sentencing statutes, the Supreme Court (and state courts and lower federal courts) regularly upheld, against a range of constitutional challenges, sentencing systems that imposed punishment without affording defendants at sentencing the traditional procedural protections of a criminal trial.⁶¹ This hands-off jurisprudence reached its high-water mark with the Supreme Court's 1997 decision in *United States v. Watts*.⁶²

In *Watts*, the Supreme Court approved the federal guideline provisions which required enhancing sentences based on conduct underlying charges of which defendants had been acquitted if the government establishes that conduct by a preponderance of the evidence to the sentencing judge.⁶³ Remarkably, in support of its ruling, the *Watts* Court parroted the statement in *Williams* that it is essential to the selection of an appropriate sentence for a judge to have "possession of the fullest information possible concerning the defendant's life and characteristics."⁶⁴ But the *Watts* Court did not discuss or even acknowledge (1) that the *Williams* Court made this statement a half-century earlier in service to the rehabilitative model of sentencing, nor (2) that the federal guideline at issue concerned only offense conduct and not any aspect of the offender's "life and characteristics." The *Watts* Court, without any conceptual discussion of the modern shift in sentencing philosophies and structures, simply asserted, *ipse dixit*, that there had long been "different standards of proof that govern at trial and sentencing" and noted that "under the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."⁶⁵ Thus, ruling as if the sentencing revolution never happened—or at least as if the revolution's transformation of the enterprise of sentencing had absolutely no significance to the constitutional inquiry—the *Watts* Court held that it was permissible for the guidelines to

the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies." *Id.*

61. See, e.g., *United States v. Mergerson*, 4 F.3d 337, 343–45 (5th Cir. 1993); *United States v. Restrepo*, 946 F.2d 654, 657 (9th Cir. 1991) (en banc); *Vega v. People*, 893 P.2d 107, 116 (Colo. 1995); *State v. Rettinghaus*, 591 N.W.2d 15, 16–17 (Iowa 1999); *Farris v. McKune*, 911 P.2d 177, 186 (Kan. 1996); *People v. Eason*, 458 N.W.2d 17, 21–24 (Mich. 1990); *State v. Christie*, 506 N.W.2d 293, 299, 301 (Minn. 1993); *State v. Krantz*, 788 P.2d 298, 303, 306 (Mont. 1990).

62. 519 U.S. 148 (1997).

63. *Id.* at 154, 156.

64. *Id.* at 152 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

65. *Id.* (quoting *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982)).

mandate an increase in a defendant's punishment based on "conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."⁶⁶

2. A New World Order

Remarkably, only a year after the Supreme Court's decision in *Watts*,⁶⁷ a new Sixth Amendment jurisprudence with profound implications for sentencing procedures began to emerge. All of a sudden, almost as if a mysterious *fin-de-siecle* doctrinal light-switch was flipped, the Supreme Court started to express considerable concerns with traditionally lax sentencing procedures. This new jurisprudence first surfaced with *Almendarez-Torres v. United States*,⁶⁸ and *Jones v. United States*,⁶⁹ then formally shook the world of sentencing in 2000 with the "watershed" Supreme Court ruling in *Apprendi v. New Jersey*,⁷⁰ and it has recently culminated with the "earthquake" decision in *Blakely v. Washington*⁷¹ and the federal aftershock of *Booker*.⁷²

66. *Id.* at 157. As in *McMillan*, 477 U.S. 79 (1986), Justice Stevens dissented in *Watts* and assailed the application of old precedents to sustain the limited procedural rights afforded to defendants under the federal guidelines. *See Watts*, 519 US at 159–70 (Stevens, J., dissenting). In his *Watts* dissent, Justice Stevens noted that the "goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution." *Id.* at 159 (Stevens, J., dissenting). Further, he complained about the Court's continued reliance on *Williams* since "its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system." *Id.* at 165 (Stevens, J., dissenting).

67. 519 U.S. at 159.

68. 523 U.S. 224 (1998).

69. 526 U.S. 227 (1999).

70. 530 U.S. 466 (2000). Justice Sandra Day O'Connor, dissenting in *Apprendi*, is to be credited with using the term "watershed" to describe the majority's decision. *See Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting) (asserting that the *Apprendi* decision "will surely be remembered as a watershed change in constitutional law").

71. 542 U.S. 296 (2004).

72. *United States v. Booker*, 543 U.S. 220 (2005). Justice Sandra Day O'Connor used the earthquake metaphor to describe *Blakely*. *See Senate, Judges Urge 'Blakely' Redux*, 231 N.Y. L.J., 1, 2 (2004) (quoting Justice O'Connor's earthquake comments at the Ninth Circuit's annual conference in July). I have also analogized *Blakely* to an earthquake that has shaken the foundation of structured sentencing reforms. Douglas A. Berman, *Examining the Blakely Earthquake and its Aftershocks*, 16 FED. SENT'G REP. 307 (2004); Douglas A. Berman et al., "Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System," Written Testimony Submitted to the Senate Committee on the Judiciary (July 13, 2004).

The key doctrinal turning point came when the *Apprendi* Court declared unconstitutional a New Jersey hate crime statute that authorized a sentencing judge to impose a higher sentence for various crimes based on a finding by a preponderance of the evidence that an offense involved racial animus.⁷³ The *Apprendi* Court, in a contentious 5-4 ruling, concluded that the hate crime statute operated in an unconstitutional manner because “[o]ther 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.”⁷⁴

The meaning and import of the Supreme Court’s decision in *Apprendi* was hotly debated as soon as the decision was handed down;⁷⁵ the *Apprendi* opinion raised many questions about the scope of the ruling and left lower courts and legislatures somewhat at sea trying to figure out exactly how to apply *Apprendi*’s rule. As the *Apprendi* dissenters warned,⁷⁶ and as many commentators noted,⁷⁷ the *Apprendi* decision, if construed broadly, would cast constitutional doubt on the many modern sentencing statutes and guidelines that relied heavily on judicial fact-finding as part of the sentencing decision-making process. But *Apprendi*’s direct impact on established criminal sentencing laws proved to be relatively limited: lower federal and state courts typically interpreted *Apprendi* narrowly in order to preserve, as much as possible, existing sentencing structures that relied on judicial fact-finding,⁷⁸ and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.⁷⁹

73. 530 U.S. at 490–91.

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

75. Within a year of the *Apprendi* ruling, in addition to the publication of numerous academic and practitioner articles addressing the decision, there had already been at least three major scholarly symposia devoted to examining *Apprendi*. See *Apprendi Symposium*, 38 AM. CRIM. L. REV. 241 (2001); *Assessing Apprendi*, 12 FED. SENT’G REP. 301 (2000); *Symposium: Reflections on the Consequences of Apprendi v. New Jersey*, 37 CRIM. L. BULL. 552 (2001).

76. See *Apprendi*, 530 U.S. at 550 (O’Connor, J., dissenting); *id.* at 565 (Breyer, J., dissenting).

77. See, e.g., Jane A. Dall, Note, “A Question for Another Day”: *The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617 (2003); Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002); Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775 (2002).

78. See generally Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).

79. The one exception to this story comes from Kansas, where the Kansas Supreme Court held after *Apprendi* that its judicially administered sentencing guidelines system was constitutionally problematic. *State v. Cullen*, 60 P.3d 933, 937 (Kan. 2003); *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001). The Kansas legislature responded by creating procedures for using sentencing juries to find necessary facts in certain cases. KAN. STAT. ANN. § 21-4718 (2004).

The Supreme Court itself contributed significantly to restricting the reach of *Apprendi* through its decision in *Harris v. United States*.⁸⁰ In *Harris*, the Court examined anew the issue it had addressed years earlier in *McMillan v. Pennsylvania*,⁸¹ namely what procedures were constitutionally required when a statute specified a mandatory minimum sentencing term.⁸² The majority opinion in *Apprendi*⁸³ distinguished *McMillan*, which previously held that facts triggering mandatory minimum sentences could be found by a judge based on a preponderance standard of proof. However, the Supreme Court accepted certiorari in *Harris* because there was an obvious tension between *Apprendi*'s "elements" rule for fact-finding that raises available maximum sentences and *McMillan*'s rule for fact-finding that triggers mandatory minimum sentences.⁸⁴ Even though Justice Breyer concurring in *Harris* candidly admitted that he could not "easily distinguish *Apprendi v. New Jersey* from this case in terms of logic,"⁸⁵ the Supreme Court in *Harris* ultimately reaffirmed *McMillan* and held, in another 5-4 decision, that submission to a jury or proof beyond a reasonable doubt was not required for facts which mandated minimum penalties.⁸⁶

By seeming to limit *Apprendi*'s reach, *Harris* suggested that the structured and guidelines sentencing provisions developed during the sentencing revolution could continue to operate with judge-centered, administrative sentencing procedures. As Professor Stephanos Bibas put matters at the time, by holding in *Harris* that only facts which raise maximum sentences, and not those which establish minimums, must be treated procedurally as elements, the Supreme Court seemed to have "caged the potentially ravenous, radical *Apprendi* tiger that threatened to devour modern sentencing law."⁸⁷ Consequently, when certiorari was granted two terms later in *Blakely v. Washington*,⁸⁸ most observers believed the case was to serve as final confirmation that the *Apprendi* decision would not radically transform modern sentencing practices. After *Harris*, the widely-shared belief was that the sentencing revolution had been spared from further constitutional intrusion, and it was thought that the Supreme Court would use *Blakely* to rule, as had nearly all lower courts, that *Apprendi* had no

80. 536 U.S. 545 (2002).

81. 477 U.S. 79 (1986).

82. See *Harris*, 536 U.S. at 550.

83. See *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000).

84. *Id.* at 485-87.

85. 536 U.S. at 569 (Breyer, J., concurring) (citations omitted).

86. *Id.* at 568-69.

87. Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing*, 15 FED. SENT'G REP. 79, 79 (2002).

88. 542 U.S. 296 (2004).

applicability to judicial fact-finding that only impacted guideline sentencing outcomes *within* otherwise applicable statutory ranges.

But then the *Blakely* earthquake hit: the Supreme Court in *Blakely* extended *Apprendi* by declaring that judicial fact-finding to enhance sentences within guideline systems was constitutionally problematic. Justice Scalia, writing for the Court and on behalf of the same group of five Justices constituting the majority in *Apprendi*, concluded that Ralph Blakely's Sixth Amendment right to a jury trial was violated when a Washington State sentencing judge enhanced his guideline sentence based on the judge's factual finding that his kidnaping offense involved "deliberate cruelty."⁸⁹ Linking this holding back to the Court's *Apprendi* ruling, Justice Scalia explained:

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.⁹⁰

Justice Scalia further explained that this particular articulation of the meaning and reach of *Apprendi* "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."⁹¹ And Justice Scalia concluded his opinion for the Court with the breathtakingly bold assertion that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."⁹²

In recent articles, I have detailed more fully the conceptual ins-and-outs of the Supreme Court's modern sentencing jurisprudence, and there I have suggested that *Apprendi* and *Blakely* can and should be viewed as the inevitable product of the pressures created by the intersection of the Supreme Court's own revolution of criminal procedures and sentencing reformers' revolution of the substance of sentencing decision-making.⁹³ In short form, the essence of this story is that structured sentencing reforms, by making sentencing determinations more offense-oriented and fact-driven,

89. *Id.* at 313.

90. *Id.* at 303–04 (citations omitted).

91. *Id.* at 305–06.

92. *Id.* at 313.

93. See Berman, *Reconceptualizing*, *supra* note 45, at 28; Douglas A. Berman, *The Roots and Realities of Blakely*, 19 CRIM. JUST., at 4, 5 (2005).

have transformed sentencing decision-making into a more trial-like enterprise. This reality—combined with the fact that, because of the large percentage of cases resolved through guilty pleas, sentencing typically serves as the only trial-like procedure for most defendants⁹⁴—propelled a majority of Justices to see the need to place restrictions on how much of the day-to-day dynamics of criminal justice administration could be relegated to the largely procedure-free world of sentencing.⁹⁵ Or, to reiterate this article’s main themes, as it became exceedingly clear that a judge’s work at sentencing had become less about the exercise of reasoned judgment and more about directed fact-finding, a majority of the Supreme Court was no longer willing to adhere to old world precedents that depended upon the uniqueness of sentencing decision-making in order to justify the limited constitutional protections for defendants at sentencing. Put simply, through *Apprendi* and *Blakely*, the constitutional jurisprudence about sentencing procedures finally transformed to catch up to the transformation of the enterprise of sentencing.⁹⁶

94. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1099–1101 (2001) (stressing the significance of the prevalence of guilty pleas in the criminal justice system); see also *United States v. Green*, 346 F. Supp. 2d 259, 264–79 (D. Mass. 2004) (detailing the centrality of plea agreements and plea bargaining in the operation of the federal criminal justice system).

95. Professor Hoffmann developed this point especially effectively a few years ago in an article commenting on *Apprendi*:

Th[e] evolution in both the form and substance of sentencing hearings undoubtedly influenced the Court to see sentencing hearings as more like guilt/innocence trials than before, [and] this seems to be reflected in the Court’s abrupt change of direction in *Apprendi*. In short, as an unintended consequence of the recent move from discretionary to determinate sentencing, sentencing hearings have begun to look more and more like adversarial proceedings, which in turn has helped to ensure that they will be treated, for constitutional purposes, more and more like adversarial proceedings. *Apprendi*, in other words, is a natural and perhaps even predictable consequence of the recent trend toward adversarial-ness in sentencing.

Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 267–68 (2001).

96. In his concurrence in *Ring v. Arizona*, a decision in which the Supreme Court applied *Apprendi* to death penalty sentencing determinations, Justice Scalia forthrightly explained that transformations wrought by modern sentencing reforms motivated his votes in the *Apprendi* line of cases. 536 U.S. 584, 610–11 (2002) (Scalia, J., concurring). In *Ring*, Justice Scalia lamented “the accelerating propensity of both state and federal legislatures to adopt ‘sentencing factors’ determined by judges that increase punishment beyond what is authorized by the jury’s verdict,” which led him to the conclusion “that our people’s traditional belief in the right of trial by jury is in perilous decline.” *Id.* at 611–12 (Scalia, J., concurring). And thus, continued Justice Scalia, he felt compelled to champion the principle that all sentencing-increasing factors “must be subject to the usual requirements of the common law, and to the requirement enshrined in our

The *Blakely* ruling was especially significant and consequential for modern sentencing law and practice because the decision not only redefined the reach of *Apprendi*, but further suggested that every fact “legally essential to the punishment” must be proven beyond a reasonable doubt to a jury or admitted by the defendant.⁹⁷ Consequently, the potential impact of *Blakely* on modern sentencing systems could be—indeed, already has been—staggering.⁹⁸ Indeed, it is hard to read the *Blakely* opinion without believing that a majority of Justices had decided that the sentencing systems ushered in by the sentencing revolution, which had largely embraced judge-centered administrative procedures, should have to start granting defendants the full panoply of jury-centered adversarial procedures. In turn, when the Supreme Court agreed to consider on an expedited schedule *Blakely*’s applicability to the federal sentencing guidelines, nearly all observers were prepared for the Court to declare *Blakely* applicable to the federal system and to deem unconstitutional the federal sentencing guidelines’ reliance on judicial fact-finding.

II. CONCEPTUALIZING *BOOKER*

In part because of *Blakely*’s bold and often majestic assertions about the reach and importance of the Sixth Amendment’s jury trial right, it was expected that the Supreme Court would declare *Blakely* applicable to the federal sentencing guidelines. And yet, the Court’s ruling in *Booker* still found a way to surprise and confound legal observers. In *Booker*, the same five Justices who comprised the majorities in *Apprendi* and *Blakely* declared that the federal sentencing guidelines, when instructing judges to make factual findings to calculate increases in applicable sentencing ranges, transgressed the Sixth Amendment’s jury trial right.⁹⁹ But the prescribed remedy was not, as this ruling would seem to connote, a larger role for juries in the operation of the federal sentencing system. Rather, as a result of a defection by Justice Ruth Bader Ginsburg, a different group of five

Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.” *Id.* at 612.

97. 542 U.S. at 313.

98. See generally *State of Blakely in the States*, 18 FED. SENT’G REP. 1 (2005) (special issue detailing impact of the *Blakely* ruling on numerous state sentence systems); Douglas A. Berman, *Blakely in the States*, SENT’G L. & POL’Y, http://sentencing.typepad.com/sentencing_law_and_policy/blakely_in_the_states/index.html (last updated May 3, 2006) (reporting on numerous major decisions from state supreme courts applying *Blakely* to state sentencing systems).

99. See *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (opinion for the Court by Justice Stevens, with Justices Scalia, Souter, Thomas, and Ginsburg joining this opinion).

Justices—the *Apprendi* and *Blakely* dissenters plus Justice Ginsburg—concluded that the remedy for this Sixth Amendment problem was to declare the federal sentencing guidelines “effectively advisory.”¹⁰⁰

A. Booker’s *Jury Rights Conceptual Conundrum*

A remarkable ruling for many reasons, the *Booker* decision found a way to make a conceptually muddled constitutional jurisprudence concerning sentencing procedures even more opaque.¹⁰¹ Through the dual rulings of dueling majorities, the Supreme Court in *Booker* declared that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding, but as a remedy it created a system which now depends upon discretionary and loosely directed judicial fact-finding. Thus, to culminate a jurisprudence seemingly seeking to vindicate the role of the jury and to require enhanced procedures in modern sentencing systems, the so-called “remedial majority” in *Booker* devised a new system of federal sentencing that granted judges new sentencing powers and indirectly endorsed the lax sentencing procedures that had been used in the federal system over the prior two decades.

Not only did the Court’s schizophrenic results in *Booker* reveal the Justices’ enduring division on sentencing issues, but the Court’s reasoning suggested a profound conceptual confusion in the minds of all the Justices. In *Booker*’s merits opinion, though finding judicial fact-finding within a mandatory guideline system unconstitutional, Justice Stevens favorably cites the “old world” decision in *Williams*¹⁰² and declares that the Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”¹⁰³ Laying the groundwork for the advisory guideline approach adopted by the remedial majority, Justice Stevens further explains:

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of

100. *See id.* at 245 (opinion for the Court by Justice Breyer, with Chief Justice Rehnquist and Justices O’Connor, Kennedy and Ginsburg joining this opinion).

101. *See* Berman, *Reconceptualizing*, *supra* note 45, at 15–41 (detailing and lamenting the conceptual problems in the jurisprudence which *Booker* serves to culminate); *see also* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1088–1101 (2005) (detailing the gaps and holes in the Supreme Court’s Sixth Amendment decisions and describing the Court’s jurisprudence as “a kind of constitutional ‘Swiss cheese’”).

102. *Williams v. New York*, 337 U.S. 241 (1949).

103. *Booker*, 543 U.S. at 233 (citations omitted).

facts, their use would not implicate the Sixth Amendment Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.¹⁰⁴

In other words, even though a majority of Justices declared in *Apprendi* and *Blakely* and *Booker* that a judge finding facts within a mandatory sentencing system transgressed a defendant's jury trial rights, apparently "everyone agrees" that judges can find facts within an advisory sentencing system without transgressing these rights. As others have noted, the continued endorsement of *Williams* and approval of judicial fact-finding in discretionary sentencing systems seems to run counter to the essential meaning and spirit of the Court's embrace of jury decision-making in *Apprendi* and *Blakely*.¹⁰⁵

According to Justice Scalia's opinion for the Court in *Blakely*, the rulings in *Apprendi* and *Blakely* are animated by "the need to give intelligible content to the right of jury trial" which is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."¹⁰⁶ Similarly, in *Booker*, Justice Stevens' opinion for the Court champions the importance of "enforcement of the Sixth Amendment's guarantee of a jury trial in today's world."¹⁰⁷ Claiming the constitutional ruling in *Booker* is "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance,"¹⁰⁸ Justice Stevens speaks grandly of the development of the *Apprendi* line of cases in order to ensure that the "right of jury trial could be preserved, in a meaningful way guaranteeing that the

104. *Id.*

105. See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 677–80 (2006) ("The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence."); Reitz, *supra* note 101, at 1096 ("To many, the two lead opinions in *Booker* have seemed incomprehensible when read side by side [T]he Court's body of precedent is inherently schizophrenic as long as *Blakely*, on the one hand, and *Williams*, on the other, cohabit the same legal universe."); see also Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1051–52 (2005) (explaining why the embrace of *Williams* "seems almost impossible to square with the logic of *Apprendi* [because it seems] paradoxical to impose constitutional limits on sentencing that is governed by rules, while permitting sentencing that is not governed by rules to escape all constitutional constraint").

106. *Blakely v. Washington*, 542 U.S. 296, 305–06.

107. *Booker*, 543 U.S. at 236.

108. *Id.* at 237.

jury would still stand between the individual and the power of the government.”¹⁰⁹

But all these platitudes about the importance of jury trial rights fade away when the Court asserts, apparently without any reservation from even a single Justice, that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”¹¹⁰ By continuing to cite *Williams* favorably and by continuing to endorse judicial fact-finding at sentencing if but only when that fact-finding is *not* subject to structured rules, the Court seems almost to invite turning the jury trial right into a “mere procedural formality.” Indeed, Justice Stevens’ opinion for the Court in *Booker*, by bestowing a resounding (and apparently unanimous) constitutional blessing to unfettered judicial fact-finding within discretionary sentencing systems, ultimately provides a clear blueprint for eviscerating “Sixth Amendment substance” and for guaranteeing that juries will *not* in a meaningful way “still stand between the individual and the power of the government.”¹¹¹

Of course, Justice Breyer’s remedy in *Booker* follows this blueprint exactly by crafting a revised federal sentencing system that relies fully on judicial fact-finding within what is now an advisory guidelines sentencing scheme.¹¹² Justice Breyer’s advisory guideline remedy is expressly designed to permit federal judges to continue to have broad authority to find facts at sentencing: noting the flaws of having the “constitutional jury trial requirement . . . patched onto” the federal sentencing guidelines, the remedial opinion in *Booker* emphasizes the importance of enabling judges to still consider “post-verdict-acquired real-conduct information” and allowing judges to base a sentence upon “conduct *other* than the conduct the prosecutor chose to charge” and a jury has considered.¹¹³ And, as

109. *Id.*

110. *Id.* at 233.

111. *Cf. McConnell, supra* note 105, at 680 (“Because the Sixth Amendment majority reaffirmed the constitutionality of discretionary judging, it left itself wide open to a remedial holding that enhanced judicial discretion rather than eliminating judicial fact-finding.”); Reitz, *supra* note 101, at 1119 (“If the Justices are serious about an underlying theory of jury control in punishment (equivalent to voter control in elections), then judicial factfinding under *Williams* is much more offensive to Sixth Amendment values than the confined and transparent judicial powers exercised in *Blakely* and *Booker*.”).

112. Notably, in his dissent from the remedial portion of the *Booker* ruling, Justice Stevens laments that the Court has embraced a remedy that “has effectively eliminated the very constitutional right *Apprendi* sought to vindicate.” *Booker*, 542 U.S. at 302 (Stevens, J., dissenting in part). But Justice Stevens’ assertions for the Court in *Booker* that defendants have jury trial rights in a discretionary sentencing system paved the way for this remedy.

113. *Booker*, 543 U.S. at 256.

demonstrated by a year's worth of experience with advisory guidelines, the *Booker* remedy has succeeded in keeping judges empowered and juries marginal in the federal sentencing system. In the wake of *Booker*, federal judges are continuing to do all the fact-finding that the advisory guidelines recommend with the same lax sentencing procedures that had been used in the federal system over the prior two decades.¹¹⁴

In sum, then, to restate *Booker's* conceptual conundrum in amorous terms, though the Supreme Court's rhetoric and results in *Apprendi* and *Blakely* suggested that a majority of Justices had fallen in love with jury trial rights, the Court in *Booker* chose a funny way to show it.

B. *Booker's Judicial Role Conceptual Solution*

Though a jury-centered perspective spotlights *Booker's* central conceptual conundrum, this cloudy conceptual tale appears clearer if we return to the idea developed in Part I of this Article—namely, that sentencing is a distinct enterprise in the criminal justice system if and when sentencing judges are exercising reasoned judgment. To make better conceptual sense of *Booker*, we must recast our conceptual perspective and view the decision not in terms of the distinctive role and importance of juries and a traditional vision of a criminal trial, but rather in terms of the distinctive role and importance of judges and a traditional vision of sentencing. In other words, a resolution to *Booker's* conceptual conundrum can be found if the decision is understood to be not really about vindicating the role of juries and the meaning of the Sixth Amendment's jury trial right, but rather about vindicating the role of judges and the meaning of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment. Or, to restate *Booker's* conceptual solution in amorous terms, though perhaps some Justices do love jury trial rights, all the Justices love judges and thus seem comfortable allowing sentencing judges to consider extra-verdict facts when exercising reasoned judgment at sentencing.

The *Booker* Court's endorsement of judicial fact-finding at sentencing in discretionary systems, while finding problems with such fact-finding within mandatory systems, makes far more sense in light of the traditional understanding of sentencing as a distinctive enterprise involving the exercise of reasoned judgment. In *Booker* and its predecessors, the Supreme Court has not effectively articulated the functional distinction between the

114. See generally Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. (forthcoming 2006).

work of juries at trial and the work of judges at sentencing,¹¹⁵ a distinction appropriately stressed in the Supreme Court's *Williams* decision permitting broad judicial considerations at sentencing.¹¹⁶ Nevertheless, the *Booker* decision gains conceptual clarity once we recall the functional justifications for countenancing a distinctive constitutional structure at sentencing in order to facilitate the exercise of reasoned judgment. The *Booker* Court is ultimately recognizing and safeguarding, implicitly if not expressly, an important constitutional distinction between (1) finding those facts that mandate particular sentencing outcomes based on the predetermined judgments of legislatures or sentencing commissions (which has always been and remains a task for juries), and (2) exercising reasoned judgment at sentencing based on the consideration of relevant sentencing facts (which is a task that can still be given to judges). In other words, *Booker*'s result can reasonably—if not elegantly—stand for the constitutional principle that judges are still permitted to consider a range of facts at sentencing when their fact-finding is done in service to exercising reasoned judgment.¹¹⁷

To articulate these concepts in a slightly different way, *Booker* reveals that the *Apprendi* line of cases is fundamentally about the proper and constitutionally required allocation of roles between judge and jury: finding facts that have a fixed and predictable sentencing consequence is always a task for juries; considering facts in service to the exercise of reasoned judgment at sentencing is a task that can still be done by judges. In other words, *Booker* culminates a set of rulings best read for the proposition that whenever there are facts that have fixed and predictable sentencing consequences, then the jury, as the preferred fact finder in our judicial system, must pass on those facts. But judges remain authorized to consider

115. Indeed, in *Apprendi* and *Blakely* and *Booker*, the Court has tended to invoke historical materials when speaking broadly about the importance of jury trials rights. Only Justice Breyer, writing in dissent in *Apprendi* and *Blakely* and *Booker*, has made much of the history of judges having distinct and defensible powers at sentencing.

116. *Williams v. New York*, 337 U.S. 241, 251–52 (1949).

117. Professor Kyron Huigens has recently explained and justified the *Apprendi-Blakely-Booker* line of decisions in a somewhat similar manner:

Judicial factfinding in a fully discretionary sentencing system is different from judicial factfinding in a determinate sentencing system, and the differences are relevant to each system's constitutionality If a legislature makes the choice to carry the conceptual and normative structure of offense definition and adjudication over into sentencing, then the Court is right to carry the constitutional constraints on that process over into sentencing as well. Fully discretionary sentencing does not resemble offense definition and adjudication, and the constitutional governance appropriate to the latter enterprise is not required in the former.

Huigens, *supra* note 105, at 1051–52.

a range of facts if and whenever such consideration is necessary to aid in the exercise of reasoned judgment at sentencing.¹¹⁸

C. *Booker's Remedy Informed by Its Core Concept*

A view of *Booker* focused on sentencing as a distinctive judgment-centered enterprise not only brings needed clarity to Justice Stevens' merits opinion in *Booker*, it also brings Justice Breyer's remedy opinion into greater harmony with the rest of the Court's recent sentencing jurisprudence. Justice Breyer explains that, with the guidelines transformed into an advisory system, federal judges are still required "to take account of the Guidelines together with other sentencing goals" specified in 18 U.S.C. § 3553(a).¹¹⁹ That is, the *Booker* remedy crafted by Justice Breyer requires judges now to filter the guidelines and their sentencing recommendations through the provisions of section 3553(a). And the provisions of section 3553(a) demand that district judges exercise reasoned judgment in their sentencing decision-making.

As Justice Breyer stressed in the remedial portion of the *Booker* decision, section 3553(a) instructs a judge to consider "the need to avoid unwarranted sentencing disparities" and the need for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care."¹²⁰ Moreover, the central directive of section 3553(a) commands that federal sentencing judges "shall impose a sentence sufficient, but not greater than necessary, to comply with the [traditional] purposes" of punishment while giving consideration to "the nature and circumstances of the offense and the history and characteristics of the defendant"¹²¹ By mandating that judges consider the needs of deterrence, incapacitation, retribution and rehabilitation, while also seeking to avoid unwarranted disparities, all in the course of imposing a sentence that is "sufficient, but not greater than necessary," section 3553(a) requires sentencing judges to exercise reasoned judgment in the course of a holistic sentencing decision-making process. After *Booker*, federal judges may no longer simply find guideline-specified facts, plug these facts into a guideline calculation, and then in rote fashion follow the guidelines' predetermined sentencing

118. I am grateful to Professor Sigmund "Zig" Popko at Arizona State University College of Law for suggesting this particular way of phrasing how to conceptualize *Booker*.

119. *Booker*, 543 U.S. at 259 (Breyer, J.).

120. *Id.* at 260 (citing provisions of § 3553(a)(2)).

121. 18 U.S.C. § 3553(a) (2006).

outcomes. Rather, federal judges must now integrate and assimilate the facts emphasized by the guidelines with the dynamic judgment-oriented considerations that are set forth in section 3553(a).¹²² In short, by returning a district judge's focus at sentencing to the terms of section 3553(a), Justice Breyer's remedy for the Court in *Booker* has restored the exercise of reasoned judgment to federal sentencing.

Moreover, *Booker*'s embrace of reasoned judgment transcends the conversion of the guidelines from mandates to advice and the new focus on the provisions of section 3553(a) in the district courts. Justice Breyer's handiwork in the *Booker* remedial opinion also included preserving appellate review, although it is recast as a review for "reasonableness."¹²³ Drawing on provisions of the Sentencing Reform Act, Justice Breyer decided that, within an advisory sentencing guideline system, appellate courts can and should now "determine whether the sentence 'is unreasonable' with regard to § 3553(a)."¹²⁴ Justice Breyer further explained that the "numerous factors that guide sentencing" in section 3553(a) can "guide appellate courts . . . in determining whether a sentence is unreasonable."¹²⁵ As the term itself highlights, review for "reasonableness" is essentially a double endorsement of the exercise of reasoned judgment in federal sentencing: reasonableness review requires an appellate court to exercise its own reasoned judgment to assess whether the sentencing court has properly exercised reasoned judgment in selecting a sentence in a particular case in accord with the directives of section 3553(a).

In sum, the remedy Justice Breyer fashioned in *Booker*—by converting the guidelines into advice and stressing the mandates of section 3553(a), and by requiring circuit courts to review sentences for reasonableness—is a

122. Indeed, the directives of section 3553(a) bring to mind the language used by the Supreme Court in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex* to describe the traditional vision of sentencing decision-making as involving the exercise of reasoned judgment. 442 U.S. 1, 8, 13 (1979). Recall that the *Greenholtz* Court described a sentencing determination as one that "is, in a sense, an 'equity' type judgment that cannot always be articulated in traditional findings" because it involves a kind of decision-making that is "necessarily subjective in part and predictive in part" and requires a "discretionary assessment of a multiplicity of imponderables." 442 U.S. 1, 8–13 (1979) (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)). Determining exactly what sort of sentence will be "sufficient, but not greater than necessary," to achieve the traditional purposes of punishment, as federal judges must now do under the terms of section 3553(a), quite clearly calls for a kind of decision-making that is "necessarily subjective in part and predictive in part" and requires a "discretionary assessment of a multiplicity of imponderables." *Id.* at 10–13 (quoting Kadish, *supra* at 813).

123. *Booker*, 543 U.S. at 260–62 (Breyer, J.).

124. *Id.* at 261.

125. *Id.*

remedy which calls upon federal judges to exercise reasoned judgment in their sentencing decision-making.¹²⁶ In this way, there is a real conceptual harmony between the *Booker* remedy and the *Booker* merits opinion: together both halves of the *Booker* ruling vindicate and champion the special role of judges in the sentencing process and the very concept of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment. Consequently, it is not surprising that, in the wake of *Booker*, judges have not been heard to complain, as they did after the initial promulgation of the guidelines, that sentencing is still “a mechanistic administrative formula”¹²⁷ involving no more than “filling in the blanks,”¹²⁸ which makes judges “rubber-stamp bureaucrats” and “judicial accountants” in the sentencing process.¹²⁹ To the contrary, federal district judges have praised the *Booker* ruling for “restoring judges to a meaningful role in the sentencing process.”¹³⁰

III. THE IMPLICATIONS OF CONCEPTUALIZING *BOOKER*

The Supreme Court’s development of its modern Sixth Amendment jurisprudence over the last decade has been contentious and convoluted, and the *Booker* decision made a conceptually muddled jurisprudence concerning sentencing procedures even more opaque. Unfortunately, a fractured Supreme Court has been unable (or at least unwilling) to work together to

126. Moreover, focusing on the exercise of reasoned judgment at sentencing not only informs the *Booker* remedy, it also justifies the selection of that remedy. The text of section 3553(a) of the Sentencing Reform Act suggests that Congress had always envisioned that federal judges, even when sentencing within a mandatory guideline sentencing system, would and should exercise reasoned judgment in their sentencing decision-making rather than just finding facts that mandated particular sentencing outcomes. *See generally* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93 (1999) (explaining why the text of the SRA and its legislative history reveal that Congress expected and desired that federal judges would have an integral role in developing the principles and doctrines for a reformed federal sentencing system).

127. *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988).

128. *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988).

129. *See supra* note 53.

130. Lynn Adelman & Jon Deitrich, *Judgment on Booker?*, LEGAL TIMES, Jan. 16, 2006, at 46 (commentary by U.S. District Judge and his clerk); *cf.* James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT’G REP. 295, 295–98 (2005) (commentary by a U.S. District Judge stressing the imbalance resulting from unregulated prosecutorial power within a mandatory guideline system and celebrating the fact that “Booker has restored [discretion to judges that] is regulated, reviewable, and restricted.”); McConnell, *supra* note 105, at 684 (article by a U.S. Circuit Judge suggesting that *Booker*’s “modest increase in the discretion of district judges, exercised judiciously, could enhance justice”)

forge a modern sentencing jurisprudence that is conceptually clear, and lower courts and legislatures have had to try to make the best of a chaotic doctrine that has emerged in fits and starts and evolved with unexplained gaps and unexpected growths.¹³¹ Tellingly, Professor Kevin Reitz has come to describe the Supreme Court's recent Sixth Amendment jurisprudence as "a kind of constitutional 'Swiss cheese.'"¹³²

The vision of *Booker* developed in this Article could perhaps provide a conceptual framework for reordering the Supreme Court's Sixth Amendment jurisprudence. Because the Court's sentencing jurisprudence is necessarily still in development as it confronts new and challenging constitutional questions that emerge from modern sentencing systems (and because the Court has some new members who might bring new perspectives to this jurisprudence¹³³), a conceptual view of *Booker* focused on sentencing as a distinctive judgment-centered enterprise could have important implications for the Court's continuing work in this area. In this concluding Part, I will briefly sketch the possible implications of conceptualizing *Booker* for the Supreme Court's recent Sixth Amendment jurisprudence, as well as for the proper approach to federal guideline sentencing in the wake of *Booker*.

A. *Redefining the Nature of the Sixth Amendment's Not-So-Bright-Line Rule*

In his opinion for the Court in *Blakely*, Justice Scalia suggested that the Supreme Court announced a bright line rule about the reach of the Sixth Amendment in *Apprendi* and that this bright line rule was simply being applied in *Blakely*.¹³⁴ But current Sixth Amendment jurisprudence looks like "a kind of constitutional 'Swiss cheese'" (and may smell like Limburger cheese to some defendants) because the purported "bright line" articulated

131. See, e.g., Berman, *Reconceptualizing*, *supra* note 45, at 15–41; Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

132. Reitz, *supra* note 101, at 1088.

133. Two of the Justices who played integral roles in the Supreme Court's contentious and convoluted Sixth Amendment jurisprudence have recently been replaced: Chief Justice Rehnquist has been replaced by Chief Justice Roberts and Associate Justice O'Connor has been replaced by Associate Justice Alito. As of this writing, the views of these two new Justices concerning the scope and application of Sixth Amendment rights are hard to predict with any confidence.

134. See *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (discussing "*Apprendi*'s bright line").

in *Apprendi* and *Blakely* has been obscured by an array of questionable and confusing exceptions.¹³⁵

Because of the Supreme Court's 1998 ruling in *Almendarez-Torres v. United States*,¹³⁶ which held that evidence of a defendant's prior convictions could be used to increase a sentence without a jury determination,¹³⁷ the *Apprendi* rule was inaugurated with a built-in exception allowing judges to find "prior conviction" facts that aggravate sentences.¹³⁸ In addition, another key exception to the *Apprendi* rule was preserved through the Court's 2002 decision in *Harris v. United States*,¹³⁹ in which the Court reaffirmed that judges could find those facts that trigger mandatory minimum sentences without transgressing the Sixth Amendment.¹⁴⁰ And though the bold *Blakely* ruling suggested that a majority of the Court was prepared to apply a broad bright-line vision of the constitutional limits on judicial fact-finding, the *Booker* decision has further obscured whatever bright line *Blakely* may have aspired to create.¹⁴¹

135. Reitz, *supra* note 101, at 1088–1101 (discussing the "convolutions and perversities" of the Supreme Court's Sixth Amendment caselaw).

136. 523 U.S. 224 (1998).

137. *Id.* at 226–27.

138. Recall that the *Apprendi* court declared that "[o]ther 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). Significantly, in the wake of *Apprendi* and *Blakely*, many lower courts have struggled over how broadly to apply the "prior conviction" exception. Though some sentencing laws link enhanced punishment to the basic fact of a prior conviction, many jurisdictions have more elaborate criminal history rules that focus on, for example, whether the defendant committed a current offense while on probation or parole or whether the defendant's prior criminal conduct is of a certain character. *See, e.g.*, CAL. R. CT. 4.421(b)(4) (2005); OHIO REV. CODE ANN. § 2929.12(D)(1) (West 2005); *see also* Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing: Blakely v. Washington—Legal Considerations for State Sentencing Systems* 10 (Sept. 2004) [hereinafter Vera Institute, *Legal Considerations*] (discussing this issue). Lower courts have been divided on whether the "prior conviction" exception applies only to the basic fact of a prior conviction or rather extends more broadly to matters related to prior convictions that involve additional criminal history facts or findings. *See id.* at 10.

139. 536 U.S. 545 (2002).

140. *See id.* at 567.

141. Tellingly, a recent state high court decision from New Mexico has suggested that the Supreme Court's precedents "ought not be viewed as 'draw[ing] a bright line,'" *State v. Lopez*, 123 P.3d 754, 766 (N.M. 2005) (referring to *People v. Black*, 113 P.3d 534, 547 (Cal. 2005)), and the California Supreme Court has likewise declared simply that the "high court's precedents do not draw a bright line." *People v. Black*, 113 P.3d 534, 547 (Cal. 2005). *See generally* Douglas A. Berman, *Does Blakely draw a bright line? What is that line?* SENT'G L. & POL'Y, Oct. 23, 2005, http://sentencing.typepad.com/sentencing_law_and_policy/2005/10/does_blakely_dr.html.

A conceptual view of *Booker* focused on sentencing as a distinctive judgment-centered enterprise could recast how to understand and apply the Sixth Amendment's (not-so-)bright line. As developed in Part II, the *Booker* ruling can be viewed as recognizing and embracing, implicitly if not expressly, an important constitutional distinction between (1) finding those facts that mandate particular sentencing outcomes based on the predetermined judgments of legislatures or sentencing commission (a task juries must perform), and (2) exercising reasoned judgment at sentencing based on the consideration of relevant sentencing facts (a task judges may perform).¹⁴² Were the *Apprendi* line of cases, through the lens of *Booker*, understood to be fundamentally about preserving the distinctive roles of juries and judges and the distinctive ambit of trials and sentencing, the reach and limits of the Sixth Amendment might be redefined to require that any and all fact-finding with fixed and predictable sentencing consequences must be performed by juries, whereas judges may still consider extra-verdict facts in service to the exercise of reasoned judgment at sentencing.

Recasting the Sixth Amendment in terms of preserving and vindicating sentencing as a distinct enterprise involving the exercise of reasoned judgment would require a reconsideration of both the mandatory minimum exception and the prior conviction exception that now limit the reach of the *Apprendi-Blakely* rule. Notably, the Court's own effort to defend the mandatory minimum exception in *Harris v. United States* highlights the conceptual schizophrenia of this aspect of the Court's jurisprudence.¹⁴³ Writing the plurality opinion for the Court in *Harris*, Justice Kennedy provided this explanation of the Court's doctrine:

142. It is worth noting here that, even though the Sixth Amendment may not require jury involvement in the exercise of reasoned judgment at sentencing, a state surely would be permitted to choose to have greater jury involvement in the exercise of sentencing judgment. Of course, all states and the federal government have generally provided for some form of jury sentencing in capital cases, and Justice Breyer, in his concurrence in *Ring v. Arizona*, has even argued "that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." 536 U.S. 584, 619 (2002). Moreover, there are six states that currently provide for jury involvement in felony, noncapital cases. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004); see also Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005) (arguing forcefully that juries are to be preferred over judges when it comes to making sentencing judgments).

States are always free to provide more procedure to a defendant than the Constitution demands; greater jury involvement in the exercise of sentencing judgment is surely constitutionally permissible (and may also be wise as a matter of policy). The conceptual vision of *Booker* advanced in this article suggests simply that the Constitution's jury trial right does not demand greater jury involvement in the exercise of sentencing judgment.

143. 536 U.S. 545, 567 (2002).

Read together, [our precedents] mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.¹⁴⁴

The conceptual confusions surrounding the *Harris* decision are palpable from this small snippet of the Court's opinion. The reference to "judicial expertise" is an obvious throwback to the old-world sentencing model in which judges were expected to use reasoned judgment to craft an individualized offender-oriented rehabilitative sentence.¹⁴⁵ But, as Judge Nancy Gertner has astutely noted in a commentary about *Harris*, within the context of applying mandatory minimum sentencing terms in modern structured sentencing systems often "the judge is 'just' another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences."¹⁴⁶ To speak in this setting of reliance on "judicial expertise" for making offense-based factual findings is almost nonsensical. Thus, it is hardly surprising that Justice Breyer, though providing a key fifth vote in *Harris*, stated in his concurrence that he could not easily see the logic of distinguishing *Harris* from *Apprendi*.¹⁴⁷

The prior conviction exception to the *Apprendi-Blakely* rule that resulted from the Supreme Court's *Almendarez-Torres* decision also loses much of its luster upon further reflection. Notably, not only have many commentators asserted that the prior conviction exception is an illogical and inappropriate gap in the Supreme Court's recent sentencing jurisprudence,¹⁴⁸ but Justice Thomas has recently and emphatically urged the court to now reject the "prior conviction" exception to the Court's Sixth Amendment rules.¹⁴⁹ Of course, Justice Thomas's call for overturning the "prior conviction" exception is especially notable because he was the key

144. 536 U.S. at 567.

145. See discussion *supra* Part I.

146. Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT'G REP. 83, 83–85 (2002); see also *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 (D. Mass. 2004) (noting that, after a prosecutor makes a variety of discretionary charging and bargaining choices, the judge's role within the operation of the mandatory federal sentencing guideline system was "transformed to 'just' finding the facts, now with Commission-ordained consequences").

147. See 536 U.S. at 569–72 (Breyer, J., concurring).

148. See Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. DAVIS L. REV. 973 (2004); Kyron Huigens & Danielle China, "Three Strikes" Laws and *Apprendi*'s Irrational, Inequitable Exception for Recidivism, 37 CRIM. L. BULL. 575 (2001).

149. See *Shepard v. United States*, 125 S. Ct. 1254, 1263–64 (2005) (Thomas, J., concurring).

fifth vote to create that exception in the first instance; this exception thus lives on in legal limbo while critical questions about its validity and scope fester in the lower courts.¹⁵⁰

Recasting the Sixth Amendment in terms of preserving and vindicating sentencing as a distinct enterprise involving the exercise of reasoned judgment would seem to call for the demise of these two exceptions to the extent that they permit judges to engage in rote fact-finding with fixed and predictable sentencing consequences, which is a task that the Constitution demands to be performed by juries. That is, conceptualizing *Booker* and the Sixth Amendment aided by what might be deemed a “fact-finding/exercise of judgment distinction” suggests that both the prior conviction exception and the mandatory minimum exception ought to be eliminated.

And yet, while conceptualizing *Booker* and the Sixth Amendment aided by a fact-finding/exercise-of-judgment distinction suggests that the reach of the Sixth Amendment should be expanded in some ways, the distinction also suggests some new limits on the Supreme Court’s developing Sixth Amendment doctrine. Though the application of some modern structured sentencing laws call upon judges to conduct fact-finding in ways that seem to transgress the proper domain of juries, judges are also called upon in many sentencing systems to make determinations that do not look like classic “fact” findings. For example, Ohio’s structured sentencing laws condition an increased sentence on a determination by a sentencing judge that “the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime by the offender or others.”¹⁵¹ Similarly, a number of states have recidivist statutes that permit an enhanced sentence when the court believes “the history and

150. Notably, the Eleventh Circuit has recently predicted that the Supreme Court will eventually overrule *Almendarez-Torres* and its prior conviction exception. See *United States v. Greer*, 435 F.3d 1327, 1334 (11th Cir. 2006); see also Douglas A. Berman, *Eleventh Circuit predicts the demise of Almendarez-Torres (though it lives on for now)*, SENT’G L. & POL’Y, Jan. 10, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/eleventh_circui_1.html.

In another article, I have argued that the “prior conviction” exception might be defensible through a distinct conceptual vision of the *Apprendi-Blakely* line of cases. In *Conceptualizing Blakely*, I develop the idea that an offense/offender distinction should inform the jury-trial right, and I explain how an offense/offender distinction is suggested by the text of the Constitution and resonates with the distinctive institutional competencies of juries and judges. Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT’G REP. 89 (2004). Under this conceptual vision, as explained more fully in the article *Conceptualizing Blakely*, the Constitution’s jury trial right could be understood to allow an array of criminal history issues to be purely matters of judicial concern. See *id.* at 89–91.

151. OHIO REV. CODE ANN. § 2929.14(B)(2) (invalidated 2006); see also Vera Institute, *Legal Considerations*, *supra* note 138, at 4–5 (discussing the “uneasy nature of ‘facts’ under *Blakely*”).

character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.”¹⁵² Conceptualizing *Booker* and the Sixth Amendment as suggested in this Article would connote that these sorts of determinations—which do not involve findings of historical fact, but are akin to value judgments that judges have traditionally made when exercising reasoned judgment in the course of selecting an appropriate sentence—should not be seen as implicating the Constitution’s jury trial right. Though there is broad language in parts of the *Blakely* decision which suggests juries must now be involved in *all* punishment-enhancing sentencing determinations, the decision’s overall emphasis on juries finding “facts” and *Booker*’s vindication of a judicial role in exercising reasoned judgment at sentencing suggest that these sorts of value-judgment determinations perhaps should not be viewed as creating Sixth Amendment concerns.

B. Recasting Federal Sentencing Under Advisory Guidelines After Booker

In addition to redefining how to understand and apply the Sixth Amendment’s (not-so-)bright line, a conceptual view of *Booker* focused on sentencing as a distinctive judgment-centered enterprise could recast how federal sentencing under advisory guidelines after *Booker* should develop. In light of *Booker*’s conceptual emphasis on the exercise of reasoned judgment at sentencing, lower federal courts should—and perhaps must as a matter of constitutional law—ensure that all fact-finding under advisory guidelines is done in service to exercising reasoned judgment at sentencing.

In the wake of *Booker*, there seems to be universal lower court agreement that, after *Booker*, district judges must still properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the guidelines.¹⁵³ Moreover, more than a

152. HAW. REV. STAT. § 706-662 (2004); N.Y. PENAL LAW § 70.10 (2) (McKinney 2003); compare *People v. Rivera*, 833 N.E.2d 194, 198–200 (N.Y. 2005) (suggesting no Sixth Amendment concerns might be triggered by such a finding), with *Kaua v. Frank*, 436 F.3d 1057, 1061 (9th Cir. 2006) (concluding over a contrary opinion from the Hawaii Supreme Court that this aspect of Hawaii’s sentencing system violates the *Apprendi-Blakely* rule).

153. One of the first major circuit court decisions about *Booker* stressed these points, see *United States v. Crosby*, 397 F.3d 103, 113–14 (2d Cir. 2005), and circuit court rulings have continued to reiterate and reinforce these points. See, e.g., *United States v. Mares*, 402 F.3d 511, 520–21 (5th Cir. 2005); *United States v. Webb*, 403 F.3d 373, 383–84 (6th Cir. 2005); *United States v. Dean*, 414 F.3d 725, 727 (7th Cir. 2005); *United States v. Crawford*, 407 F.3d 1174, 1180, 1180–82 (11th Cir. 2005). See generally Nancy King, *Reasonableness Review After Booker*, 43 HOUS. L. REV. (forthcoming 2006) (discussing post-*Booker* appellate review caselaw); Adam Lamparello, *The Unreasonableness of “Reasonableness” Review: Assessing*

few circuits have expressly declared after *Booker* that a within-guideline sentence is presumptively reasonable.¹⁵⁴

But the vision of *Booker* developed in this article suggests that lower courts have the post-*Booker* equation backwards: in light of the constitutional importance of judges exercising reasoned judgment at sentencing and not merely finding facts, perhaps federal judges should have to provide a reasoned justification for their sentencing choices only when they decide to follow the guidelines. For it is only when the court decides to follow the guidelines' advice that there is reason to fear that the district judge has merely engaged in rote fact-finding (and thereby usurped the jury's role) and not exercised the sort of independent reasoned judgment at sentencing that is essential to legitimate judicial factfinding at sentencing for constitutional purposes. An appellate presumption of reasonableness, though perhaps comporting with the remedial decision in *Booker*, does not clearly comport with the merits decision in *Booker* or the broader conceptual ideas to be found in both *Booker* opinions.¹⁵⁵ Indeed, it might be more appropriate for circuit courts, at least in cases involving judicial fact-finding to support a higher guideline range, to be applying a "presumption of unconstitutionality" to any within-guideline sentence because those sentences may be the result of rote fact-finding in a way that usurps the jury's constitutionally guaranteed role and thereby transgresses the Sixth Amendment.

Beyond matters of post-*Booker* federal sentencing doctrine, my conception of *Booker* could have an impact on federal sentencing practice. Indeed, one might reasonably be concerned that, with an emphasis on individual judges exercising reasoned judgement, there is the potential for a return to disparate treatment of people convicted of the same crime. Based on a wealth of federal sentencing experience before and after *Booker*, there

Appellate Sentencing Jurisprudence after Booker, 18 FED. SENT'G REP. (forthcoming 2006) (same).

154. See, e.g., *United States v. Williams*, No. 05-5416 (6th Cir. Jan. 31, 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); see also *King*, *supra* note 153 (discussing post-*Booker* adoption of presumption of reasonableness by circuit courts for within-guideline sentences); *Lamparello*, *supra* note 153 (same); Douglas A. Berman, *Reasonableness review round-up . . . calling Justice Scalia*, SENT'G L. & POL'Y, Feb. 20, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/reasonableness_.html (detailing that the majority of circuits have embraced a "presumption of reasonableness" for within-guidelines sentences).

155. As I have explained more fully elsewhere, I view the development of a "presumption of reasonableness" for within-guideline sentences to be troubling for statutory and practical reasons, as well as for constitutional reasons. See Douglas A. Berman, *Why a "presumption of reasonableness" is troubling*, SENT'G L. & POL'Y, Feb. 7, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/why_a_presumpti.html.

is every reason to believe that the “reasoned judgment” of a federal judge in New York may be different than the “reasoned judgment” of a federal judge in Iowa, Wisconsin, or Utah. When contemplating the impact of an emphasis on reasoned judgment on sentencing consistency, however, it is valuable to appreciate that, though achieving greater sentencing uniformity was an important goal of the Sentencing Reform Act of 1984, it was not the only goal.¹⁵⁶ Indeed, the *Booker* Court’s emphasis on all the provisions of 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed “the need to avoid unwarranted sentence disparities” as only one of seven distinct sentencing considerations.

Moreover, both the *Blakely* and *Booker* decisions can and should be read as a statement by the Supreme Court that a range of values—such as our society’s commitment to fair procedures and adversarial justice and the role of the jury in factfinding and the role of the judge in exercising reasoned judgment—need to be balanced with and integrated into a modern quest for sentencing uniformity. Absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing that a just sentencing system should also strive to be humane and respectful to all persons it impacts. Encouraging judges to exercise reasoned judgment at sentencing is a step in the right direction as a matter of policy as well as a matter of constitutional jurisprudence.

IV. CONCLUSION

Though the Supreme Court has not even really tried to bring greater conceptual order to its recent sentencing work, perhaps recent transitions in the Court’s membership might ultimately prompt some Justices to explore conceptually sound ways to fill some holes in the Sixth Amendment jurisprudential “Swiss cheese” after *Blakely* and *Booker*. The Supreme Court’s sentencing jurisprudence is necessarily still developing as it confronts new and challenging constitutional questions that emerge from modern sentencing systems.¹⁵⁷ A conceptual view of *Booker* focused on

156. See generally STITH & CABRANES, *supra* note 6 (emphasizing the importance of a range of sentencing values besides reasonable consistency); Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271 (2005) (discussing critically undue and excessive concerns about sentencing uniformity in modern federal sentencing reforms); see also Michael O’Hear, *The Myth of Uniformity*, 17 FED. SENT’G REP. 249, 249 (2005) (discussing the harms of Justice Breyer’s tendency in *Booker* to “exalt uniformity to the detriment of other important objectives” in his understanding of the goal of federal sentencing reform).

157. Indeed, the Supreme Court recently granted certiorari in *Cunningham v. California*, 126 S. Ct. 1329, 1329–30 (2006) (mem.), to address whether judicial fact-finding within California’s determinate sentencing scheme violates the Sixth Amendment as articulated in

sentencing as a distinctive judgment-centered enterprise could and should have important implications for the Court's continuing work in this area.

Blakely. The *Cunningham* case will present the newly-comprised Supreme Court with its first important opportunity to elaborate on, and try to clarify the conceptual confusions surrounding, the meaning and reach of *Blakely*, *Booker*, and the Court's modern approach to the Constitution's jury trial right.