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The Sixth Amendment Sentencing Right and Its Remedy

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THE SIXTH AMENDMENT SENTENCING RIGHT AND ITS REMEDY*

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The Sixth Amendment sentencing doctrine recognizes the right to a jury trial of facts that increase criminal sentences. The doctrine has had only a minimal effect on sentencing because subsequent cases crafting a remedy largely undermined the right. The remedial cases have undermined the Sixth Amendment sentencing right in three notable ways: (1) by repeatedly refusing to recognize that district courts possess an unfettered power to sentence based on nothing more than a policy disagreement; (2) by encouraging appellate court judges to review sentences in a manner that is designed to curtail district court discretion; and (3) by refusing to require district court judges to engage in any independent sentencing analysis. Although the Supreme Court has justified its remedy by reference to historical sentencing practices, these three choices in its remedial cases represent significant departures from historical practice. What is more, the current remedy fails to vindicate the interests protected by the Sixth Amendment—the liberty interests of criminal defendants and democratic input into individual criminal cases. Until and unless the Court revisits its remedial decisions, the Sixth Amendment sentencing right will continue to be little more than a meaningless formalism.

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INTRODUCTION

Apprendi v. New Jersey[1] ushered in a new doctrine of constitutional criminal procedure: the right to a jury trial of facts that increase criminal sentences. In the twenty years since *Apprendi* was decided, the Supreme Court has heard more than a dozen cases that further develop the Sixth Amendment sentencing doctrine.[2] But the doctrine has not resulted in a system in which juries actually decide sentencing facts beyond a reasonable doubt with any regularity. Especially in the federal system, the Sixth Amendment sentencing doctrine has increased the authority of judges, but it has largely failed to protect the rights of defendants.

Not only has the Sixth Amendment sentencing doctrine not resulted in more jury trials, but the doctrine also has been largely hollowed out in a number of cases decided after *Apprendi*—cases that crafted a remedy for violations of the Sixth Amendment sentencing right. Specifically, by creating an "advisory" federal sentencing guideline system, the Supreme Court has dramatically undermined the Sixth Amendment sentencing right. The Court has recalibrated that federal remedy to encourage particular sentencing outcomes[3] and, in so doing, has permitted practices that its earlier Sixth Amendment sentencing cases seemingly prohibit. Put simply, the Supreme Court has allowed its remedy to undermine the Sixth Amendment sentencing right.

The tension between the right and the remedy can be traced to two choices—the choice to preserve an important role for the Federal Sentencing Guidelines ("Guidelines"), and the choice to embrace history as a justification for, but not a limitation on, the remedy. In attempting to preserve a central role for the Guidelines, the Court has significantly weakened the Sixth Amendment sentencing right. The Court appears to require judges not only to make the factual findings required by the Guidelines but also to make additional factual findings in order to deviate from the Guidelines' sentencing range—a

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

2. *See, e.g.*, United States v. Haymond, 139 S. Ct. 2369, 2378 (2019) (plurality opinion); Chavez-Meza v. United States, 138 S. Ct. 1959, 1967–68 (2018); Rosales-Mireles v. United States, 138 S. Ct. 1897, 1911 (2018); Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016); Alleyne v. United States, 570 U.S. 99, 114–15 (2013); Peugh v. United States, 569 U.S. 530, 544 (2013); S. Union Co. v. United States, 567 U.S. 343, 360 (2012); Pepper v. United States, 562 U.S. 476, 504–05 (2011); Dillon v. United States, 560 U.S. 817, 830 (2010); Nelson v. United States, 555 U.S. 350, 352 (2009) (per curium); Spears v. United States, 555 U.S. 261, 265–66 (2009) (per curium); Irizarry v. United States, 553 U.S. 708, 716 (2008); Cunningham v. California, 549 U.S. 270, 293 (2007); Gall v. United States, 552 U.S. 38, 59–60 (2007); Kimbrough v. United States, 552 U.S. 85, 111 (2007); Rita v. United States, 551 U.S. 338, 359 (2007).

3. *Peugh*, 569 U.S. at 550 ("The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: It is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.").

requirement that is forbidden by the early cases establishing the Sixth Amendment sentencing doctrine.[4]

The Supreme Court relied on history to justify the remedy that it adopted—specifically, it relied on a long history of judges making factual findings in aid of their independent sentencing decisions. But the Court has failed to use that history as a guide or as a constraint when it has refined that remedy in subsequent cases. As a result of this failure, the Court's remedy has become entirely unmoored from its original justification, and the Court has permitted or endorsed sentencing practices that look nothing like the practices it used to initially justify the remedy. Indeed, at this point, federal sentencing more closely resembles the mandatory sentencing practices that have been deemed unconstitutional than the unstructured sentencing that the Court relied on in claiming that advisory sentencing guidelines satisfy the Sixth Amendment.

This Article proceeds in three parts. Part I briefly describes the rise of structured sentencing in the late twentieth century, the Supreme Court's initial articulation of the Sixth Amendment sentencing right in *Apprendi*, and the Court's subsequent expansion of that right. Part II turns from the right to the remedy. It explains how three key features of the remedy—the unwillingness to recognize district courts' authority to sentence based on policy disagreements with the Guidelines, the Guidelines-centric nature of appellate review, and the failure to ensure district courts are exercising independent sentencing judgment—undermine the Sixth Amendment sentencing right. Part III highlights the strange role that history has played in the crafting of the Sixth Amendment remedy—namely that history has served as a justification for, but not a limitation on, the remedy. Part III explains that the three features of the remedy discussed in Part II represent departures from historical practice. It also explains how the current remedy fails to vindicate the interests protected by the Sixth Amendment—the liberty interests of criminal defendants and democratic input in individual criminal cases. Indeed, to a certain extent, the current system undermines those principles.

I. THE DEVELOPMENT OF THE SIXTH AMENDMENT SENTENCING RIGHT

For much of American history, criminal statutes identified broad ranges of punishment, and judges were free to impose a punishment from anywhere within that range.[5] For example, a state might criminalize assault and make the

4. *See Cunningham*, 549 U.S. at 293; Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

5. The early history of sentencing in the United States—in particular, when sentencing switched from a system of determinate sentences to a system that gave sentencing discretion to judges—is a matter of some dispute. *Compare* Williams v. New York, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence

violation of that law punishable by up to five years in prison. When a defendant was convicted of assault, the judge in that case decided whether to impose a sentence of no incarceration, five years of incarceration, or something in between.

The precise sentence in a particular case was left almost entirely to the discretion of judges.[6] The judge was tasked with finding any facts relevant to the defendant's sentence—such as whether the defendant had committed previous crimes or how much harm the victim suffered. The judge was also responsible for deciding how those facts ought to affect the sentence.[7] The judge had to decide for example, whether an eighteen-year-old defendant should serve a lengthy sentence because young people are more likely to reoffend, or whether the defendant should serve a shorter sentence because young people are less culpable for their crimes. Finally, judges' sentencing decisions were usually exempted from any meaningful appellate review.[8]

Importantly, the judge was not the only official who played a significant role in deciding a defendant's punishment. When defendants were sentenced to incarceration, they rarely served the full sentence that the judge imposed.[9] Instead, they were periodically assessed by parole officials who would release

used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."), *and* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion."), *with* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990) ("[U]p through 1870, legislators retained most of the discretionary power over criminal sentencing. . . . [T]he period of incarceration was generally prescribed with specificity by the legislature."), *and* Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715, 715–16 (1942) ("During the nineteenth and twentieth centuries American criminal legislation has shifted from the fixed sentence type of criminal statute to the discretionary sentence type of statute." (footnote omitted)). But everyone seems to agree that discretionary sentencing was the norm by the late nineteenth century.

6. For an excellent historical account of judicial sentencing discretion and how judges wielded that discretion, see STITH & CABRANES, *supra* note 5, at 9–29.

7. *See* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448, 474 (2019) (explaining that before the rise of structured sentencing, judges "enjoyed the ability to make factual findings in aid of their sentencing decisions" because "people believed that it was impossible to identify ex ante those facts that ought to increase or decrease sentences"—a task that was also left to judicial discretion).

8. *See infra* text accompanying notes 147–60.

9. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., TRUTH IN SENTENCING IN STATE PRISONS 2 (1999) ("In the early 1970's, States generally permitted parole boards to determine when an offender would be released from prison. In addition, good-time reductions for satisfactory prison behavior, earned-time incentives for participation in work or educational programs, and other time reductions to control prison crowding resulted in the early release of prisoners. These policies permitted officials to individualize the amount of punishment or leniency an offender received and provided means to manage the prison population.").

defendants back into the community when it appeared that they had been sufficiently rehabilitated.[10]

Over time, the discretion that judges enjoyed at sentencing came under attack. Driven by concerns about the disparities resulting from highly discretionary sentencing practices—which dovetailed with concerns about increasing crime rates and broad criticisms of the rehabilitative model of punishment—criminal justice experts and scholars proposed reforms to bring greater consistency and certainty to the sentencing enterprise.[11]

Federal sentencing reform focused heavily on curtailing judicial sentencing discretion. The Sentencing Reform Act of 1984 ("SRA")[12] created a sentencing commission to develop mandatory guidelines that limited the available sentencing range in particular cases.[13] The Federal Sentencing Guidelines assign narrow sentencing ranges within the broader statutory sentencing limits based on a number of factual variables, including the offense of conviction, the factual circumstances surrounding the offense, and the defendant's prior criminal convictions.[14] Judges were permitted to sentence outside the Guidelines range only in a few situations expressly permitted by the Guidelines[15] or where the sentencing judge found that a circumstance had not been "taken into consideration" when the Guidelines were drafted.[16]

The federal government was hardly unique in its decision to adopt structured sentencing mechanisms. Some states developed their own sentencing guidelines, while others adopted presumptive sentencing regimes.[17] In those presumptive systems, legislatures or sentencing commissions identified a narrow presumptive sentence for the "ordinary case" of a given crime. Judges retained the power to sentence above or below the presumptive sentence in an

10. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 976–87 (2013) (describing the history of and rationale behind parole in America).

11. For examples of such proposed reforms, see MODEL SENT'G & CORR. ACT § 3 (UNIF. L. COMM'N 1979); DAVID FOGEL, ". . . WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL FOR CORRECTIONS 193–99 (2d ed. 1975); PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 96–127 (1977); TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 15–34 (1976).

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

13. *Id.* § 217(a), 98 Stat. at 2017–20 (codified as amended at 28 U.S.C. §§ 991, 994).

14. 28 U.S.C. § 994(b)(2), (c), (d).

15. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5 (U.S. SENT'G COMM'N 2018) (identifying appropriate and inappropriate grounds for departure).

16. 18 U.S.C. § 3553(b)(1); *see also* STITH & CABRANES, *supra* note 5, at 102–03 (noting that before *United States v. Booker*, 543 U.S. 220 (2005), this provision severely hampered district court ability to sentence below the Guidelines range).

17. *See* John F. Pfaff, *The Future of Appellate Sentencing Review:* Booker *in the States*, 93 MARQ. L. REV. 683, 688 (2009) (discussing different types of sentencing reforms in the states).

unusual case, but those sentencing decisions were subject to appellate review.[18] Examples of such systems include Arizona, California, and Washington, which created presumptive, mitigated, and aggravated sentences.[19]

Mandatory sentencing guidelines and presumptive sentencing systems were adopted only by a minority of jurisdictions.[20] Other jurisdictions curtailed judicial sentencing discretion through the use of mandatory minimum sentences. Some jurisdictions simply created new crimes with statutory mandatory minimum sentences. Whatever factual circumstance warranted the mandatory minimum sentence was included as an element of the new offense.[21] But creating new crimes was not the only approach to imposing mandatory sentences. Other systems treated the fact or facts triggering a mandatory minimum sentence purely as a sentencing matter to be decided by a judge by a preponderance of the evidence, rather than as an element of a new crime.[22]

Sentencing reform in the late twentieth century not only curtailed the authority of judges but also affected parole. The federal system[23] and some states[24] abandoned parole altogether in the name of "truth in sentencing."[25] And those states that retained parole changed their laws so that many crimes were either no longer parole eligible or required defendants to serve lengthy mandatory sentences before becoming eligible.[26]

When first confronted with these developments in the 1980s, the Supreme Court gave them its blessing. It upheld the Guidelines against a separation of powers attack in *Mistretta v. United States*.[27] And in *McMillan v. Pennsylvania*,[28] it rejected due process and Sixth Amendment challenges to so-called sentencing

18. Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 647 n.10 (1993). The presumptive sentence often depends not only on the offense of conviction but also on an offender's prior record of convictions.

19. *See* ARIZ. REV. STAT. ANN. §§ 13-604, 13-702 (Westlaw through end of the 48th Leg., 1st Reg. Sess. 2007); CAL. R. CT. 4.420 (Westlaw 2006) (amended 2007); WASH. REV. CODE ANN. § 9.94A.535 (Westlaw 2002); *see also* Cunningham v. California, 549 U.S. 270, 276–77 (2007) (describing the California system).

20. *See* Pfaff, *supra* note 17, at 688–89 (explaining that only eighteen states adopted structured sentencing systems that "set default sentences or ranges from which a judge cannot depart (either up or down) without making some sort of additional factual finding," though others adopted voluntary guidelines that "judges are simply encouraged, not required, to follow").

21. *See, e.g.*, Jones v. United States, 526 U.S. 227, 236–37 (1999) (collecting examples of states that created a new offense, "aggravated robbery," which required the defendant to have caused serious bodily injury, an element that was not required to convict for ordinary robbery).

22. *See, e.g.*, Act of Mar. 8, 1982, Act No. 1982-54, 1982 Pa. Laws 169 (codified as amended at 42 PA. CONST. STAT. § 9712 (Westlaw 1982)).

23. Doherty, *supra* note 10, at 995–96.

24. Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2747 (2020) (noting that from 1972 to 2007 "sixteen states abolished parole-release discretion").

25. *See* DITTON & WILSON, *supra* note 9, at 1.

26. Reitz, *supra* note 24, at 2752.

27. 488 U.S. 361 (1989); *id.* at 371, 374.

28. 477 U.S. 79 (1986).

factors.[29] The challenge in *McMillan* involved a state statute that imposed a five-year mandatory minimum sentence on defendants convicted of certain felonies if they possessed a firearm during the commission of their offense. Whether the defendant possessed a firearm was, according to the statute, to be determined by the judge by a preponderance of the evidence.[30] That is to say, the possession of a firearm was not considered an element to be proven to a jury beyond a reasonable doubt, but rather, it was only a factor for the judge to consider at sentencing in determining whether the mandatory minimum applied. The Supreme Court deferred to the Pennsylvania legislature's decision to alter the range of punishment by creating a statutory sentencing factor rather than by making possession of the firearm either a new element of the crime or a new offense.[31] The Court further held that there is no jury trial right to sentencing, even when a sentence turns on finding a specific fact.[32]

Fewer than fifteen years after affirming the constitutionality of sentencing factors in *McMillan*, the Supreme Court changed course. In *Apprendi*, the Court said these sentencing practices were limited by the Sixth Amendment.[33] *Apprendi* was the first time the Court ruled these practices unconstitutional, but it had signaled its concerns about altering a defendant's sentencing range based on judicial fact-finding the previous year in *Jones v. United States*.[34] *Jones* raised the question whether a federal carjacking statute—which increased the statutory maximum punishment if the defendant caused serious bodily injury or death—created new federal crimes or merely new sentencing factors. Writing for the majority, Justice Souter explained that increasing the statutory maximum sentence based on judge-found facts raised serious constitutional questions, including questions regarding the defendant's right to a jury trial.[35] To avoid those questions, the Court elected to construe the statute as creating new federal crimes rather than new federal sentencing factors.[36]

The questions the Court avoided in *Jones* were squarely presented in *Apprendi*. *Apprendi* involved a state statutory sentencing enhancement similar to the sentencing factor at issue in *McMillan*. But unlike *McMillian*, the enhancement in *Apprendi* increased the maximum sentence for defendants, rather than imposing a mandatory minimum sentence. The enhancement applied to defendants convicted of the unlawful possession of a firearm if they

29. *Id.* at 91, 93.

30. Act of Mar. 8, 1982, Act No. 1982-54, 1982 Pa. Laws 169 (codified as amended at 42 PA. CONST. STAT. § 9712 (Westlaw 1982)); *McMillan*, 477 U.S. at 81.

31. *McMillan*, 477 U.S. at 85–86.

32. *Id.* at 93.

33. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

34. 526 U.S. 227 (1999).

35. *Id.* at 240–51.

36. *Id.* at 251–52.

possessed the firearm in order to intimidate someone because of their race.[37] That factual finding—whether the defendant committed the crime to intimidate the victim based on race—was decided by the sentencing judge using a preponderance of the evidence standard.[38] The *Apprendi* Court struck down the statute. It held that, other than the fact of a prior conviction, any fact that increases the statutory maximum penalty for a crime must be submitted to a jury and proved beyond reasonable doubt.[39]

In striking down the New Jersey statute, the *Apprendi* Court cast doubt on *McMillan*, which had affirmed the constitutionality of statutory sentencing factors involving judicial fact-finding. The *Apprendi* Court characterized the "distinction between 'elements' and 'sentencing factors'" as "constitutionally novel and elusive."[40] The Court elected to distinguish between elements (which require jury fact-finding) and sentencing factors (which do not) by focusing on the effect of the statutory punishment enhancement. The *Apprendi* Court stated, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[41] Applying this "effect over form" framework to the New Jersey statute, the Court concluded that "the effect of New Jersey's sentencing 'enhancement' here is unquestionably to turn a second-degree offense into a first-degree offense, under the State's own criminal code."[42]

Put simply, *Apprendi* stated that whether a fact is an element, and thus subject to the Sixth Amendment, turns on what that fact does. If a fact increases the statutory maximum sentence by reclassifying a crime under the state's criminal code, then the fact is the functional equivalent of an element. But if a fact merely "supports a specific sentence *within the range* authorized by the jury's finding," then it is a sentencing factor, and the Sixth Amendment does not apply.[43]

37. *Apprendi*, 530 U.S. at 468–69.

38. *Id.*

39. *Id.* at 476. The *Apprendi* Court exempted previous convictions from its ruling because two years before, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), it had held that prior convictions that increase punishments need not be submitted to a jury or proven beyond a reasonable doubt. *Id.* at 239.

40. *Apprendi*, 530 U.S. at 494 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).

41. *Id.*

42. *Id.*

43. *Id.* at 494 n.19 ("This is not to suggest that the term 'sentencing factor' is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense.").

Apprendi was groundbreaking in its establishment of the Sixth Amendment sentencing doctrine. But when that doctrine was first announced, the importance of the ruling was not immediately clear. Because the Court limited the rule announced in *Apprendi* to increases in statutory maximum sentences, the Sixth Amendment sentencing doctrine did not appear to reach sentencing guidelines. But *Ring v. Arizona*[44] expanded the Sixth Amendment sentencing doctrine beyond statutory maxima—and in doing so, ensured that the doctrine would have a much broader effect.[45]

Ring involved a Sixth Amendment challenge to Arizona's capital sentencing regime. Arizona law permitted the imposition of the death penalty only in the presence of certain aggravating circumstances, and it assigned the task of finding those aggravating circumstances to the trial judge, not the jury.[46] Because the relevant statute said that the maximum penalty was death,[47] the new rule announced in *Apprendi* arguably did not apply. The judge was merely choosing whether to impose the maximum sentence of death or a lesser sentence. Indeed, the Supreme Court had said as much in *Apprendi* when it explained why the rule it announced was not foreclosed by a prior decision upholding the Arizona death penalty regime against constitutional attack.[48]

But the *Ring* Court rejected that reading of *Apprendi*. It relied on language from *Apprendi* indicating that the relevant constitutional question was whether the judicial fact finding increased the sentence a defendant could receive above the maximum sentence she could receive if he were "punished according to the facts reflected in the jury verdict alone."[49] Because a judge could legally impose the death penalty only after finding one or more aggravating factors identified in the statute, the Court concluded that those "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'"[50] And thus the Sixth Amendment applied.

It bears emphasizing that *Ring* could have gone the other way. Unlike the New Jersey statute in *Apprendi*, the statute at issue in *Ring* explicitly stated that the maximum punishment for first-degree murder was death. The Supreme

44. 536 U.S. 584 (2002).

45. *See* JOHN F. PFAFF, SENTENCING LAW AND POLICY 322 (2016) (stating that *Ring* clarified that *Apprendi* was not "a drafting rule" and as a result, "*Ring* would prove to be the intellectual forebear of *Blakely*"); Hessick & Berry, *supra* note 7, at 455–56 (explaining how *Ring* expanded the rule from *Apprendi*, but that expansion was not acknowledged until *Blakely v. Washington*, 542 U.S. 296 (2004)).

46. *See Ring*, 536 U.S. at 592–93 (describing the Arizona capital sentencing system).

47. ARIZ. REV. STAT. ANN. § 13-1105(C) (Westlaw 2001).

48. *Apprendi*, 530 U.S. at 497 ("[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting) (emphasis omitted))).

49. *Ring*, 536 U.S. at 588–89 (quoting *Apprendi*, 530 U.S. at 483).

50. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Court could have distinguished the statute in *Ring* from the statute in *Apprendi* on those grounds. But, once again, the Court focused on the effect of the statute, not merely what the statute said. Life in prison was the maximum penalty that Timothy Ring could receive based on his conviction alone.[51] Unless and until the judge found an aggravating circumstance, the judge could not sentence him to death. And this, according to the *Ring* Court, violated the Sixth Amendment.[52]

An acknowledgment of the full effect of *Ring*—and arguably the high-water mark of the Sixth Amendment sentencing doctrine—came soon after in *Blakely v. Washington*.[53] Decided only four years after *Apprendi* and two years after *Ring*, *Blakely* extended the Sixth Amendment sentencing right to sentencing guidelines. The *Blakely* Court held that mandatory sentencing guidelines can violate the Sixth Amendment if a judge's sentencing discretion is limited to a range narrower than the statutory range and if the sentencing range can increase only if the sentencing court makes factual findings. The *Blakely* Court explained that mandatory guidelines fell within the *Apprendi* rule because "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*."[54] The *Blakely* Court went on to clarify that

> the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.[55]

Blakely did not merely acknowledge the full effect of the *Ring* decision. It also expanded the doctrine beyond what the Court had previously set forth in *Apprendi* and *Ring*. In particular, it no longer relied, as an analytical matter, on the analogy to statutory elements that created new, aggravated crimes. That analogy worked in both *Apprendi* and *Ring* because those cases involved sentencing factors that were specifically identified in statutes. Those identified factors increased the maximum available sentence, and so the *Apprendi* and *Ring* Courts said that the factors operated as the functional equivalent of an element. But the state sentencing scheme at issue in *Blakely* did not limit judges to a finite list of aggravating factors. The list that appeared in the statute was "illustrative

51. *Id.* at 597 ("Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.").

52. *Id.* at 609.

53. 542 U.S. 296 (2004).

54. *Id.* at 303.

55. *Id.* at 303–04 (citation omitted) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 87 (Boston, Little, Brown, & Co. 1866)).

only and . . . not intended to be exclusive."[56] In other words, judges had to find aggravating factors in order to impose a higher sentence, but judges could also decide what those factors could be.

It is difficult to analogize this abstract fact-finding requirement to an element of a crime. Indeed, if a legislature enacted a criminal statute that imposed additional punishment on people who did something "aggravating" or "exceptional," the courts might strike down such a statute as unconstitutionally vague.[57] Rather than resembling an element of a crime, the idea that sentences on the higher end of the statutory range should be imposed only when there are "substantial and compelling reasons"[58] to do so seems like common sense. Indeed, that is presumably why legislatures enact criminal statutes with statutory ranges rather than single, fixed penalties—to permit judges to impose sentences at or near the top of the statutory range for those defendants who do things that make their crimes seem worse and lower sentences for those defendants who do not.

But the *Blakely* Court decided that *any fact-finding requirement* triggered the Sixth Amendment, regardless whether particular, previously determined facts had to be found. Imagine, for example, a statute said that judges should impose sentences above the presumptive range only if they first find "aggravating facts," and the statutes gave a nonexhaustive list of three aggravating facts—whether the defendant used a gun, whether the victim suffered a physical injury, and whether the defendant had previously been convicted of the same crime. In this hypothetical regime, a particular judge could decide that committing a crime in the presence of a minor is also an aggravating fact and then impose a sentence above the presumptive range on a specific defendant after finding that the defendant had committed the crime in front of a child. Following *Blakely*, such a sentence violates the Sixth Amendment sentencing doctrine because it requires additional fact-finding:

56. WASH. REV. CODE ANN. § 9.94A.390 (Westlaw 2000).

57. It is possible, but by no means certain, that such an element would be deemed unconstitutionally vague. While the Court has sometimes deemed qualitative standards impermissibly vague, *e.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983), it has also rejected vagueness challenges to such standards, *e.g.*, Schall v. Martin, 467 U.S. 253, 279–80 (1984). The Court's cases in this area are simply not consistent. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 371–72 (2019) (noting the inconsistency between *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), and *Nash v. United States*, 229 U.S. 373 (1913)). And the Court has recently stated that qualitative standards, standing alone, are not enough to render a statute unconstitutionally vague. *See* Johnson v. United States, 576 U.S. 591, 603–04 (2015) ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct . . . .").

58. State v. Blakely, 47 P.3d 149, 157 (Wash. Ct. App. 2002) ("Under the [Washington sentencing system], a trial court must impose a sentence within the standard range for the offense unless the court finds substantial and compelling reasons justifying an exceptional sentence."), *rev'd sub nom*. *Blakely*, 542 U.S. 296.

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.[59]

Following *Blakely*, it was clear that the Sixth Amendment sentencing doctrine had fundamentally undermined the constitutionality of structured sentencing, including the Guidelines.[60] Because the Guidelines required judges to find facts in order to determine the applicable Guidelines range, the federal system clearly violated the rule articulated in *Ring* and *Blakely*—that a jury must find, beyond a reasonable doubt, facts that increase a defendant's sentencing exposure. And so, the Supreme Court found that the mandatory Guidelines were unconstitutional in *United States v. Booker*.[61]

Notably, the Guidelines were not mandatory in all circumstances. Judges were permitted to impose a sentence outside the Guidelines range if they found "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[62] But the *Booker* majority dismissed this authority to sentence outside the Guidelines because it was "not available in every case, and in fact [was] unavailable in most."[63] Because judges were required to sentence within the Guidelines in a "run-of-the-mill" case, the Court deemed the Guidelines' mandatory rules that increased criminal penalties based on judicial fact-finding.[64]

The Supreme Court confirmed that *any* required fact-finding by judges violated the Sixth Amendment doctrine in *Cunningham v. California*.[65] That case involved California's statutory sentencing system which, like the Washington system at issue in *Blakely*, was a presumptive sentencing system.[66] Despite that key similarity, the Supreme Court of California relied on the intervening

59. *Blakely*, 542 U.S. at 305.

60. *See, e.g.*, Douglas A. Berman, *Sentencing Guidelines Are Dead! Long Live Sentencing Guidelines!*, SENT'G L. & POL'Y (June 25, 2004, 12:43 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/sentencing_guid.html [https://perma.cc/9FZM-LEVK] ("The Supreme Court's decision in *Blakely* seems to mean that the standard operating procedures for most sentencing guideline systems—including those of the federal sentencing guidelines—are no longer constitutionally sound.").

61. 543 U.S. 220, 226–27 (2005) (merits majority).

62. 18 U.S.C. § 3553(b).

63. *Booker*, 543 U.S. at 234.

64. *Id.* at 235.

65. 549 U.S. 270 (2007).

66. *See supra* text accompanying notes 17–19; *see also Cunningham*, 549 U.S. at 277–79 (describing the California system).

decision in *Booker* to decide that its sentencing system had survived *Blakely*.[67] The unusual remedy the U.S. Supreme Court had adopted in *Booker* had created confusion about what sort of judicial sentencing discretion could avoid triggering the Sixth Amendment—an issue that I take up at some length below.

The U.S. Supreme Court reversed the Supreme Court of California. While declining to further clarify the amount of discretion that federal judges enjoyed in the wake of *Booker*, the *Cunningham* Court reiterated that because the California system required judges to make factual findings in order to increase sentences, it violated the rule set out in *Blakely*.[68] In so holding, the Court rejected Justice Alito's contention in dissent that, as the majority put it, "a policy judgment, or even a judge's 'subjective belief' regarding the appropriate sentence, qualifies as an aggravating circumstance" under the California system.[69] The majority pointed to statutory language making clear that the term "circumstances in aggravation" was defined as "*facts* which justify the imposition of the upper prison term."[70]

Since deciding *Blakely* and *Cunningham*, the Court has, on several occasions, further expanded the doctrine. The doctrine, as originally formulated, initially applied only to increases in the maximum punishment; it did not forbid the adoption of sentencing factors that triggered a mandatory minimum sentence.[71] But in *Alleyne v. United States*,[72] the Court extended the doctrine to mandatory minimum punishments as well, holding that any factual finding that increases the required minimum punishment also must be proven to a jury beyond a reasonable doubt.

Alleyne was not the first case to address whether the rule from *Apprendi* applied to mandatory minimum sentences. The Court took up the question two years after *Apprendi* in *Harris v. United States*.[73] The *Harris* Court refused to apply the rule from *Apprendi* to mandatory minimum sentences. The Court justified its decision on several grounds. First, it noted that *Apprendi* had relied on the distinction between maximum and minimum sentences in reconciling its holding with *McMillan*.[74] Second, it noted that the mandatory minimum was already within the range of permissible sentencing without any additional fact-finding, and so defendants did not have a right to be sentenced below the mandatory minimum.[75]

67. People v. Black, 113 P.3d 534, 536 (Cal. 2005), *overruled by Cunningham*, 549 U.S. 270.

68. *Cunningham*, 549 U.S. at 288–89.

69. *Id.* at 279 (citing *id.* at 307–08 (Alito, J., dissenting)).

70. *Id.* (quoting CAL. R. CT. 4.405(d) (Westlaw 2006) (amended 2007)).

71. *E.g.*, Harris v. United States, 536 U.S. 545, 557 (2002), *overruled by* Alleyne v. United States, 570 U.S. 99 (2013).

72. 570 U.S. 99 (2013).

73. 536 U.S. 545 (2002), *overruled by Alleyne*, 570 U.S. 99.

74. *Id.* at 562–65.

75. *Id.* at 566.

The *Alleyne* Court rejected this analysis and overruled *Harris*. It reframed the Sixth Amendment sentencing doctrine as a simple test: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."[76] The Court then explained that adding or increasing a mandatory minimum sentence is an increase in the penalty for that crime because it "alter[s] the prescribed range of sentences to which a defendant is exposed . . . in a manner that aggravates the punishment."[77] The *Alleyne* Court bolstered this conclusion with historical evidence.[78] It also stated that its new rule would allow defendants to predict their sentencing range based on the charges in an indictment, and it would "preserve[] the historic role of the jury as an intermediary between the State and criminal defendants."[79]

The Supreme Court has also applied the Sixth Amendment sentencing doctrine to situations other than the calculation of sentences of incarceration. In *Southern Union Co. v. United States*,[80] the Court extended the doctrine to any factual findings that are necessary to the calculation of a criminal fine. And in *United States v. Haymond*,[81] the Court applied the doctrine to a mandatory sentence that was imposed in a supervised-release revocation hearing.

But at the same time the Court has expanded the Sixth Amendment sentencing doctrine, it has also dramatically undercut the doctrine. The biggest blow to the doctrine has been the remedy that the Court adopted in *Booker*. That is the subject of the next part.

II. UNDERMINING THE RIGHT WITH THE REMEDY

In *United States v. Booker*, five Justices agreed that the federal system, which was based on mandatory sentencing guidelines, violated the Sixth Amendment.[82] But a different five-Justice majority determined how to fix the problem.[83] This remedial majority was unwilling to submit the Guidelines' factual findings to a jury. The remedial majority was concerned that if the Court required juries to find sentencing facts, then parties would engage in plea bargaining over those facts. Plea bargaining over sentencing facts could lead to different sentencing outcomes in cases with similar facts—differences driven by lawyers' negotiating skills rather than differences that ought to drive sentences. Because Congress enacted the SRA to reduce sentencing disparities, the remedial majority thought that allowing plea bargaining over sentencing facts

76. *Alleyne*, 570 U.S. at 102 (citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10, 490 (2000)).

77. *Id.* at 108 (first citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000); and then citing *Harris*, 536 U.S. at 579 (Thomas, J., dissenting)).

78. *Alleyne*, 570 U.S. at 108–11.

79. *Id.* at 114 (citing United States v. Gaudin, 515 U.S. 506, 510–11 (1995)).

80. 567 U.S. 343 (2012).

81. 139 S. Ct. 2369 (2019) (plurality opinion).

82. United States v. Booker, 543 U.S. 220, 226–27 (2005) (merits majority).

83. *Id.* at 244–46 (remedial majority).

would be inconsistent with congressional intent.[84] Thus, instead of requiring federal prosecutors to submit sentencing enhancements to a jury, the remedial majority decided to make the Guidelines "advisory," rather than mandatory.[85]

"Advisory" guidelines, the Court explained, would not violate the Sixth Amendment right because they "recommended, rather than required, the selection of particular sentences in response to differing sets of facts."[86] Sentencing judges had long enjoyed the discretion to select particular sentences from within broad statutory ranges, and the Sixth Amendment sentencing cases have frequently affirmed that such discretion is constitutional, even though judges doubtlessly made factual findings when deciding what sentences to impose.[87] As a result, the *Booker* Court reasoned, a system that restored sentencing discretion to judges could remedy the Sixth Amendment problem with the Guidelines.[88]

Of course, giving trial judges sentencing discretion would hardly protect against sentencing disparity. If judges could ignore the Guidelines, then they could impose the same disparate sentences that they had prior to the SRA. And so the remedial majority sought to preserve a central role for the Guidelines. It did this by imposing two additional limitations to promote sentencing uniformity. First, it required sentencing judges to begin each sentencing by calculating the correct Guidelines range. Judges were instructed to "consider" that range in selecting a sentence, along with other factors identified in 18 U.S.C. § 3553(a).[89] Those § 3553(a) factors include the nature and circumstances of the offense, the history and characteristics of the defendant, the seriousness of the offense, the need to deter to criminal conduct, and the need to protect the public from further crimes of the defendant. The second limitation that the Court imposed was appellate review of sentencing decisions. Appellate courts were instructed to reverse "unreasonable" sentences in order to "iron out" differences in sentencing decisions.[90]

As I have explained elsewhere,[91] there is a fundamental tension between granting district courts discretion and preserving a central role for the

84. *Id.* at 255–58.

85. *Id.* at 245.

86. *Id.* at 233 (merits majority).

87. *E.g.*, Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (noting the history of judges' broad discretion in sentencing within statutory limits).

88. *Booker*, 543 U.S. at 259 (remedial majority).

89. *Id.* at 259–60.

90. *Id.* at 261–63.

91. Carissa Byrne Hessick, *A Critical View of the Sentencing Commission's Recent Recommendations To "Strengthen the Guidelines System"*, 51 HOUS. L. REV. 1335, 1337 (2014) ("[T]hese two goals—adherence to the Guidelines and district court discretion—are fundamentally in tension with one another."); Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717, 741 (2009) [hereinafter Hessick, *After* Kimbrough] (noting "the precarious balance the Court is attempting to strike between district court sentencing discretion and the preservation of

Guidelines. The *raison d'etre* for the Guidelines is to limit district court discretion and create sentencing uniformity. The *Booker* opinion gave little guidance regarding how the remedy would strike a balance between these two seemingly incompatible goals. But in subsequent decisions, it has become clear that the *Booker* remedy is intended to ensure that most sentences still fall within the Guidelines range (or very close to it). What is more, the discretion that district court judges have—specifically, their discretion not to follow the Guidelines—is not nearly as great as the *Booker* opinion suggested that it would be.

In tilting the balance of its remedy toward the Guidelines and away from district court discretion, the Supreme Court has hollowed out the Sixth Amendment sentencing right. Indeed, the Court appears to have created tension—if not irreconcilable conflict—with its earlier Sixth Amendment cases. As described in more detail below, there are three deeply problematic aspects of the post-*Booker* cases: First, the Court has repeatedly refused to recognize that district courts possess an unfettered power to sentence outside of the Guidelines range based on nothing more than a policy disagreement. Second, the Court has encouraged appellate court judges to review sentences in a manner it openly admits is designed to curtail district court discretion in order to have more sentences conform to the Guidelines. Third, while the Court has repeatedly reversed sentences that incorrectly calculate the Guidelines range, it has refused to require district court judges to engage in any independent sentencing analysis.

A. *Policy Disagreement*

In two early sentencing cases, the Court made clear that the Sixth Amendment sentencing doctrine applied to *any* factual findings, not merely those findings that are identified in the relevant statutes or guidelines. In *Blakely*, the Court said that the Washington sentencing system was unconstitutional because it required a judge to make a factual finding in order to increase a defendant's sentence above the presumptive sentencing range.[92] In *Cunningham*, the Court indicated that, so long as a judge was free to increase a defendant's sentence based on a policy judgment or the judge's "subjective belief" regarding the appropriate sentence, then the Sixth Amendment did not apply.[93]

some adherence to the Guidelines through appellate review" and describing those goals as being in tension with one another); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 1 (2008) ("These two objectives—requiring district court discretion and cabining that discretion through reasonableness review—are in tension with each other.").

92. *See supra* notes 53–59 and accompanying text.

93. *See supra* text accompanying notes 65–70.

Despite these early opinions about the scope of the Sixth Amendment sentencing doctrine, in the wake of *Booker*, the Supreme Court has resisted stating that federal judges are always free to sentence above or below the Guidelines range based on anything other than factual findings. It is difficult to square this resistance with a right that does not permit mandatory judicial fact-finding to increase sentences.

The Court first confronted this issue two years after *Booker* in *Kimbrough v. United States*.[94] *Kimbrough* involved a district court's authority to sentence a defendant outside of the Guidelines range based on a categorical disagreement with the policy underlying the crack-cocaine guideline. The government argued that the guideline could not be disregarded because it was derived from congressional policy.[95] The *Kimbrough* Court rejected that argument, holding that district courts have the ability to sentence outside of the Guidelines range based on a categorical disagreement with the disparity between crack and cocaine. That is to say, district courts were free to base their sentencing decisions on policy disagreements with the crack-cocaine guideline as opposed to case-specific factual circumstances.[96]

Although the *Kimbrough* Court held that district courts were free to sentence outside the Guidelines based on a policy disagreement with the crack-cocaine guideline, the Court suggested that there might be limits on the ability of district courts to impose sentences based on policy disagreements with other Guidelines.[97] The Court said that district courts were not constrained by the crack-to-cocaine sentencing ratio because the crack-cocaine guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role."[98] In "formulating Guidelines ranges for crack cocaine offenses," the Court elaborated, "the Commission looked to the mandatory minimum sentences . . . and did not take account of 'empirical data and national experience.'"[99] The Court noted that "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'"[100] And, in such an ordinary case—that is, in a case where the Guidelines in question *do* "exemplify the Commission's exercise

94. 552 U.S. 85 (2007).

95. *Id.* at 102 (citing Brief for the United States at 16, 25, *Kimbrough*, 552 U.S. 85 (No. 06-6330)).

96. *See id.* at 109–10.

97. *See id.* at 108–09. Notably, the government's brief in *Kimbrough* conceded that "the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Id.* at 101 (quoting Brief for the United States at 16, *Kimbrough*, 552 U.S. 85 (No. 06-6330)). But the Court did not adopt that concession. *Id.* at 108–09.

98. *Id.* at 109.

99. *Id.* at 109–10 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring), *vacated*, 552 U.S. 1306 (2008)).

100. *Id.* at 109 (quoting Rita v. United States, 551 U.S. 338, 350 (2007)).

of its characteristic institutional role"[101]—"closer review may be in order" when a district court bases its decision to impose a non-Guidelines sentence on a policy disagreement.[102]

The Court reiterated the possibility of "closer review" in a subsequent crack-cocaine case, *Spears v. United States*.[103] The Court once again repeated the suggestion that policy disagreements are permitted for some Guidelines, but not for others, in *Pepper v. United States*.[104] The *Pepper* Court stated that "a district court may *in appropriate cases* impose a non-Guidelines sentence based on a disagreement with the Commission's views. That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[105] Endorsing district court policy disagreement only in "appropriate" cases suggests that there are cases in which district courts do not have the power to sentence outside the Guidelines range on pure policy grounds.

This reading of *Pepper* as endorsing only limited district court authority to sentence outside of the Guidelines for nonfactual reasons was confirmed in *Peugh v. United States*.[106] Although *Peugh* did not involve a question of policy disagreement, the opinion explicitly noted that whether a district court's decision to sentence outside Guidelines ranges based solely on policy considerations is subject to heightened appellate review remains an open question.[107]

The Court has yet to explain what "closer review" might entail. District court sentencing decisions are presently reviewed for "reasonableness," which the Court tells us is equivalent to abuse of discretion review.[108] "Closer review" might mean that appellate courts need not accord any deference to the district court's sentencing decision, leaving them free to reverse whenever they would have imposed a different sentence. But whatever "closer review" might mean,

101. *Id.*

102. *Id.*

103. 555 U.S. 261 (2009) (per curium); *id.* at 264 (stating that a district court's "'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect").

104. 562 U.S. 476 (2011).

105. *Id.* at 501 (emphasis added) (citation omitted) (citing *Kimbrough*, 552 U.S. at 109–10). At issue in *Pepper* was whether a district court could impose a below-Guidelines sentence on a defendant based on post-sentencing rehabilitation, even though a federal statute and a Commission policy statement said that such evidence could not be considered at sentencing. *Id.* at 493, 500–01. The *Pepper* Court held the federal statute unconstitutional, and it criticized the Commission policy statement. *Id.* at 497–98, 501–02.

106. 569 U.S. 530 (2013).

107. *Id.* at 537 n.2.

108. *See* Hessick & Hessick, *supra* note 91, at 11 (noting that the Supreme Court did not "equate reasonableness review with the 'familiar' abuse of discretion standard" until after *Booker*).

it is a clear signal to district courts that they are more likely to be reversed on appeal.

Telling a district court that it is more likely to be reversed on appeal is not very far removed from telling them that they are not permitted to do something. A rule is still a rule even when it is enforced only through appellate review rather than directly on district courts. Nor is it clear how one could reconcile the idea of close appellate review with broad sentencing discretion. After all, appellate review is, by its nature, a limit on district court discretion.[109]

It may be necessary to dig deeper into what a "policy disagreement" means to understand why it is so troubling that the Court has refused to say that district courts may impose sentences based solely on policy disagreements with the Guidelines. A so-called policy disagreement with the Guidelines occurs when a judge imposes a non-Guidelines sentence, not because some fact or circumstance made a Guidelines sentence unsuitable *in a particular case*, but rather because the sentencing judge concluded that the sentence recommended by the Guidelines is unsuitable *in many or most cases*.[110]

Some examples may be helpful. If a judge decides to impose a lower sentence because the defendant turned himself in to authorities and immediately compensated the victim, then the judge has deviated from the Guidelines based on facts and circumstances in the particular case. If a judge decides to impose a lower sentence on an insider trading defendant because she believes that the Commission generally set the sentences for white-collar offenses too high, then the judge has deviated from the Guidelines based on a policy disagreement. The same is true if the judge decides to impose a higher sentence because she believes that the Commission generally set the sentences for white-collar offenses too low. What makes a disagreement a policy disagreement is that the judge is imposing a non-Guidelines sentence based on a generalizable disagreement with the Commission rather than the specific facts presented in a particular case.

The power to impose sentences based on policy disagreements with the Guidelines seems like it is logically required by the *Booker* remedy. Recall, the constitutional flaw in the mandatory federal sentencing regime prior to *Booker* was that sentencing judges were permitted to impose certain sentences only when they had made a factual finding.[111] If judges do not have the ability to

109. *See id.* at 29.

110. *Cf.* Spears v. United States, 555 U.S. 261, 267 (2009) (per curiam) (confirming that district courts may reject and categorically vary from the crack-cocaine range suggested by the Guidelines even in a "mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range").

111. At the time *Booker* was decided, the relevant limit on sentencing authority was whether the judge could not impose a higher sentence without a factual finding. The Court has since decided that factual findings which prohibit a judge from imposing a lower sentence also raise Sixth Amendment problems. *See supra* text accompanying notes 53–72.

impose a non-Guidelines sentence based on a policy disagreement, then they must impose a Guidelines sentence unless they identify specific facts that render a Guidelines sentence inappropriate. Indeed, the Court seems to have admitted as much when it stated in *Peugh* that "'a district court's decision to vary from the advisory Guidelines may attract greatest respect when' it is based on the particular facts of a case."[112] But if policy disagreements are not allowed, then the fatal constitutional flaw is reintroduced to the post-*Booker* sentencing system.

Of course, allowing judges to sentence outside of the Guidelines range based only on the facts and circumstances of a particular case does not return us to the pre-*Booker* system. Prior to *Booker*, the only facts and circumstances that mattered were those identified by the Guidelines.[113] But *Blakely* and *Cunningham* tell us that turning *more* facts and circumstances into permissible sentencing factors is not enough to satisfy the Sixth Amendment.[114] Even if the sentencing court were not limited to those facts and factors specifically listed in the Guidelines, the judge would have to identify *some fact* about the defendant's crime or personal background that warranted a non-Guidelines sentence.[115] It was the requirement of some factual finding—even when judges had the authority to decide which facts would matter—that led the Supreme Court to conclude that the Washington and California sentencing systems were unconstitutional. So, if the Supreme Court were to conclude that federal judges do not have the authority to base their sentences on policy disagreements, such a conclusion would overrule *Blakely* and *Cunningham*.

To be clear, the Supreme Court has not affirmatively said that district courts lack the authority to impose a sentence based on a policy disagreement with the Guidelines. Instead, it has framed the issue as an open question.[116] But given the Court's rulings in *Blakely* and *Cunningham*, the question should be considered entirely settled. And so one might suspect that the Court has repeatedly said that this is an open question because it is trying to minimize the number of judges who are willing to ignore the Guidelines on purely policy grounds by warning them that they might get reversed on appeal. This suspicion becomes more plausible when we read the Court's ruminations about "closer review" for policy disagreement in the context of other statements that the Court has made about federal sentencing in the wake of *Booker*. In particular,

112. *Peugh*, 569 U.S. at 537 (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007)).

113. To be clear, judges could consider facts and circumstances that were not identified in the Guidelines when selecting a sentence from within the narrow range identified by the Guidelines. But those facts and circumstances were irrelevant to the selection of the narrow Guidelines range itself.

114. *See supra* text accompanying notes 53–59, 65–70.

115. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 UNIV. PA. L. REV. 1631, 1668–69 (2012).

116. *Peugh*, 569 U.S. at 537 n.2.

the Court has said that it expects district court judges to impose Guidelines sentences in most cases.[117]

The Court also admits that its remedial cases were designed with the intent of ensuring more Guidelines sentences. For example, in *Peugh*, the Court said that "the federal sentencing regime after *Booker*" uses "procedural rules and standards for appellate review" in order to "encourage[] district courts to sentence within the guidelines."[118] It also stated that "the post-*Booker* sentencing regime puts in place procedural 'hurdle[s]' that, in practice, make the imposition of a non-Guidelines sentence less likely."[119]

Although the Court has, on multiple occasions, said that district court judges may not presume that a Guidelines sentence is appropriate,[120] it has also said that district judges may rely on "the Guidelines range to instruct them regarding the appropriate balance of the relevant federal sentencing factors."[121] Personally, I do not understand how using the Guidelines range to "instruct" oneself of the proper sentence is even remotely different than presuming that the sentencing range is reasonable. And the Court never bothers to clarify.

These statements strongly suggest that the Court expects district courts to impose non-Guidelines sentences only in unusual cases—that is, in cases where the facts and circumstances warrant a different sentence. Since the Court readily admits that it has consciously used "procedural rules and standards for appellate review" to create more within-Guidelines sentences,[122] it is hard not to suspect that they have left this question open on purpose and for the same reason.

117. *Id.* at 542 ("Normally, a 'judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range.'" (quoting Freeman v. United States, 564 U.S. 522, 529 (2011) (plurality opinion))).

118. *Id.* at 547.

119. *Id.* at 542 (quoting Miller v. Florida, 482 U.S. 423, 435 (1987), *abrogated by Peugh*, 569 U.S. 530).

120. Nelson v. United States, 555 U.S. 350, 352 (2009) (per curiam) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable."); Gall v. United States, 552 U.S. 38, 50 (2007) (stating that the district court judge "may not presume that the Guidelines range is reasonable"); Rita v. United States, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

121. Molina-Martinez v. United States, 136 S. Ct. 1338, 1347 (2016). Similarly, the *Rita* Court said: "Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning." *Rita*, 551 U.S. at 357. We know very little about the Commission's reasoning, and it is clear that the Commission simply relied on distorted calculations of past sentencing practice to set the sentencing ranges of many guidelines. *See* STITH & CABRANES, *supra* note 5, at 60–61 (describing and criticizing the origins of many guidelines); Hessick, *After* Kimbrough, *supra* note 91, at 726–33 (analyzing *Kimbrough*'s failure to accurately describe the development of the Guidelines). Because of this, it is unclear to me how a district court could know—let alone rely—on the Commission's reasoning about how to best balance the § 3553(a) factors.

122. *Peugh*, 569 U.S. at 547.

B. *Appellate Review*

As noted above, the *Booker* remedy sought to ensure sentencing uniformity by preserving appellate review of sentences.[123] Before *Booker*, appellate review was designed to ensure that district judges correctly calculated the Guidelines range and sentenced within that range. The SRA empowered the appellate courts to overturn any sentence that "was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."[124] It further granted the power to overturn any sentence that was "outside the range of the applicable sentencing guideline range" and was "unreasonable."[125] The SRA was later amended to clarify that "the court of appeals shall review de novo the district court's application of the guidelines to the facts" for any sentence.[126]

Booker rejected this de novo standard of review. It held that sentencing decisions would be reviewed only for "reasonableness."[127] According to the remedial majority, appellate review would recover some sentencing uniformity by allowing the circuit courts "to iron out sentencing differences" in the district courts.[128] But the *Booker* remedial opinion was vague about how courts of appeals would conduct reasonableness review. The dissenters expressed doubt that the remedial majority had given appellate courts sufficient guidance about how to conduct reasonableness review,[129] and the remedial majority's claim that that reasonableness review was "already familiar to appellate courts"[130] was not supported by the evidence that it cited.[131]

In the cases that followed *Booker*, the Court elaborated on what it meant by reasonableness review. In so doing, the Court developed an appellate doctrine that not only deviated from ordinary appellate principles[132] but also re-entrenched the Guidelines. Those subsequent cases made clear that appellate review is not about simply recapturing some semblance of uniformity. It is

123. *See supra* text accompanying notes 83–90, 118–19.

124. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(e)(1), 98 Stat. 1987, 2012 (codified as amended at 18 U.S.C. § 3742(f)).

125. *Id.*

126. PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670 (codified at 18 U.S.C. § 3742(e) (2004), *invalidated by* United States v. Booker, 543 U.S. 220 (2005)). The amended statute also directed appellate courts to determine whether a district court's departure "is not justified by the facts of the case." *Id.* § 401(d)(1).

127. United States v. Booker, 543 U.S. 220, 260–64 (2005) (remedial majority).

128. *Id.* at 263–64.

129. *Id.* at 311 (Scalia, J., dissenting in part); *see also id.* at 301 (Stevens, J., dissenting in part).

130. *Id.* at 261 (remedial majority).

131. Hessick & Hessick, *supra* note 91, at 9–10 (describing how reasonableness was not the appellate standard used in many of the cases the remedial majority claimed it was and further demonstrating that the reasonableness standard was not consistently applied when it was employed).

132. *Id.* at 18–28.

about encouraging trial courts to follow the Guidelines and discouraging them from making their own independent sentencing decisions.

The Court's first attempt to clarify appellate review came only a year after *Booker*. In *Rita v. United States*,[133] the Supreme Court said that appellate courts may "presume" that sentences that follow the Guidelines are reasonable. In other words, appellate courts are free to conduct a less searching review of sentences that fall within the Guidelines' advisory range.

A year after *Rita*, in *Gall v. United States*,[134] the Court declared that "reasonableness review" has two stages.[135] First, appellate courts determine whether a sentence is *procedurally* reasonable. According to *Gall*, a judge commits a procedural error if she fails to calculate (or improperly calculates) the Guidelines range, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence. Assuming that the judge properly calculated the Guidelines range, the appellate court must then determine whether the sentence imposed was *substantively* reasonable. *Gall* instructed the courts of appeals to "take into account the totality of the circumstances,"[136] and it also suggested that this review should be conducted no differently for sentences inside the Guidelines range than those outside of the range.[137] But this even-handed language was undercut elsewhere in the opinion. For example, in stating that appellate courts should consider the totality of the circumstances, the *Gall* Court mentioned only a single circumstance—"the extent of any variance from the Guidelines range."[138] It also said it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one."[139]

More recent cases confirm that the Guidelines are intended to play a substantial role in appellate review. In *Peugh* for example, the Court appeared to admonish appellate courts to conduct this substantive review of sentencing using the Guidelines range as a "meaningful benchmark."[140] Indeed, the Guidelines are the only substantive criteria that the Court has identified for appellate review of sentences post-*Booker*.[141]

133. 551 U.S. 338 (2007).

134. 552 U.S. 38 (2007).

135. *Id.* at 51.

136. *Id.*

137. *Id.* at 49 ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.").

138. *Id.* at 51.

139. *Id.* at 50.

140. Peugh v. United States, 569 U.S. 530, 541 (2013).

141. *See id.* at 542 (speaking of appellate review in terms of the Guidelines, for example, "appellate review for reasonableness using the Guidelines as a benchmark helps promote uniformity," and "[c]ourts of appeals may presume a within-Guidelines sentence is reasonable, and they may further 'consider the extent of the deviation' from the Guidelines as part of their reasonableness review" (citation omitted) (quoting Rita v. United States, 551 U.S. 338 (2007)).

Perhaps most importantly, the Court has admitted that it uses "standards for appellate review" in order to "encourage[] district courts to sentence within the guidelines."[142] And it seems to have worked. In both *Peugh* and *Molina-Martinez v. United States*,[143] the Court spoke in positive terms about how many Guidelines sentences are imposed, leading the Court to conclude that there is "considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges."[144]

But pushing judges to impose sentences that are either within the Guidelines—or very close to it—seems inconsistent with the logic of *Booker*. The *Booker* Court leaned heavily on the idea of what is legally permitted or legally authorized in developing the "advisory" Guidelines remedy. The remedial majority said judicial fact-finding for advisory Guidelines did not violate the Sixth Amendment because judges now had discretion to sentence above the Guidelines range without making any factual findings.[145] This discretion meant the advisory Guidelines range did not define the maximum punishment—the statute did.[146]

This argument—that district courts are authorized to sentence anywhere within the statutory sentencing range despite having to calculate the Guidelines range—might be persuasive if that were an accurate description of appellate review in the post-*Booker* system. But it is not. The Supreme Court has repeatedly treated the Guidelines differently for appellate review—reducing the scrutiny of within-Guidelines sentences and requiring no explanation for them, while at the same time requiring explanations for non-Guidelines sentences and telling appellate courts to rely on the extent to which a sentence deviates from the Guidelines in deciding whether the sentence is unreasonable.[147]

These developments suggest that the Court has calibrated appellate review of federal sentences to serve as an end run around its Sixth Amendment right. It has insisted that the post-*Booker* system complies with the Sixth Amendment because district court judges have the discretion to sentence outside of the Guidelines range. At the same time, it has permitted—if not encouraged—appellate courts to curtail that discretion and funnel cases back within the Guidelines range through their review practices. It is hard to understand why such a system complies with the Sixth Amendment—if it violates the Constitution to directly constrain sentencing authority through mandatory

142. *Id.* at 547.
143. 136 S. Ct. 1338 (2016).
144. *Id.* at 1346; *Peugh*, 569 U.S. at 543.
145. *See supra* text accompanying notes 86–88.
146. United States v. Booker, 543 U.S. 220, 245 (2005).
147. Gall v. United States, 552 U.S. 38, 51 (2007).

guidelines, it should equally violate the Constitution to constrain that discretion indirectly through reversal on appeal.

Perhaps in recognition of this fact, the Court sometimes frames its Guidelines-centric appellate review as something that circuit courts are permitted, but not required, to adopt. The most obvious example of this permissive approach is *Rita*'s "presumption of reasonableness."[148] After granting certiorari to resolve a circuit split over whether such a presumption was permitted, the Court declined to resolve the split, saying that those circuits that want to apply a presumption can, and those that do not want to need not.[149] The *Gall* Court also suggested that Guidelines-centric appellate review was permissive, rather than mandatory, in stating that appellate courts "may consider the extent of the deviation" when assessing whether a non-Guidelines sentence was unreasonable.[150] In more recent cases, the Court has suggested that Guidelines-centric review is an intended, rather than merely permissive, feature of appellate sentencing review.[151]

Appellate courts appear to have taken the Supreme Court at its word, and they have developed different appellate review standards.[152] The Court is well aware of those different legal standards, and it has opted not to review them and provide uniform appellate standards for the country.[153] It is difficult to understand why the Court has allowed different appellate legal standards to persist across the country—especially in light of the fact that it retained appellate review after *Booker* in order to promote uniformity. The most likely answer appears to be that the Court is willing to sacrifice uniformity of law—giving up its ordinary role of resolving different legal rules in the circuits[154]—

148. Rita v. United States, 551 U.S. 338, 347–49 (2007).

149. Hessick & Hessick, *supra* note 91, at 21 (noting that the *Rita* Court "made the presumption optional, stating that circuit courts 'may' choose to rely on the presumption and that the presumption is 'non-binding'").

150. *Gall*, 552 U.S. at 51.

151. Peugh v. United States, 569 U.S. 530, 541 (2013) (noting that the Court "aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review").

152. *See* Hessick, *After* Kimbrough, *supra* note 91, at 733–41 (collecting examples of different legal standards in the courts of appeals); Anne Louise Marshall, *How Do Federal Courts of Appeals Apply* Booker *Reasonableness Review After* Gall*?*, 45 AM. CRIM. L. REV. 1419, 1435–36 (2008) (same).

153. For example, the Court recently denied certiorari in a case that squarely presented two appellate review circuit splits—the policy disagreement question and a question about how deferential courts of appeals must be to non-Guidelines sentencing decisions. United States v. Demma, 948 F.3d 722, *cert. denied*, 141 S. Ct. 620 (6th Cir. 2020).

154. *See* Hessick & Hessick, *supra* note 91, at 21 n.106 (noting how odd it is that the Supreme Court refused to actually resolve the legal question in *Rita* and instead left appellate courts free to adopt the presumption of reasonableness or not because "[c]ertiorari is usually granted to resolve differences in the circuits; but *Rita* appears to endorse differing treatment in different circuits" (quoting Carissa Byrne Hessick & F. Andrew Hessick, Rita*: More for District Courts?*, SCOTUSBLOG (June 22, 2007, 12:23 PM), http://www.scotusblog.com/wp/uncategorized/rita-more-for-district-courts [https://perma.cc/6UZW-F645]).

in order to encourage more within-Guidelines sentences. These different legal standards have had noticeable effects on district court behavior. In the Fifth Circuit, which has adopted appellate review standards that push sentences towards the Guidelines,[155] 84.3% of sentences were imposed consistent with the Federal Sentencing Guidelines.[156] In the Second Circuit, which has adopted appellate review standards that afford district courts more latitude,[157] only 55.3% of sentences comply with the Guidelines.[158]

Regardless whether the Court is requiring or merely encouraging Guidelines-centric appellate review, such review means that a district court does *not* have authority or discretion to sentence within the full statutory sentencing range in all cases. If appellate courts are going to reverse them if they deviate too much from the Guidelines, then district court judges do not have the authority that they have been promised. If a government official is told that another government actor will overrule their decision, does the first official actually have the authority to take that action? That may be a somewhat philosophical way to frame the question, but I still think that the answer is "no." If, for example, a prosecutor indicts a suspect without probable cause and a court later dismisses the indictment, we would not say that the prosecutor had the authority to indict without probable cause. To the contrary, we would say that the indictment must be dismissed because the prosecutor was not authorized to indict in the absence of probable cause.

To be sure, the post-*Booker* appellate review system has extended the upper and lower limits of the Guidelines' sentencing ranges. The Supreme Court interprets the Commission's data to mean that Guidelines ranges continue to exert gravitational pull even on those sentences that are not precisely within their range—as the range changes up or down, so do sentences.[159] But it has not restored the authority of judges to impose any sentence within the full statutory sentencing range. Appellate courts are

155. *See* Hessick, *After Kimbrough*, *supra* note 91, at 737–40.

156. U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2018: FIFTH CIRCUIT 12 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/5c18.pdf [https://perma.cc/5L35-JDCX]. This figure includes "offenders whose sentences are determined to be either within the guideline range or outside the guideline range and for which the court cited a reason on Part V of the Statement of Reasons form (Departures Pursuant to the Guidelines Manual)." U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 210 (2018) [hereinafter 2018 ANNUAL REPORT AND SOURCEBOOK], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf [https://perma.cc/2E5P-2BKZ].

157. *See* Hessick, *After* Kimbrough, *supra* note 91, at 733–34.

158. U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2018: SECOND CIRCUIT 12 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/2c18.pdf [https://perma.cc/9856-ZTJJ].

159. Peugh v. United States, 569 U.S. 530, 543–44 (2013); Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016).

encouraged to reverse district judges' sentences that are dramatically different than the Guidelines range, unless they have identified factual circumstances that uniquely warrant such a sentence.

In *Booker*, the Court thought that the inability of a sentencing judge to impose the statutory maximum sentence in most cases triggered the Sixth Amendment.[160] But the Court's post-*Booker* cases have reintroduced that same problem in its federal remedy. The Guidelines range may not set the outer boundaries of sentencing authority in run-of-the-mill cases—appellate courts will permit some minor deviations—but neither do the statutory maximum and minimum sentences. To the extent that appellate courts will affirm a sentence only in extraordinary or unique cases—that is, to the extent that "a major departure should be supported by a more significant justification than a minor one"[161]—it remains a mystery why the facts that are necessary to support that "significant justification" need not be found by a jury.

C. *Independent Sentencing Analysis*

The *Booker* remedial opinion suggested that an "advisory" Guidelines system would look a lot like sentencing before the SRA. Not only did the Court rely on the history of judicial fact-finding in the aid of sentencing discretion to justify its remedy, but it also laid out a vision for sentencing that resembled that pre-SRA regime. The *Booker* opinion required judges to calculate the Guidelines' sentencing range (which required judges to find facts that were identified ex ante). But the *Booker* remedy also required district court judges to do more. It replaced the mandatory Guidelines regime with a statutory balancing test—a test for which the Guidelines range was but one of several factors. District court judges were instructed that the first step at sentencing was to calculate the appropriate Guidelines range. But after that calculation, judges were instructed to choose a sentence based on a balancing of all of the § 3553(a) factors.[162]

Those § 3553(a) factors look an awful lot like traditional sentencing discretion. The factors include "the nature and the circumstances of the offense"[163] and factors that appear to restate the major theoretical justifications for punishment—retributivism, deterrence, incapacitation, and rehabilitation.[164] These factors are written in sufficiently broad terms that they could support basically any sentence within the statutory range. What is more, they clearly require the sentencing judge to make policy judgments about appropriate sentences.

160. United States v. Booker, 543 U.S. 220, 234 (2005) (merits majority).
161. Gall v. United States, 552 U.S. 38, 50 (2007).
162. *Booker*, 543 U.S. at 259–60 (remedial majority).
163. 18 U.S.C. § 3553(a)(1).
164. *Id.* § 3553(a)(2).

But the Supreme Court's post-*Booker* jurisprudence appears to have abandoned any notion that judges must engage in this independent sentencing analysis. The Court continues to say that district court judges may be reversed for failing to calculate the Guidelines, calculating them incorrectly, or failing to justify a decision to sentence outside of the Guidelines.[165] But it requires trial judges to do absolutely nothing to incorporate any of the § 3553(a) factors other than the Guidelines.

On more than one occasion, the Supreme Court has made clear that district court judges need not say anything about their sentencing decision other than calculating the proper Guidelines range. Even when a defendant makes a detailed argument about why the Guidelines would be too harsh in his case, the Court will not require the judge to explain why those arguments do not affect her § 3553(a) analysis.

That is precisely what happened in *Rita*. The district court failed to address any of the defendant's arguments for a below-Guidelines sentence. Nor did it provide any indication of how it balanced the § 3553(a) factors. All one could glean from the district court's "statement of reasons" for the sentence it imposed was that the judge decided to impose a Guidelines sentence.[166] The Supreme Court affirmed the sentence despite the fact that there was nothing in the record to suggest that the judge had actually performed the independent § 3553(a) analysis required by *Booker* or why the judge did not accept the defendant's arguments in favor of a below-Guidelines sentence.[167]

To be sure, *Rita* did not say that trial courts could treat the Guidelines as mandatory. Although it affirmed the authority of courts of appeals to employ a presumption of reasonableness, the Court took pains to point out that the presumption was only an appellate presumption.[168] District courts were not permitted to presume that the Guidelines range was reasonable. And the Court reversed a sentence in a subsequent case when the district court stated on the record that it was presuming that the Guidelines range was reasonable.[169] But

165. *See, e.g.*, *Gall*, 552 U.S. at 51.

166. Rita v. United States, 551 U.S. 338, 345 (2007).

167. *Id.* at 358–59. Justice Stevens wrote a concurring opinion in which he expressed concern about the lack of independent analysis in the district court's statement of reasons. *Id.* at 367 (Stevens, J., concurring). But he nonetheless voted to affirm the sentence in order to respect the discretion of the district court judge since that discretion includes the discretion to impose a sentence within the Guidelines. *Id.*

168. *Id.* at 351 (majority opinion).

169. *See* Nelson v. United States, 555 U.S. 350, 350 (2009) (per curium). But at the same time that the *Rita* Court advised district court judges that they may not presume that Guidelines ranges are reasonable, it also insisted that the Commission, which writes the Guidelines, has institutional advantages over the district courts when it comes to balancing the § 3553(a) factors to arrive at a sentencing range. *Rita*, 551 U.S. at 347–49. If district courts are not supposed to presume that the Commission's Guidelines ranges are reasonable, one wonders why the Court insisted on explaining why the Commission is better situated to balance the § 3553(a) factors in typical cases.

in affirming a sentence without any indication that an independent analysis actually occurred, the Court signaled to district courts that appellate review functions only to ensure that they calculate the Guidelines range and justify any sentence outside of that range; it will not ensure that they undertake any independent analysis when they sentence within the Guidelines.

If *Rita* signaled the first move away from *Booker*'s independent analysis requirement, subsequent cases have dealt it a fatal blow. In *Molina-Martinez*, for example, the Supreme Court reviewed another within-Guidelines sentence where the district court provided no explanation for the sentence.[170] But while the *Rita* Court was willing to assume that the district court judge had engaged in an independent § 3553(a) analysis even though he had not explained the sentence, the *Molina-Martinez* Court assumed that the judge had *not* engaged in an independent § 3553(a) analysis. What is more, the *Molina-Martinez* Court raised no objection to the failure to conduct that analysis.[171]

Molina-Martinez involved a question of harmless error—namely whether a defendant was entitled to remand when the trial court had miscalculated the Guidelines range. Some appellate courts held that, because district courts were free to sentence anywhere in the statutory range after *Booker*, a Guidelines miscalculation alone was not enough to show "a reasonable probability" that the defendant would have received a different sentence if the calculation had been correct.[172] It seems entirely unremarkable to say that there is a "reasonable probability" that defendants would have received a different sentence if there was a calculation error. Misinformation at sentencing has long been deemed a reason to reverse an otherwise lawful sentence.[173]

Rather than simply relying on that precedent, the Court spoke about the post-*Booker* role of the Guidelines in a manner that was troubling. The *Molina-Martinez* Court noted that the district court "said nothing specific about why it chose the sentence it imposed" but instead "merely adopted the guideline applications in the presentence investigation report."[174] The Supreme Court seemed to think that this was precisely what the *Booker* remedy was designed to accomplish: "As intended, the Guidelines served as the starting point for the

170. Molina-Martinez v. United States, 136 S. Ct. 1338, 1344–45 (2016).

171. *Id.* at 1346–47 ("The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range. Judges may find that some cases merit a detailed explanation of the reasons the selected sentence is appropriate. And that explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines.").

172. *Id.* at 1341–42.

173. *See* Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Gonzalez-Castillo, 562 F.3d 80, 83 (1st Cir. 2009) (holding that defendants "have a due process right to be sentenced upon information which is not false or materially incorrect" (quoting United States v. Pellerito, 918 F.2d 999, 1002 (1st Cir. 1990))); *see also* United States v. Tucker, 404 U.S. 443, 447–48 (1972) (reaffirming *Townsend*).

174. *Molina-Martinez*, 136 S. Ct. at 1347.

sentencing and were the focal point for the proceedings that followed."[175] The idea that a judge merely imposing a Guidelines sentence without any explanation is the "intended" outcome of a federal sentencing is disturbing. The *Booker* remedy should not intend to have trial courts impose Guidelines sentences; it should intend to have trial courts seriously consider not only the Guidelines but also other information before arriving at an independent sentencing decision.

The *Molina-Martinez* Court not only suggested that district court judges have no obligation to explain their independent sentencing analysis, it also suggested that they have no obligation to engage in that analysis themselves: "District courts, as a matter of course, use the Guidelines range to instruct them regarding the appropriate balance of the relevant federal sentencing factors."[176] In other words, the Court believed that many (if not most) trial courts select the Guidelines range only because the Commission believed that was an appropriate sentence. Remarkably, when stating that only some judges believe that the sentences they choose are appropriate irrespective of the Guidelines range and that only some judges base the sentences they select on factors independent of the Guidelines, the *Molina-Martinez* Court did not indicate that the judges who are not engaging in an independent § 3553(a) analysis are violating the *Booker* remedy. Nor did it explain how these practices are consistent with the Court's prior admonitions that district court judges may not presume that the Guidelines range is a reasonable sentence.[177] These two failures suggest that the Court cares only about the proper application of the Guidelines; it does not care that judges are failing to conduct an independent analysis of their sentencing decisions under § 3553(a).[178]

In short, the *Molina-Martinez* Court assumed that the defendant in that case, as well as many others, was sentenced only on the basis of the Guidelines calculation and not on the basis of an independent § 3553(a) analysis. And yet the Court indicated that sentences that are based only on a Guidelines calculation are problematic only if there was an error in that calculation. This strongly suggests that the Court is no longer committed to ensuring that post-*Booker* sentencing includes an independent analysis of the appropriate sentence using the § 3553(a) factors and that its previous admonitions to district courts about not presuming that Guidelines sentences are reasonable were about style rather than substance. Without the independent-analysis requirement, the *Booker* remedy does nothing more than ensure judges *have* discretion to sentence

175. *Id.*

176. *Id.*

177. *See supra* note 120 (collecting cases).

178. *See, e.g.*, *Molina-Martinez*, 136 S. Ct. at 1342, 1345 (describing "the Guidelines' central role in sentencing" and mentioning only the Guidelines as something that the judge "must consult" when imposing a sentence).

outside the Guidelines, not that they *use* that discretion. And, as the previous sections explained, the Supreme Court has also used its post-*Booker* cases to cut back on that discretion.

III. SENTENCING, HISTORY, AND PRINCIPLES

From its inception, the Sixth Amendment sentencing doctrine has been grounded in history. The Justices who initially recognized the right relied on the importance of the jury during the Founding era to conclude that modern sentencing practices violated the constitutional right to a jury trial. The decisions in *Apprendi*, *Blakely*, and *Alleyne* are replete with references to opinions of the Founding Fathers, old treatises, and pre-twentieth-century cases. Although none of those sources specifically prohibit the modern sentencing practices, the Justices emphasize how Founding-era sentencing practices are different than modern practices. Those differences and the tendency of modern practices to undermine the importance of the jury as an institution led the Court to conclude that the Sixth Amendment prohibits the modern practices.

The Justices who fashioned the "advisory guidelines" remedy in *Booker* also relied on history. Before legislatures began to create their structured sentencing systems, there was a long tradition of allowing judges to select sentences from within broad statutory ranges, and there was agreement that judges could make whatever factual findings they wanted in order to exercise that discretion.[179] Relying on statements from the merits majority and previous Sixth Amendment cases affirming the constitutionality of judicial sentencing discretion, the *Booker* remedial majority insisted that, so long as judges had sentencing discretion, any factual findings they made to aid their exercise of that discretion was constitutional.[180]

But in subsequently "clarifying" the *Booker* remedy, the Supreme Court has endorsed a system that bears a much greater resemblance to the mandatory sentencing systems it struck down in *Blakely* and *Cunningham* than the discretionary sentencing systems that existed prior to the rise of structured

179. Alleyne v. United States, 570 U.S. 99, 116 (2013) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); Cunningham v. California, 549 U.S. 270, 285 (2007) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." (quoting United States v. Booker, 543 U.S. 220, 233 (2005))); United States v. Booker, 543 U.S. 220, 233 (2005) ("[W]hen 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."); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.").

180. *Booker*, 543 U.S. at 259.

sentencing. Indeed, many federal defendants receive no more protection from the Sixth Amendment at sentencing than did the people who were sentenced under the mandatory system that the Court purported to strike down in *Booker*.

The post-*Booker* cases seem to assume the constitutionality of the *Booker* remedy so long as it is not entirely identical to any of the systems that have been declared unconstitutional.[181] But if we use history not only as an authorization of the advisory guidelines system but also as a benchmark against which to assess that system, then it becomes clear that the advisory system—at least as it is currently formulated—cannot be justified by historical practice. In particular, the unwillingness to recognize district court authority to sentence based on policy disagreement with the Guidelines, the Guidelines-centric nature of appellate review, and the failure to ensure district courts are exercising independent sentencing judgment are all highly inconsistent with historical sentencing practice.

Not only have the Justices failed to use history as a limit on their "subsequent calibration" of the *Booker* remedy,[182] but they have also failed to ensure that the remedy actually protects the interests that the Sixth Amendment serves—namely the liberty interests of criminal defendants and the value of democratic input in individual criminal cases. Restoring some limited judicial discretion does not obviously further either of the principles behind the jury-trial right. It does not make it more difficult to punish defendants nor does it ensure democratic input into the decision. And to the extent that the Court has "recalibrated" the *Booker* remedy, it has done so in a way that exacerbates these problems.

A. *History as a Justification and a Limit*

The early American history of criminal punishment is difficult to study.[183] As a general matter, criminal practices often are not enshrined in published opinions, and so those who wish to study the history of criminal punishment must either rely on secondary accounts or look for original sources. The search for original sources is complicated by the fact that the federal government had very few criminal prosecutions, so one must look to the states. But state practices were not uniform, historical state records can be difficult to locate, and the effort required to collect and analyze documents from all of the states can be time-consuming and difficult.

181. In *Peugh*, the Court stated that the *Booker* remedy has been "subsequently calibrated" in a manner "intended to promote sentencing uniformity while avoiding a Sixth Amendment violation." Peugh v. United States, 569 U.S. 530, 550 (2013).

182. *Id.* at 549.

183. *See* Hessick & Berry, *supra* note 7, at 469 n.100 (discussing the difficulty of locating reliable historical sources that describe sentencing practices).

Even if the history surrounding early American sentencing practices were easy to discover, modern sentencing cases present another difficulty. Many of the modern sentencing practices that the Court must evaluate do not appear to have existed in the Founding era. Because those practices did not exist, history cannot definitively tell us whether the original understanding of the Sixth Amendment would have permitted or prohibited the practice. Instead, the Justices have to make their own decisions about what to permit and what to prohibit, though they often do so while claiming the mantle of originalism.

One prominent example of this difficulty is the Court's decision in *Oregon v. Ice*.[184] *Ice* involved a state statute that regulated the imposition of consecutive sentences for those defendants who were convicted of multiple crimes. The Oregon statute required a judge to find one or more statutorily identified facts in order to impose consecutive sentences.[185] If the judge did not find such a fact, then the defendant was entitled to serve the sentences for those different crimes concurrently (that is, at the same time).

Neither the majority nor the dissent identified any early American practice that conditioned the imposition of consecutive sentences on judicial fact-finding. And both agreed that states had historically left the question whether to impose consecutive or concurrent sentences to the judge, who could decide the issues as a matter of her discretion.[186] The majority interpreted this common-law practice of judicial discretion as evidence that the Oregon statute did not implicate the Sixth Amendment.[187] But the dissenters interpreted it as the opposite—that to the extent judges could make the decisions, their authority to do so could not be conditioned on mandatory fact-finding.[188]

Advisory guidelines pose the same methodological problem that occurred in *Ice*. No advisory guidelines existed at the time that the Constitution was written, and so we cannot know for sure whether the Founders would have believed that such a sentencing system violated the Sixth Amendment.[189] While the lack of historical analogue was seen as a reason not to deem a practice unconstitutional in *Ice*, the Justices who formed the majority in *Jones* and *Apprendi* took the opposite approach. They acknowledged that "the scholarship of which we are aware does not show that a question exactly like this one was

184. 555 U.S. 160 (2009).

185. OR. REV. STAT. ANN. § 137.123 (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.).

186. *Ice*, 555 U.S. at 168–69; *id.* at 174–76 (Scalia, J., dissenting).

187. *Id.* at 168–70 (majority opinion).

188. *Id.* at 175–76 (Scalia, J., dissenting).

189. This problem of how to assess the constitutionality of a practice that did not exist at the Founding is hardly limited to sentencing. It is a methodological challenge for originalism more generally. As an example of how this is a methodological challenge for originalism, see the dueling opinions of Justice Scalia and Justice Thomas in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring), and *id.* at 371–85 (Scalia, J., dissenting).

ever raised and resolved in the period before the framing,"[190] but ultimately concluded that the fact that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding" was a reason to deem those modern practices unconstitutional.[191]

Even though we do not have clear evidence that the original understanding of the Sixth Amendment would have forbidden advisory sentencing guidelines—that is, even though we do not have an authoritative Founding era court opinion in which judges said such practices are unconstitutional—there are still strong reasons to view the current *Booker* remedy with constitutional suspicion. In particular, the three features of the remedy described in Part II—the unwillingness to recognize district court authority to sentence based on policy disagreement with the Guidelines, the Guidelines-centric nature of appellate review, and the failure to ensure district courts are exercising independent sentencing judgment—look incredibly different than the historical sentencing practices that supposedly justify them. And, as described more fully in the next section, an advisory guidelines regime fails to protect the principles underlying the Sixth Amendment.[192]

Let us first examine the Court's unwillingness to state that district court judges may sentence outside of the Guidelines based only on policy disagreement.[193] This unwillingness is impossible to square with the historical practice that the Court relied on to fashion the *Booker* remedy. Specifically, the *Booker* remedy relied on our history of broad judicial sentencing discretion. As the *Booker* Court said, "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."[194] Judges enjoyed that discretion because sentencing was thought to be a circumstance-driven and defendant-specific endeavor. Judicial fact-finding at sentencing was not limited to specific sentencing factors because it was widely believed that those facts that ought to increase or decrease sentences could not be identified ex ante.[195]

Next, let us consider the Court's appellate review doctrine after *Booker*.[196] It fares even worse when compared to historical practice. Before the SRA was passed, appellate review of federal criminal sentences was nonexistent in most

190. Jones v. United States, 526 U.S. 227, 244 (1999).

191. Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (emphasizing that, as a general rule, there should be no doubt as to what judgment should be given if a defendant is convicted).

192. *See infra* Section III.B.

193. *See supra* Section II.A.

194. United States v. Booker, 543 U.S. 220, 233 (2005).

195. *See* Hessick & Berry, *supra* note 7, at 474–75.

196. *See supra* Section II.B.

cases.[197] So long as a sentence was within the range authorized by statutes, appellate courts would refuse to hear any appeal from a judge's sentencing decision. This refusal was based on a federal statute passed in 1891, which was generally understood to have stripped appellate courts of jurisdiction to hear appeals from federal criminal sentences.[198] Before that statute was passed, federal appellate courts "had power to correct harsh sentences on appeal."[199] The states also generally declined to provide appellate review of sentences within the authorized statutory range. A mid-twentieth-century review of the matter found fewer than a dozen states that authorized appeals from sentencing decisions.[200] Those states which permitted appellate review of sentencing did so under quite deferential standards. Appellate review basically served only as a check on excessively harsh sentences.[201]

To be sure, there were exceptions to the federal appellate courts' refusal to hear appeals from sentences within the statutory range. Appellate courts would reverse a sentence within the statutory range in cases where the sentencing courts based their decisions on "material misinformation [or] upon constitutionally impermissible considerations," such as race.[202] Such sentences were said to violate defendants' constitutional rights, regardless whether they were authorized by statute.[203] In addition, several circuit courts held that

197. *See* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("[T]he general proposition [is] that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

198. STITH & CABRANES, *supra* note 5, at 197–98 n.3.

199. Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 259 (1962) ("Prior to 1891, the old circuit courts had power to correct harsh sentences on appeal; and the power was exercised. But the language of the 1891 statute creating the new appellate courts was thought to 'repeal' that grant of authority; and since 1891 federal upper courts have generally denied themselves any power to revise sentences." (footnotes omitted)).

200. Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1453 (1960) (noting that eleven states provided some form of review of criminal sentences).

201. *See, e.g.*, State v. Kunz, 259 A.2d 895, 901–03 (N.J. 1969) (noting a defendant's right to appeal from a sentence that is "manifestly excessive"); Montalto v. State, 199 N.E. 198, 200 (Ohio Ct. App. 1935) (stating that "the rule generally applied may be that a reviewing court will not disturb a sentence as excessive, provided it is within the limits prescribed by law," but on the other hand, "if the sentence appears to be very much greater than the proper protection of society demands, and the record justifies the conclusion that the sentence was probably the result of prejudice rather than the exercise of a sound discretion, a reviewing court has the power to relieve against the excessiveness of the sentence").

202. United States v. Colon, 884 F.2d 1550, 1552 (2d Cir. 1989); *see also* Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 6 n.19 (1997); *Appellate Review of Sentences*, *supra* note 199, at 259 ("A sentence will be vacated when a reviewing tribunal finds that it is based upon information which is so clearly incorrect or upon criteria so improper as to constitute a violation of the defendant's right to due process.").

203. *See, e.g.*, Townsend v. Burke, 334 U.S. 736, 740–41 (1948); *see also* United States v. Tucker, 404 U.S. 443, 447–49 (1972) (reaffirming *Townsend*).

sentencing judges could not impose the statutory maximum punishment based solely on the crime of conviction. Those courts said district court judges were required to individualize sentences based on the facts or circumstances of the defendant's offense and personal background.[204] The circuits justified their intervention in sentencing decisions on the theory that, when the sentencing court does not actually exercise its discretion when imposing a sentence, then "the appellate court does not usurp the discretion vested in the district court when it reviews the sentence."[205]

Importantly, even these modest appellate limits on district court sentencing authority often could not be enforced. As a practical matter, appellate courts were unable to review the reasons behind many sentencing decisions because sentencing courts were not required to explain the sentences that they imposed.[206] When lower courts did not explain their sentences, appellate courts had little or no ability to determine whether the sentencing judges exercised their discretion in a prohibited way.

To put a finer point on it, it is extremely difficult to understand why the Court believes that this Guidelines-centric appellate review satisfies the Sixth Amendment. The only real justification that the Court has given for the *Booker* remedy is that judicial fact-finding in aid of judicial sentencing discretion has historically been understood to stand outside of the Sixth Amendment. But the appellate review that the Court has created in its post-*Booker* cases looks nothing like the sort of appellate scrutiny that criminal sentences received in the discretionary sentencing systems that the Court uses as a historical analogy for its post-*Booker* advisory system. In those discretionary systems, appellate review was limited to a very narrow set of circumstances and it was exceedingly deferential.[207] Outside of those narrow circumstances, what sentence to impose and why were questions left to the trial judge, leading to the perception that sentencing courts could impose sentences for any reason or no reason at all.[208]

There can be no real dispute that appellate review in the post-*Booker* system does not resemble appellate review in discretionary sentencing regimes:

204. *See, e.g.*, United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973); United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974); United States v. Daniels, 446 F.2d 967, 970–71 (6th Cir. 1971); Woosley v. United States, 478 F.2d 139, 143–44 (8th Cir. 1973); United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir. 1970).

205. United States v. Bates, 852 F.2d 212, 220 (7th Cir. 1988).

206. O'DONNELL ET AL., *supra* note 11, at 2–3 (noting that due process protections, including a statement of reasons for government action, that apply to agency action appear not to govern federal sentencing).

207. *See supra* note 179 and accompanying text.

208. *See* O'DONNELL ET AL., *supra* note 11, at 2–3 ("[T]here is no requirement that the sentence have any rational basis whatsoever."); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 61 (2006) ("From the nineteenth through the mid-twentieth century, sentencing judges enjoyed almost unfettered discretion. . . . Sentencing judges were free to select any sentence within the range for any reason or no reason at all.").

post-*Booker* appellate review exists to push district court judges to sentence within or close to the Guidelines range, rather than merely to correct excessively harsh sentences. If anything, post-*Booker* appellate review looks like a slightly watered-down version of the pre-*Booker* appellate review: district court judges will be reversed if they fail to make required factual findings and calculate the correct Guidelines range. And while appellate courts will permit minor variations from the Guidelines range, they will demand additional explanation and fact-finding before permitting sentences that are significantly different than the Guidelines range. Indeed, many appellate reversals are of sentences that appellate judges deem too lenient[209]—a stark contrast with historical appellate review, which was all about reversing sentences that were too harsh.[210]

Finally, let us examine the Court's failure to ensure that district court judges are engaged in any independent sentencing analysis.[211] That failure is also entirely inconsistent with historical practice. It is only if the sentencing judge takes seriously her responsibility to engage in a § 3553(a) analysis that post-*Booker* sentencing resembles the broad discretionary systems that the Court tells us do not implicate the Sixth Amendment. A judge who engages in the § 3553(a) analysis must not only engage in the fact-finding required by the Guidelines, but she also must inquire more broadly into the facts and circumstances of the crime and the character and background of the offender. The judge must decide whether the Guidelines sentence is longer than necessary to protect the public from future crimes against the defendant, or whether the Guidelines sentence is long enough given the seriousness of the offense. These broad judgment calls are precisely the sort of nonfactual findings that the *Cunningham* Court indicated were the difference between a system that triggers the Sixth Amendment and one that does not.[212]

In abandoning the independent-analysis requirement, the post-*Booker* cases have made judicial discretion, rather than individualized sentencing, the touchstone of the federal sentencing system. So long as a judge has the authority to engage in an independent analysis, it does not matter whether she actually engages in that analysis. Put differently, it is the *availability* of judicial

209. For example, in 2018 appellate courts affirmed sentencing decisions in appeals by defendants 71.3% of the time and only revered in slightly more than 10% of appeals. 2018 ANNUAL REPORT AND SOURCEBOOK, *supra* note 156, at 180 tbl. A-2. The remaining appeals had mixed outcomes; they were reversed in part and affirmed in part. But when the government (as opposed to the defendant) appealed a district court sentencing decision, the outcome was dramatically different—only 24% of sentences were affirmed and more than 70% of sentences were reversed. *Id.* at 183 tbl. A-3. While there are clearly far more appeals by defendants than by the government, *see id.* at 180 tbl. A-2, 183 tbl. A-3 (recording 3,224 appeals by defendants as compared to twenty-five appeals by the government), these figures demonstrate that appellate courts are far more likely to reverse a sentence that the government says is too lenient than a sentence that a defendant says is too harsh.

210. *See supra* note 201.

211. *See supra* Section II.C.

212. *See supra* text accompanying notes 65–70.

discretion, rather than the *exercise* of that discretion, that the post-*Booker* Court has secured for defendants.

A judge who fails to engage in an independent § 3553(a) analysis—that is, a judge who is not engaging in individualized sentencing—is continuing to apply the Guidelines no differently than in the pre-*Booker* system. When individual judges mechanically apply the Guidelines, and when litigants are told that arguments about why a Guidelines sentence is flawed are better directed to the Commission rather than to sentencing judges,[213] then the defendants in those cases are in the same position as defendants under mandatory Guidelines. Put simply, the Guidelines are mandatory in their cases.

Indeed, allowing district court judges to avoid any independent sentencing analysis also runs afoul of historical practice. As noted above, one of the few times that appellate courts would reverse a sentence on appeal was if a judge explicitly refused to engage in any individualized sentencing analysis and instead imposed a sentence based on the crime of conviction alone.[214] Judges who do not engage with arguments about why a non-Guidelines sentence is appropriate seem no different than judges who refused to individualize sentences prior to the SRA. Given that the reason judges were historically permitted to engage in fact-finding was that the facts were deemed necessary to individualize sentences,[215] the current failure to require individualization seems impossible to square with historical practice.

B. *Advisory Guidelines and Sixth Amendment Principles*

In addition to being at odds with sentencing history, advisory guidelines do not advance the two major interests that the Sixth Amendment protects—the liberty interests of criminal defendants and democratic input in individual criminal cases.[216] The Sixth Amendment protects criminal defendants by

213. For example, the Seventh Circuit has declared that, when faced with defense arguments about why a Guidelines sentence is inappropriate, if a judge is "not persuaded by the argument, it may pass over it in silence." United States v. Schmitz, 717 F.3d 536, 542 (7th Cir. 2013). The court noted that while judges *may* address arguments that challenge the policy wisdom of a Guidelines sentence, "[a]rguments urging a reexamination of a particular guideline are more naturally addressed to the Sentencing Commission." *Id.*

214. *See supra* text accompanying notes 202–05.

215. *See* Hessick & Berry, *supra* note 7, at 474–75.

216. The individual right is protected in the text of the Sixth Amendment, which reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. The democratic input is made clear in Article III, which does not frame the right in individual terms: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." *Id.* art. III, § 2, cl. 3. For more on the Article III role for the jury, see Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 446 (2009); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 195–97 (2005); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1705–06 (2000).

making it more difficult to convict them of a crime.[217] It accomplishes this by requiring a trial (which is expensive) in front of a jury (who may be more skeptical of government power than public officials) and by requiring that the defendant's guilt be proven beyond a reasonable doubt (a relatively high standard of proof). The Sixth Amendment sentencing doctrine further protects defendants by ensuring that these protections apply to all facts that, by law, increase punishment.[218]

The Sixth Amendment does more than just secure individual rights for defendants; it also serves a structural purpose. It allocates certain powers to the jury—the power to convict—and those powers serve as a check on the three branches of government.[219] Criminal juries obviously serve as a check on the executive's power to enforce the law—after all, the executive cannot punish anyone without convincing a jury to convict—but they also can limit the legislature's power by refusing to convict under unjust laws.[220] And while judges have the power to enter the judgment of conviction, they cannot do so in the absence of a guilty verdict from the jury or a guilty plea from the defendant.

The structural check provided by the Sixth Amendment is important, the Founding generation explained, because it provides a democratic check on government officials.[221] Voting provides a check at the wholesale level—allowing voters to select and reject the officials who make and enforce our laws. Juries provide a check at the retail level—allowing voters to accept or reject government decisions to punish in individual criminal cases.[222] That retail-level check is extremely important for democracy. Thomas Jefferson once said that, if he had to choose between democratic participation in the legislature and democratic participation in the judicial branch in the form of juries, he would choose juries.[223]

217. *See* Jones v. United States, 526 U.S. 227, 245–46 (1999) (discussing Sir William Blackstone and other sources for the importance of the jury as an individual right).

218. Alleyne v. United States, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

219. F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 182 (2019).

220. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–61 (2003) (explaining how the jury's power to nullify served "as a potent check on the legislature").

221. Blakely v. Washington, 542 U.S. 296, 305–06 (2004).

222. *See generally* Appleman, *supra* note 216, at 405–14 (providing historical support for the democratic importance of the jury right).

223. In July of 1789, Thomas Jefferson wrote, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." Letter from Thomas Jefferson to Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 283 (Julian P. Boyd ed., 1958). The majority in *Blakely* cited this statement from Jefferson as support for its contention that the "jury trial is meant to ensure [the people's] control in the judiciary." *Blakely*, 542 U.S. at 306.

In theory, both of these concepts—protecting defendants and providing a democratic check—are important. In practice however, modern American juries rarely serve either purpose. Plea bargains, rather than jury trials, are the dominant method of resolving cases.[224] Fewer than five percent of defendants convicted of a crime in this country are found guilty by a jury—and that number is even lower in some jurisdictions.[225] The remaining defendants plead guilty.

To be sure, things would be worse in the absence of the Sixth Amendment sentencing doctrine. Without the Sixth Amendment sentencing doctrine, legislatures could make jury trials even less important. They could create an entire criminal code that applied only at sentencing and limit the right to a jury and to proof beyond a reasonable doubt only to trivial allegations of wrongdoing. As the Supreme Court explained in *Blakely*, without the Sixth Amendment sentencing doctrine,

> the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene.[226]

Not only could judges make these other determinations, but they could use a lower standard of proof than proof beyond a reasonable doubt.

The Sixth Amendment sentencing doctrine gives defendants the right—at least on paper—to demand a jury trial on every disputed fact, including those that the legislature would rather label sentencing factors.[227] And if they decide to plea bargain, then in theory the defendants will be able to negotiate a better

224. Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.").

225. NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/V4WM-GC4Z] ("[I]n recent years *fewer than 3%* of federal criminal defendants chose to take advantage of [the right to trial,] one of the most crucial constitutional rights."); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/Q5F7-XBCH] (reporting that only two percent of federal defendants who were convicted went to trial, and reporting similar numbers for states: "In 2017 – the year with the most recent data – jury trials accounted for fewer than 3% of criminal dispositions in 22 jurisdictions with available data, including Texas (0.86%), Pennsylvania (1.11%), California (1.25%), Ohio (1.27%), Florida (1.53%), North Carolina (1.66%), Michigan (2.12%) and New York (2.91%)."); *see also Lafler*, 566 U.S. at 170 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

226. *Blakely*, 542 U.S. at 306.

227. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

bargain because treating sentencing facts as elements gives them more bargaining power.[228] In practice, however, we find that prosecutors have overwhelming leverage, defendants have insufficient information, and real people do not behave as economic models predict.[229]

That the Supreme Court allows defendants to so easily waive their Sixth Amendment rights in plea bargaining significantly diminishes the role of juries as a democratic check on public officials. And because the Court allows prosecutors to pressure and threaten defendants to waive their right to a jury trial—behavior that the courts would never permit if other constitutional rights were at risk[230]—the Sixth Amendment sentencing right does not provide much protection for individual defendants either. To be clear, these are problems associated with the Court's plea-bargaining doctrine, not its sentencing doctrine. But the Court's plea-bargaining doctrine effectively renders its Sixth Amendment sentencing doctrine moot.

The irony of plea bargaining undermining the Sixth Amendment sentencing doctrine is that the remedial majority in *Booker* relied on the prevalence of plea bargaining in refusing to remedy the Sixth Amendment violation by requiring the prosecution to prove all of the facts required by the Federal Sentencing Guidelines to a jury beyond a reasonable doubt.[231] The remedial majority thought that plea bargaining over sentencing facts would lead to less uniformity in sentencing, and it was probably correct that sentencing disparity would result from plea bargaining over sentencing facts. But again, that is a problem with the Court's plea-bargaining doctrine, which largely defers to prosecutorial charging decisions and which does not contemplate any significant judicial review of plea-bargaining negotiations.[232] Consequently, plea bargaining already results in all sorts of disparity, and this disparity has significant effects on sentencing decisions.[233]

Irony aside, it is hard to understand how the Court could possibly seek to strike a balance between the right to a jury trial and a desire to achieve uniform

228. *See, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

229. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011).

230. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 187–88 (2019); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (observing that the criminal waiver doctrine does not apply to the waiver of many criminal rights, including the right to a jury trial).

231. *See supra* text accompanying notes 83–85.

232. *E.g.*, United States v. Batchelder, 442 U.S. 114, 124–25 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Oyler v. Boles, 368 U.S. 448, 455–57 (1962).

233. *See generally* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2 (2013) (presenting empirical evidence to demonstrate that prosecutors' discretionary charging, plea bargaining, and fact-finding cause significant sentencing disparity).

results in the criminal justice system. Juries are not well designed to provide uniformity; they are made up of laypeople who sit for only one case at a time. And juries have long been criticized for their lack of predictability and uniformity.[234] When it comes to jury verdicts, we see inconsistent results not only across juries but sometimes even within a single jury's verdicts.[235]

But the question we need to ask is not whether the Court *can* balance uniformity and the right to a jury trial. Given the path that the Court took in *Booker*, attempting that balance is unavoidable. Instead, we must ask how much the Justices can (and should) tilt that balance in favor of uniformity. At present, it seems as though the Court may be on a path that tilts the balance just short of reinstating mandatory Guidelines.[236] But perhaps that tilt could be arrested—and perhaps some modicum of balance could be restored—if we assess the Court's "subsequent calibration" of the remedy against the backdrop of the principles underlying the right to a jury trial.

Even without looking at how the Court has privileged the Guidelines in its post-*Booker* cases, it is important to note that restoring judicial discretion does not obviously further either of the principles behind the jury trial right. It does not make it more difficult to punish defendants—judges can impose harsher sentences without finding any additional facts beyond a reasonable doubt. Nor is there is any democratic input into the sentencing decisions in individual cases because juries are excluded.

One could argue that increased judicial sentencing discretion is likely to lead to more carefully drafted criminal codes with narrower sentencing ranges—a result that could inject democratic input into sentencing decisions during the legislative process. The people, through their elected legislators, determine what punishment range ought to correspond to a particular crime. Because the voting public knows that a judge is empowered to impose the maximum sentence upon a finding of guilt, so the argument goes, legislatures will only enact statutes with maximum authorized punishment that is appropriate upon

234. *See* Andrew Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 394–406 (2018) (collecting sources).

235. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 777–81 (1998) (describing inconsistent verdicts in cases involving multiple-count indictments and multiple-defendant cases).

236. The following language from *Peugh* suggests as much:

> Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our *ex post facto* cases, in contrast, have focused on whether a change in law creates a "significant risk" of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely. The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: it is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.

Peugh v. United States, 569 U.S. 530, 550 (2013).

a bare finding of guilt rather than based upon additional aggravating factors.[237] Instead, aggravating factors will be identified as elements of new, aggravated crimes with harsher sentencing ranges. And those elements will have to be proven to a jury beyond a reasonable doubt.

But there are reasons to doubt that judicial sentencing discretion will lead to the legislative choices described above. Even before the rise of structured sentencing, plenty of states enacted statutes with broad sentencing ranges that empowered judges rather than juries.[238]

Even if we were to assume that (a) judicial sentencing discretion is likely to lead to more carefully drafted criminal codes with narrower sentencing ranges and (b) such a criminal code would empower juries, an "advisory" system changes that dynamic. "Advisory" sentencing systems actually incentivize legislatures to move important factual determinations out of the domain of juries and into the domain of judges. So long as legislatures are willing to endure some deviation from their judges, they are able to relabel elements as "sentencing factors" and dramatically increase the punishment associated with those facts by having judges make factual findings at sentencing.

"Advisory" sentencing guidelines also make voters less likely to check their legislatures. Imagine, for example, a state that punishes burglary by up to ten years' imprisonment, but it "advises" judges that they should only impose a five-year sentence unless the defendant possessed a gun during the burglary, and then it also makes reversal on appeal far more likely if the judge does not find that the defendant possessed a gun. The voting public knows that a judge has the authority to impose ten years in prison based only on a defendant's commission of a burglary. But they also know that judges are probably only going to impose a ten-year sentence on a burglar if he also possessed a gun. The voting public will likely approve of such legislation if they think that burglars should receive five-year sentences, and armed burglars should receive ten-year sentences. That some unarmed burglars may receive ten-year sentences does not change the fact that this "advisory" sentencing system has effectively recategorized an element of a crime that ought to be found by a jury (possession of a gun) as a sentencing factor that will be found by a judge.

Importantly, to the extent that the Court has "subsequently calibrated" the *Booker* remedy,[239] it has done so in a way that exacerbates these problems. It has failed to clarify whether district courts have unfettered authority to sentence outside of the Guidelines range based only on their policy views, encouraged

237. Variations of this argument have been offered in Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1487 (2001), and Hessick & Berry, *supra* note 7, at 473–74.

238. Texas, for example, has created statutory sentencing ranges of five to ninety-nine years for first-degree felonies and two to twenty years for second-degree felonies. TEX. PENAL CODE ANN. §§ 12.32(a), 12.33(a) (Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.).

239. *Peugh*, 569 U.S. at 550.

appellate courts to curtail sentencing discretion and funnel cases within the Guidelines range, and refused to require district judges to engage in any independent sentencing analysis. Each of these developments make district court judges more likely to impose Guidelines sentences. And the more likely judges are to follow the Guidelines, the more of an incentive there is to move important sentencing distinctions out of statutory elements and into the Guidelines.

One might argue that a defendant in an advisory system is no worse off than a defendant in a system of broad judicial sentencing discretion; in the latter system, a judge is unlikely to impose the maximum sentence on defendants unless there are some aggravating facts present. The advisory system might even be preferable, one might argue, because it identifies ex ante the facts that defendants ought to dispute at sentencing and it better ensures that defendants are treated similarly to one another. But those arguments do not explain why *judges* ought to be finding those sentencing facts, rather than *juries*; nor do those arguments address the fundamental Sixth Amendment objection—that advisory sentencing systems are designed precisely to avoid having juries decide those facts that the legislature has identified as deserving of additional punishment.

Indeed, giving this advisory system a constitutional pass only makes sense if you actually *want* these advisory sentencing facts to drive sentences and if you also want to avoid juries.

CONCLUSION

The right that the Supreme Court first recognized in *Apprendi* was very important. Legislatures across the country had adopted structured sentencing decisions that moved consequential decisions from the guilt phase of a criminal case to the sentencing phase—a move that deprived defendants of both their right to a jury trial and their right to have facts found beyond a reasonable doubt.

Despite the importance of the Sixth Amendment sentencing right, the exercise of jury-trial rights has not actually increased. Part of the problem is that the Supreme Court is unwilling to revisit its plea-bargaining doctrine, which empowers prosecutors to pressure defendants into guilty pleas and which shields that pressure from judicial review. But the Sixth Amendment sentencing doctrine itself—in particular the remedy that the Court adopted in *Booker*—is also partially to blame. That remedy, especially as it has been modified in more recent cases, substantially undercuts the right itself and permits practices that appear to be forbidden by the early cases establishing the right.

The Court should, once again, recalibrate its Sixth Amendment sentencing remedy in a way that does not continue to privilege the Guidelines. It should look to historical practice and the interests underlying the Sixth Amendment to further refine the *Booker* remedy. In particular, it should acknowledge that

district courts are fully empowered to sentence outside of the Guidelines range based only on policy disagreement, it should scale back appellate review of sentencing decisions so that appellate courts only reverse excessively harsh sentences, and it should require district court judges to explicitly grapple with sentencing factors other than the Guidelines. Until and unless the Court does so, the remedy for Sixth Amendment sentencing violations will continue to undermine the Sixth Amendment sentencing right.