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Restoring the Peers in the Bulwark: Blakely v. Washington and the Court's Jury Project

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RESTORING THE PEERS IN THE "BULWARK": *BLAKELY V. WASHINGTON* AND THE COURT'S JURY PROJECT

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In this Article, Professor Myers argues that the right to a jury is a mainstream value that is at the center of an evolving jurisprudence over the meaning of the Sixth Amendment. It is, perhaps counterintuitively, a mainstream value supported most powerfully not by the centrists of the Supreme Court, but by the left and right wings. He explores the Court's recent expansion of the jury right in the line of cases culminating in Blakely v. Washington *and* United States v. Booker *and anchors it in this Symposium's consideration of the constitutional center.*

The jury is both the most effective way of establishing the

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people's rule and the most efficient way of teaching them how to rule well.

—Alexis de Tocqueville, 1835.[1]

INTRODUCTION

The right of every criminal defendant in the United States charged with a serious crime to trial by a jury of his peers is a mainstream American value. The jury right appears twice in the Constitution, in Article III[2] and in the Sixth Amendment,[3] and has been incorporated against the states under the Fourteenth Amendment.[4] Basic civics classes nationwide teach this right to schoolchildren by the millions, and, like so much else of our legal system, this right is reinforced by the almost daily news coverage of some new crime of the century, and by the popular culture in the myriad television shows and movies devoted to the criminal trial. William Blackstone famously described the right to a jury trial two centuries ago as the "grand bulwark" of English liberty.[5]

Yet the contours of the right to a jury trial are at the core of a wide-ranging, high stakes battle over the future of structured sentencing schemes in many states and in federal courts nationwide. In July of 2004, the United States Supreme Court decided *Blakely v. Washington*,[6] which held that the jury must find every fact necessary for the imposition of a sentence, derailing the nation's twenty-five year experiment with mandatory sentencing guidelines at both the state and federal levels. *Blakely* reshaped the critical question by defining the relevant maximum sentence as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury*

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (J.P. Mayer ed., George Lawrence trans., Penguin Classics 2000) (1835).

2. "The Trial of all Crimes . . . shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2.

3. "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.

4. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

5. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342 (1769).

6. 124 S. Ct. 2531 (2004).

verdict or admitted by the defendant,"[7] overturning the judicial factfinding at the sentencing phase that was standard under many state structured sentencing schemes. In January of 2005, in *United States v. Booker*,[8] the Court held that this principle applied to the United States Sentencing Guidelines as well.

This Article does two things—it examines the right to a jury trial, arguing that it is a mainstream value and examining it against conceptions of the constitutional core outlined by Professor Cass Sunstein and Professor Akhil Amar. It then examines the current Court's path to the holdings in *Blakely* and *Booker*[9] and explores the counterintuitive voting lineup on the Court in the recent line of jury cases, where the most conservative and most liberal justices joined forces to adopt the more expansive view of this mainstream value, over vigorous objections from the "centrists." The opinions in these cases reveal that the so-called "centrist" Justices on the current Court have difficulty identifying the right to jury trial—at least as defined by the *Blakely* majority—as a mainstream value. The unconventional lineup in the *Blakely/Booker* line of cases confounds the conventional wisdom, as well as the social scientists' models. In each case in the *Blakely* line, Justices Thomas and Scalia joined with Justices Stevens, Ginsburg and Souter to uphold the rights of criminal defendants against the state, declaring particular practices detrimental to defendants to be unconstitutional.[10] These cases, which together have fundamentally altered state and federal structured sentencing guidelines systems, suggest that for some reason, the "centre cannot hold."[11]

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7. *Id.* at 2537 (emphasis in original).

8. 125 S. Ct. 738 (2005).

9. *See infra* notes 49–83 and accompanying text. The jury's role in finding facts essential to the defendant's sentence was explored in a line of cases beginning with *Jones v. United States*, 526 U.S. 227 (1999), followed by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and culminating this term with *United States v. Booker*, 125 S. Ct. 738 (2005).

10. The Court's jury project is considered the result of a "counterintuitive" alignment of interests in part because the Justices typically labeled "most conservative" find themselves voting with the Justices labeled "most liberal," and Justices O'Connor and Kennedy, Justices typically considered the center of the Court, and hence the swing votes, find themselves in dissent—vociferously so in *Blakely* where they proclaim that the consequences of the Court's decision are potentially horrific. That majority collapsed in *Booker*, when Justice Ginsburg switched sides regarding the appropriate remedy under the Federal Sentencing Guidelines. The remedy issues at the federal level are fascinating, but are beyond the scope of this paper.

11. Apocalyptic predictions notwithstanding, the result has not been quite as

The Court's holding in *Blakely* extends a line of recent cases exploring the meaning of the right to a jury trial and establishes a readily understood principle for deciding what the right means and when it is being eroded. The *Blakely* line of cases shows that the jury stands at a constitutional crossroads where substantive and structural issues overlap. The jury right implicates substantive concerns critical to the left, such as innocence, appropriate levels of punishment, and proportionality, as well as structural concerns critical to judicial conservatives, such as separation of powers and democratic theory principles. This position ensures that the right to a jury trial will endure as a core constitutional value. Finally, the *Blakely* and *Booker* decisions slow a trend of legislative reallocation of responsibilities in the criminal justice system in favor of those laid out in the Constitution and, while it is too early to tell, may lead in the long term to a reexamination of other functions of the jury.

I. THE JURY AS A MAINSTREAM VALUE

A. What is the Center?

Defining the constitutional center is a difficult exercise. Creating a single answer that proves universally satisfactory is impossible. The participants in this Symposium presented a wide range of views on our topic: Locating the Constitutional Center, Centrist Judges and Mainstream Values.[12] There are political scientists discussing attitudinal, spatial, and strategic actor models, with various empirical methods for triangulating the center of the Court with mathematical precision.[13] There are essays considering the role of specific Justices

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cataclysmic as some would suggest:

> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world,
> The blood-dimmed tide is loosed, and everywhere
> The ceremony of innocence is drowned;
> The best lack all conviction, while the worst
> Are full of passionate intensity.
> Surely some revelation is at hand . . .

WILLIAM BUTLER YEATS, The Second Coming, *in* THE COLLECTED POEMS OF W.B. YEATS (definitive ed. 1956).

12. 83 N.C.L. REV. 1089, 1089–1418 (2005).

13. *See generally* Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005) (introducing a method for locating the median Justice and offering two contemporary applications assessing emerging pieces of

as exponents of particular views of centrist jurisprudence, both historically and on the current Court.[14]

We could discuss the center of the current natural court—the center that depends on the swing voter—i.e., the "what did the swing Justice have for breakfast?" center.[15] Or the so-called "political" center that depends on *ex ante* definitions of the political left, right and center (liberal, conservative and moderate) that are undoubtedly controversial and heavily freighted with value judgments regarding certain issues.[16] Or there is centrist jurisprudential methodology, where the reference points depend on one's view of the appropriateness of judicial review, analysis of the principles of judicial restraint and activism, and determinations of where on the activist/restraint spectrum the "center" lies.[17] It is possible that the degree to which Justices predictably vote along certain predefined lines squarely places them on one or the other end of the "spectrum," and the center is nothing more than the space occupied by the Justices with the least doctrinally consistent worldviews. That is, the center belongs to the unpredictable voters. We could reverse-

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wisdom about the Court); Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323 (2005) (testing and finding no evidence to support the hypothesis that the ideological difference between the median member of the Supreme Court and Congress constrains the Court's constitutional decisions).

14. *See generally* Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353 (2005) (analyzing the jurisprudence of the present Supreme Court, particularly that of Justice Kennedy, and arguing that Justice Kennedy's concept of centrism is a composition of recognizing normative values and protecting them via judicial doctrines); William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187 (2005) (looking back at the role of Charles Evans Hughes as the Supreme Court "center"); Mark Tushnet, *"Meet the New Boss": The New Judicial Center*, 83 N.C. L. REV. 1205 (2005) (utilizing the *Federal Guidelines on Constitutional Litigation* as a springboard for a discussion of the Supreme Court's "new center").

15. *See, e.g.*, Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search For the Swing Justice*, 70 S. CAL. L. REV. 187, 202–03 (1996) (describing three alternative approaches for determining the Court's most "powerful" Justice); Paul Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 64–66 (1996) (explaining that a "passive swing voter" gains influence in the Court).

16. For an excellent discussion of some of these line-drawing difficulties, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181–1204 (2002).

17. *See, e.g.*, Bilionis, *supra* note 14; Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385, 387–89 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (noting the difficulty of defining "judicial activism").

engineer the question, by seeing which Justices vote in the majority the most, and then look at the opinions of that Justice or those Justices to divine which principles they use to distinguish themselves from the other Justices. Or we could talk about drafting centrist opinions, or Justices who have succeeded as coalition builders.

Each of these approaches has value, but they are focused on the centrist method, or on defining the centrist judge, rather than on defining mainstream values. This Article is focused on mainstream values, which for purposes of this Article are defined as core values that are consistent over time, that can be expected to endure despite changes in the composition of the Supreme Court, and that can be the subject of meaningful normative discussion. It has a temporal component—one that operates in both directions—looking backward to text and original understanding and forward to evolving conceptions of ordered liberty. In the course of this normative discussion, one can examine which principles have reached the mainstream, which should become part of the mainstream, and which principles were intended by the founders to be there. The Constitution has both a substantive core (our enduring values) and a procedural core (the means by which we protect these values), and we can discuss the extent to which these are mutually reinforcing. This Article focuses on the debate *Blakely* has ignited over the role of the jury precisely because of the overlap between the normative debate about the jury's proper procedural role and the substance it is intended to protect. When the dissenters accused the majority of doctrinaire formalism—elevating form over substance and reintroducing known flaws into the criminal justice system in an attempt to hew closely to an outdated view of the jury's role—they precisely missed the point. In this instance, form *is* substance.

The substantive content of the mainstream in many ways resembles that referred to as the "core" by Professor Cass Sunstein in his book, *One Case at a Time*.[18] In Professor Sunstein's view, these commitments are at the core because they are widely shared, judicially enforceable, and draw the support of conservatives as well as liberals, as well as the support of those on either side of the debate about the appropriate role of judges in enforcing them.[19] Professor Sunstein elaborates ten substantive commitments that he believes

18. CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

19. *Id.* at 63–68.

comprise the core of American constitutional law: protection against unauthorized imprisonment; protection of political dissent; the right to vote; religious liberty; protection against physical invasion of property; protection against police abuse of person or property; the rule of law; no torture, murder, or physical abuse by government; protection against slavery or subordination on the basis of race or sex; and substantive protection of the human body against invasion.[20] We can call this "core" a baseline for the substantive portion of the constitutional center, our mainstream values, without doing violence to his vision or the themes of this symposium.[21]

In addition, Professor Sunstein notes that "[m]any structural issues, involving separation of powers and federalism, contain a substantive core."[22] As he notes, these structural issues, much like the substantive commitments he elaborates, are at the center of an ongoing debate about which procedural principles belong in the core. Moreover, by their very nature, they may call for a different degree of enforcement. The scope of the laws ultimately affected by structural issues might be broader, which consequently may require that the lines be drawn brighter. As Sunstein notes: "Perhaps structural issues require a greater degree of certainty, in general, than issues of individual rights."[23]

Professor Akhil Amar might not use precisely the same language as Professor Sunstein, but he has written extensively on the composition of the structural component of the constitutional center, and in particular has contributed early and often to this emerging debate on the role of the jury.[24] His exposition on the historical role of structure for the Framers of the Constitution lies at the heart of his book *The Bill of Rights*: "A close look at the Bill reveals structural

20. *Id.* at 63. Many commentators have taken their pass at describing these core values. The number of values may vary, but it is in many ways a reflection of the degree to which we subdivide these central principles, not to whether or not they are there.

21. There are certainly other ways of parsing the list, as Professor Bilionis explores in his article for this Symposium. *See* Bilionis, *supra* note 14.

22. SUNSTEIN, *supra* note 18, at 63.

23. *Id.*

24. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 81–118 (1998) (arguing that the Framers saw jurors as protectors of democracy, filling multiple roles in the new Republic); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169–76 (1995) (arguing that the text of the Bill of Rights demonstrates the centrality of the jury right in the eyes of the Framers); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182–1203 (1991) (arguing that the Framers viewed the jury right as central to the protection of popular and local will).

ideas tightly interconnected with language of rights."[25] The idea that specific substantive rights are coupled with and amplified by particular procedural protections is not unique, but it is well expounded by Amar.

To oversimplify grossly, the general assumption underlying many discussions of this issue seems to be that the "left" is concerned first with the substantive core, which governs issues of individual rights, and the "right" is concerned first with the structural core, which governs questions such as separation of powers and federalism. This is a gross oversimplification and an artificial division because the two components of the core are mutually reinforcing and because the first is impossible without the second, while the second is unnecessary without the first. The reason we have a separation of powers and structural limitations on the government is because we are concerned with protecting the freedoms we hold dear.[26] Nevertheless, if we assume that jurists might reasonably embark first down one or the other of these separate paths when beginning a constitutional analysis, their mutually reinforcing nature makes it apparent that we can expect these paths to converge when the issue at hand is one that belongs in the constitutional core. As we shall see, the *Blakely* explication of the jury's role fits into both Sunstein's and Amar's visions of the mainstream.

1. The Missing Centrists

The odd lineup of votes in the *Blakely* line of cases—with the Court's most "conservative" Justices, Scalia and Thomas, joining the most "liberal," Stevens, Souter and Ginsburg, in this majority—suggests that there is something more at play than the political scientists' models can explain.[27] It is worth taking a moment to consider why the *Blakely* lineup strikes us as odd. Political scientists studying the Court are wont to use "spatial" or "attitudinal" models, which array the Justices from left to right and predict that the Justices will vote essentially along that line, with Souter, O'Connor and Kennedy as the likely swing votes, and with most 5–4 votes predicted

25. AMAR, *supra* note 24, at xii.

26. "Which values ... qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?" ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 55 (1962).

27. In part that is because the social science models are descriptive, not normative, and thus are not intended to identify shifts in mainstream values.

by Justice O'Connor's vote.[28] The spatial models of the Court's behavior suggest that the critical issue to be considered is the array of voting blocs.[29] The breaks between the blocs, these authors suggest, may be less significant than the consistency of the alignment.[30] In the traditional formulation of this spatial model, the Justices on the Court are arrayed from left to right as follows: Stevens, Ginsburg, Breyer, Souter, O'Connor, Kennedy, Rehnquist, Scalia, Thomas.[31]

This spatial model replicates the lineup offered in more traditional legal articles, which describe the alignment as having the "liberals" on the left and the "conservatives" on the right.[32] O'Connor, Kennedy, Rehnquist, Scalia and Thomas are generally considered conservatives, with Scalia and Thomas commonly called the Court's most conservative Justices, and O'Connor and Kennedy regarded as the likely swing voters. While there are definite problems with the assumptions underlying these labels, they are nonetheless in general use.

The Supreme Court Forecasting Project has created a computer model applying the political scientists' alignment theories, based upon a series of "forecasting trees," which use relatively simple variables as predictors.[33] This computer model was more adept at predicting the likely votes of the Supreme Court than were the members of a panel of experts the Project had assembled.[34] In addition, it is clear that the approach of the social scientists has influenced traditional legal scholarship.[35]

However, *Jones*, *Apprendi*, *Ring*, *Blakely*, and *Booker* confound

28. *See* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157–59 (2004).

29. *See id.* at 1157–60.

30. *See id.* at 1151–58.

31. *See id.* at 1158 n.29.

32. For an excellent discussion of the breakdown in the taxonomy of liberal and conservative, see Young, *supra* note 16, at 1181–1203.

33. The participants in the Supreme Court Forecasting Project are participants in this Symposium and explain their project better than I can. *See* Martin et al., *supra* note 13.

34. *Id.*

35. *See, e.g.*, Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 1 (2002) ("The use of social science—of psychology in particular—to inform legal theory and practice is fast becoming the latest craze in the pages of legal academia."); Symposium, *Is Justice Just Us? A Symposium on the Use of Social Science to Inform the Substantive Criminal Law*, 28 HOFSTRA L. REV. 601, 604–06 (2000) (explaining the importance of social science in the formation and practice of law).

the models.[36] In each of these cases, Justices Thomas and Scalia split with Rehnquist, Kennedy and O'Connor, whom the model predicted would be their allies.[37] More specifically, the Supreme Court Forecasting Project's computer model predicted that in each of these cases the decisions would be decided in the government's favor, with Scalia and Thomas in the majority, and with Ginsburg, Stevens and Souter in dissent.[38] Instead, the predicted conservative blocs split and the left and the right of the Court identified a mainstream value that was the basis for this new coalition.[39] How they arrived at that value we will now explore.

2. The Mainstream, the Juror, and the *Blakely* Line of Cases

Now let us turn to the way in which this line of cases locates a portion of the mainstream. In *Blakely*, the Court extended the reach of *Apprendi*, which held that the Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[40] *Blakely* defined "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[41] In *Blakely*, that meant that the Washington state scheme, which permitted an increase in the defendant's sentence on the basis of facts found by the judge by a preponderance of the evidence, violated the Sixth Amendment right to a jury trial because someone other than the jury was deciding

36. The conceptual difficulties that the *Blakely* line presents come as no surprise to the forecasters. *See* Ruger et al., *supra* note 28, at 1158. ("The only type of decision that flunks the spatial model is one where, say, Justices Scalia and Thomas vote with Stevens, Ginsburg and Souter to vacate a defendant's sentence and Justice Breyer is with Rehnquist, O'Connor and Kennedy in dissent.").

37. *See* The Washington University Supreme Court Forecasting Model (last visited Mar. 28, 2005), *available at* http://wusct.wustl.edu (on file with the North Carolina Law Review).

38. *Id.*

39. The failure of the statistical analysis raises some questions that are beyond the scope of this paper, and certainly beyond its author's expertise. Does it mean there is something fundamentally different about the jury that leads to these disparate views, making it an outlier that the models simply fail to capture? Is there a variable the models have failed to grasp that would explain the voting pattern? Can it be incorporated into the models, or will it remain an outlier?

40. Blakely v. Washington, 124 S. Ct. 2531, 2533 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

41. *Id.* at 2538 (emphasis in original).

whether the functional equivalent of elements had been established.[42] While the Court stated that the decision was limited to the case before it, there was no avoiding its implications for all federal and state structured sentencing schemes.[43]

No case from the Court's 2003 Term more affected the day-to-day lives of practicing lawyers than *Blakely*, handed down right before the Court recessed for the summer. Its logic "cast a long shadow"[44] over the viability of the Federal Sentencing Guidelines, leaving the administration of criminal justice "discombobulated."[45] Justice O'Connor, writing in dissent, warned that "the practical consequences of today's decision may be disastrous,"[46] and chided the majority for "ignor[ing] the havoc it is about to wreak on trial courts across the country."[47] In *Booker* and *Fanfan*, the Court decided that the logic of *Blakely* would be applied to the Federal Guidelines.[48]

As the Court reexamined the jury's role in these four cases,[49] *Jones*, *Apprendi*, *Ring*, and *Blakely*, Justices from the left and the right discussed the historical and structural importance of the jury, moving from a precatory warning in *Jones* that the jury's role needed to be taken seriously, to establishing its role in moving a defendant between schemes with different statutory maxima in *Apprendi*, to emphasizing in *Blakely* that only the jury can find the facts necessary to support a sentence. As we shall see, the opinions demonstrate that the structural role of the jury is equally important to both ends of the Court.

The first case in the Court's reexamination of the jury's role was *Jones v. United States*.[50] In *Jones*, the Court engaged in a largely rhetorical skirmish over the role of the jury, but the contours of the

42. *Id.* at 2537–38.

43. *Id.* at 2543 (O'Connor, J., dissenting).

44. *See* United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004).

45. *See id.* at 521 (Easterbrook, J., dissenting).

46. *Blakely*, 124 S. Ct. at 2537–38 (O'Connor, J., dissenting).

47. *Id.* at 2549 (O'Connor, J., dissenting).

48. *See infra* notes 92–96 and accompanying text.

49. Almendarez-Torres v. United States, 523 U.S. 224 (1998), where the Court decided that a prior conviction need not be proved to a jury, *see id.* at 228–48, is an aberration. *Almendarez-Torres* necessitates the "other than the fact of a prior conviction" proviso in the *Apprendi* and *Blakely* holdings. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *Blakely*, 124 S. Ct. at 2536. However, Justice Thomas, a member of the *Almendarez-Torres* majority, has since stated that he believes *Almendarez-Torres* was wrongly decided. *See Apprendi*, 530 U.S. at 521 (Thomas, J., concurring).

50. 526 U.S. 227 (1999).

coming battlefield were laid out with surprising clarity. *Jones* was a statutory construction case involving the application of the federal carjacking statute.[51] The Court resolved the construction issue to find that provisions enhancing the penalties faced by defendants amounted to aggravated versions of the crime, with additional elements that must be proved to the jury.[52] In explaining its decision to interpret the statute this way, when it quite easily could have gone in another direction, the Court said it was doing so to avoid grave constitutional concerns: "Diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled."[53]

The lineup that would carry forward through *Blakely* was set. Justice Souter—writing for a majority that included Justices Scalia, Thomas, Ginsburg, and Stevens—noted the "grave and doubtful constitutional questions" that arose when one began to consider the continuing erosion of the historical role of the jury.[54] From the very beginning, the Court's jury project has been stated in terms of the critical procedural safeguards embodied in the Constitution:

> The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof.[55]

Justice Souter further stressed the historic importance of the jury right, and its role as the protector of freedom:

> Identifying trial by Jury as "the grand bulwark" of English liberties, Blackstone contended that other liberties would remain secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . ."[56]

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51. *Id.* at 229.
52. *Id.* at 239.
53. *Id.* at 248.
54. *Id.* at 239 (internal quotations omitted).
55. *Id.* at 243 n.6.
56. *Id.* at 246 (quoting 4 BLACKSTONE 342–44).

The Court also foreshadowed one central focus of the debate—who gets to define elements of a crime, as opposed to "sentencing factors." The Court was fully aware that conceding that right to Congress essentially gave away the issue, stating that "[a]n unlimited choice over characterizing a stated fact as an element would leave the State substantially free to manipulate its way out of *Winship*."[57] This rhetorical exchange on the Court set the agenda, but the dialogue had not yet risen to the level of a national debate.

In *Apprendi*, these ruminations on the hypothetical danger posed by a particular statutory construction gave way to a holding that overturned a state conviction. In *Apprendi*, Justices Stevens, Souter, Ginsburg, Scalia and Thomas joined forces in an opinion which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[58] Charles C. Apprendi, Jr. pled guilty to second-degree possession of a firearm, which carried a maximum sentence of ten years.[59] The trial judge found, by a preponderance of the evidence, that the defendant had been motivated by racial animus, raising the maximum sentence to twenty years.[60] He then sentenced the defendant to twelve years.[61] Apprendi appealed.

The Court held that the enhancement violated the defendant's Sixth Amendment right to a jury trial because the judge and not the jury found that the animus existed, and because the finding was by a preponderance of the evidence, not beyond a reasonable doubt.[62] The defendant has a right to " 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' "[63] The jury, not the judge, was the constitutionally appointed trier of fact.

One critical issue limiting the potential application of the *Apprendi* opinion was the fact that the judge's finding changed the applicable "statutory maximum" penalty to which the defendant was exposed.[64] In *Apprendi*, the applicable statutory maximum was the

57. *Id.* at 240–41.
58. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
59. *Id.* at 470.
60. *Id.*
61. *Id.* at 471.
62. *Id.* at 491.
63. *Id.* at 490 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).
64. *See, e.g.*, United States v. Kinter, 235 F.3d 192, 201 (4th Cir. 2000), *cert. denied*, 532

maximum the criminal statute set for the underlying offense of conviction. After *Apprendi*, the lower federal courts consistently held that the *Apprendi* requirement of jury factfinding did not apply in cases where the facts were used to move the defendant's sentence within the range of possible sentences below the statutory maximum applicable to the offense.[65] The jury was in the mix, but under the opinions issued by the appellate courts, legislators could work around it quite easily by denominating certain facts as "sentencing factors" rather than elements of the crime.

Next came *Ring*. In *Ring*, the Court held that a defendant's Sixth Amendment right to trial by jury requires that a jury, and not a judge, find the existence of facts that would raise the defendant's possible sentence from life in prison to death.[66] This time, Justice Kennedy joined the majority, although he maintained his view that *Apprendi* was wrongly decided.[67] But there was no doubt after *Ring* that the factfinding of the jury was critical in the decision to sentence someone to death, and that any other system was unconstitutional. Some thought that *Ring* might be an aberration because of the skewing effect of the death penalty, and was the outer limit of the Court's jury reinvigoration project.

As Justice Scalia noted in his concurrence in *Ring*, the issue was more fundamental:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by

U.S. 937 (2001) ("[T]he relevant maximum under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines.").

65. *See* United States v. Merritt, 361 F.3d 1005, 1015 (7th Cir. 2004); United States v. Pettigrew, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003); United States v. Goodine, 326 F.3d 26, 32–34 (1st Cir. 2003); United States v. Parmalee, 319 F. 3d 583, 592 (3d Cir. 2003); United States v. Floyd, 343 F.3d 363, 372 (5th Cir. 2003), *cert. denied* 124 S. Ct. 2190 (2004); United States v. Banks, 340 F.3d 683, 684–85 (8th Cir. 2003); United States v. Ortiz, 318 F.3d 1030, 1039 (11th Cir. 2003) (per curiam); United States v. Luciano, 311 F.3d 146, 151 (2d Cir. 2002); United States v. Cannady, 283 F.3d 641, 649 (4th Cir. 2002), *cert. denied* 537 U.S. 936 (2002); United States v. Tarwater, 308 F.3d 494, 517 (6th Cir. 2002); United States v. Ochoa, 311 F.3d 1133, 1134–36 (9th Cir. 2002); United States v. Mendez-Zamora, 296 F.3d 1013, 1020 (10th Cir. 2002), *cert. denied* 537 U.S. 1063 (2002).

66. Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

67. *Id.* at 613 (Kennedy, J., concurring).

the jury beyond a reasonable doubt.[68]

In his *Ring* concurrence, Justice Scalia foreshadowed the ultimate result in *Blakely*. Justice Scalia explained his balancing of the relative importance of what he saw as competing constitutional issues, his reaction against the Court's "death-is-different" jurisprudence, and his belief in the centrality of the jury.[69] In *Ring*, he decided that in the absence of knowledge that the states' decisions regarding allocation of the burden of proof were being skewed by what he saw as the Court's contorted Eighth Amendment jurisprudence, he would vote the principle favoring the jury.

Any thoughts that the Court's jury project was limited in scope were definitively rejected in *Blakely*. In *Blakely*, the Court extended the holding of *Apprendi* to cover the structured sentencing scheme in effect in the state of Washington. Ralph Howard Blakely, Jr. pled guilty to kidnapping his estranged wife at knife point in violation of a Washington state statute.[70] The facts admitted in his plea, without more, carried a presumptive maximum sentence range of fifty-three months.[71] Under the state of Washington's system, a defendant could have his sentence enhanced if there was a finding of "deliberate cruelty."[72] After a three-day bench hearing, the court found that the defendant had acted with deliberate cruelty and imposed an exceptional sentence of ninety months.[73] The Washington State Supreme Court denied discretionary review, and the United States Supreme Court granted certiorari.[74]

The Court reversed, applying the rule expressed in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[75] Looking back at *Apprendi* and *Ring*, the Court stated that "[i]n each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the

68. *Id.* at 610 (Scalia, J., concurring).
69. *Id.* at 610–12.
70. Blakely v. Washington, 124 S. Ct. 2531, 2534 (2004).
71. *Id.* at 2535.
72. *Id.*
73. *Id.*
74. *Id.* at 2536.
75. *Id.* at 2533 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

challenged factual finding."[76] The Court emphasized that the key issue was the sentence that the court could impose based on facts admitted by the defendant or proven to a jury. "Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."[77] If additional factual findings were required before the judge could increase his sentence, those must be proved to a jury, beyond a reasonable doubt, because they were the functional equivalent of elements of an aggravated crime:[78]

> 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 verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.[79]

Blakely was decided by the same five to four majority that decided *Apprendi*. Justice Kennedy, who had voted with the *Ring* majority, jumped ship. There was no doubt about the potential implications of the decision. The dissenters, who saw no principled way to distinguish the Federal Sentencing Guidelines from the Washington state scheme held unconstitutional by the Court, warned that the Court was about to undo twenty years worth of work on structured sentencing.[80] They warned that the evils Congress was attempting to solve—problematic disparity in sentencing, with disturbing evidence that race and class issues lurked in the background—would return in full force if the Court went forward.[81] In an attempt to head off the implications, the dissenters offered a range of policy arguments for a more "nuanced" analysis of the issues in the case.[82] It mattered not. For the majority, the critical issue was the role of the jury as a "circuitbreaker" in the democratic system.[83] The legislature was not going to be allowed to hardwire around that circuitbreaker by redefining the "elements" of the crime and short-circuiting the jury's role in determining the relevant elements.

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76. *Id.* at 2537.
77. *Id.* at 2538.
78. *Id.* at 2538–39.
79. *Id.* at 2538.
80. *Id.* at 2549–50 (O'Connor, J., dissenting).
81. *Id.* at 2544–46 (O'Connor, J., dissenting).
82. *Id.* at 2547 (O'Connor, J., dissenting).
83. "The jury could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 124 S. Ct. at 2539 (emphasis in original).

What is happening in the *Blakely* line? Have the "conservative" concerns over structure captured a central place in the opinion because they would not join an opinion written by a liberal based on a substantive view of the center? Do we simply have a marriage of convenience with the liberals along for the ride on Justice Scalia's historic and structural view of the jury's role because Scalia's opinion achieves the desired result?[84] Would they abandon the jury otherwise? The cases seem to refute such assumptions. It was Souter, not Scalia, who identified the jury's role as a historic bulwark in *Jones* and reintroduced the jury into the discussion of sentencing.[85] The majority and the dissent in *Blakely* framed the sentencing issue in vastly different terms. For the majority, the cardinal sin of the Washington statutory regime was the way that the jury's role was undermined by allowing the judge, not the jury, to find critical facts.[86] The dissenters thought that the real question was whether in creating the Guidelines and denominating some facts as sentencing factors, the Washington legislature had tipped the balance between elements and sentencing factors.[87] The disagreement between the camps turned largely on their respective assessments of how the Constitution speaks to this definition of the role of the jury. The majority was concerned that there be a bright-line test which would define clearly the term "elements," so that legislators and litigants alike would know when the Sixth Amendment and the jury trial guarantee was implicated.[88] The dissenters favored a balancing test that would place due process limitations on the legislature's ability to recast elements as sentencing factors, with the due process limitations kicking in when the legislature had gone too far.[89] Scalia soundly rejected the dissent's choice of "too far" as an appropriate constitutional standard:

> Whether the Sixth Amendment incorporates [the dissent's] manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of the jury power up to judges'

84. One possible view is that requiring aggravating factors to be proven to the jury beyond a reasonable doubt will ultimately reduce sentences in cases where it is difficult to find admissible evidence, such as drug quantities, and ultimately result in lower sentences. A skeptic might argue that the Court's liberals are committed to the jury right only so long as the likely result is pro-defendant and not because of any historic or textual pedigree that the jury may have.

85. *See* Jones v. United States, 526 U.S. 227, 240–41 (1999).

86. *See Blakely*, 124 S. Ct. 2531, 2537–39.

87. *Id.* at 2549–50 (O'Connor, J., dissenting).

88. *Id.* at 2539–40.

89. *Id.* at 2547–48 (O'Connor, J., dissenting).

> intuitive sense of how far is *too far*. We think that claim is not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out the role of the jury.[90]

While the effect of the case was to cast serious doubt on the constitutionality of the federal guideline system, the majority insisted that its opinion was not intended to be a death knell to structured sentencing, as the dissenters feared: "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[91]

In *United States v. Booker*,[92] the Court reaffirmed the position it took in *Blakely*, holding that the Sixth Amendment concerns explored in *Blakely* applied with equal force to the Federal Sentencing Guidelines, for the same reasons. The Court noted that the Guidelines as written were mandatory, not advisory, and as such had the force of law, thereby implicating the jury right: "There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases."[93]

As the Court noted:

> The effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or

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90. *Id.* at 2540. The response to the dissenters also included a classic Scalia footnote:

> To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that the tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

Id. at 2542 n.13.

91. *Id.* at 2540. Indeed there is evidence that the two can coexist. *See* Brief of Amici Curiae Nat'l Ass'n of Federal Defenders in Support of Respondents at *2, United States v. Booker, 125 S. Ct. 25 (2004) (No. 04-104), United States v. Fanfan, 125 S. Ct. 26 (2004) (No. 04–105) (explaining at length how "[t]he requirements of *Blakely* are assimilated readily into the federal sentencing scheme, with little or no change to current statutes or rules, providing sentences entirely consistent with the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines").

92. 125 S. Ct. 738 (2005).

93. *Id.* at 751.

> proved by more than a preponderance. As the enhancements became greater, the jury's finding of the underlying crime became less significant.[94]

Because Congress had created a new system not contemplated by the founders:

> [T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.[95]

If one takes the Court at its word, rather than assuming this is sleight of hand motivated by a dislike of the Federal Sentencing Guidelines, there is actually much to consider.[96] For the majority, the right to a jury trial needs to be carefully defined, so that it is not eroded from within. Much of the change that is taking place, such as reclassification of elements as sentencing factors, and the stripping away of the right to argue for nullification, is understood primarily by insiders. Meanwhile, the public is left with an increasingly mistaken impression that the jury is serving its symbolic, and historic, function as a democratic intermediary between the individual and the state. If the jury right is being hollowed out, the Court is unable to rely on it to serve as a guardian of the innocent and a true check on both legislative and executive power.

II. WHAT THE CENTRISTS ARE MISSING ABOUT THIS MAINSTREAM VALUE

If the *Blakley/Booker* majority sees the jury right as such a central value, which must be jealously guarded by the Court, why does the "centrist" view differ so markedly? Are the cases really about a fundamental disagreement on the role of the jury? Or are they really more about the efficient administration of justice? In part, the dissenters have split with the majority because, Scalia's ridicule notwithstanding, the dissenters trust the courts, and perhaps the legislatures, to see that the tail does not wag the dog. That is, they see

94. *Id.*

95. *Id.* at 752.

96. This assumption may be harder to make after *Booker*, where the majority opinion regarding remedy suggests that Justice Ginsburg was motivated by a dislike of the concept of mandatory guidelines and sought to restore judicial power to flexibly impose sentences.

any potential problems with defining the elements of a crime, and the consequent effects on the jury's role in the system, as a substantive, and not a structural issue.[97] For them, the parsing of elements can be done with fuzzier logic, without the bright line the majority is calling for. There are certainly "centrist" positions taken by the dissent in arguing for upholding guideline sentencing. Justices Kennedy and O'Connor seem to have great faith in the legislature and the Sentencing Commission.[98] They see it as the Court's job to serve as the intermediary between the legislature and the defendant, and they have faith in the Court's ability to police the system before it goes too far.[99] They believe themselves to be exercising restraint that defends the democratic values inherent in a legislative determination of how the lines should be drawn. For Justices Kennedy and O'Connor, the legislators' interests in establishing structured sentencing—proportionality, predictability, and a sub rosa consideration of racial bias—outweigh any concerns the Court might have over the diminished role of the jury.

There are some additional motivations a particular Justice might have for joining the dissenting opinions. Justice Breyer had a personal role in creating the Guidelines and thus has more invested in them than almost anyone in any position, and certainly much more than any other Justice.[100] Justice O'Connor often writes more like a legislator than a judge—perhaps unsurprisingly given her background—and therefore may be more willing to trust the legislature on this issue, as well as to trust her own ability to fix things in the event that the legislature gets it wrong. Justice Rehnquist is a faithful proponent of the Court's oversight power, and perhaps he sees the practical utility of the Guidelines for the executive when it comes to leveraging pleas and is unwilling to topple a twenty-five year old system over the objections of Congress and the executive branch.[101] However, the fact that the explanations hew to what is

97. That is not to say that we can create a purely binary substantive/structural divide. The jury serves additional democratizing functions, allocating responsibility for the verdict across the society, and permitting a valuable check on the executive and legislature. For the conservatives, there is an independent value in hewing closely to the constitutional line allocating the responsibility for protecting those values to the jury. For liberals, the question may be whether the historic allocation continues to serve the intended purposes.

98. *See Blakely*, 124 S. Ct. 2531, 2545–47 (O'Connor, J., dissenting); *id.* at 2550–51 (Kennedy, J., dissenting).

99. *See id.* at 2548–49 (O'Connor, J., dissenting); *id.* at 2550–51 (Kennedy, J., dissenting).

100. *See* Tony Mauro, *Court May Scrap Fed'l Sentencing System*, LEGAL TIMES, Oct. 11, 2004, at 8.

101. Justice Kennedy placed the issue of sentencing on the national legal agenda

generally considered a centrist line does not mean that the debate is not about the centrality of the jury's role.

A. *The Renewed Role of the Jury*

Going forward, what can we expect? The jury is regaining strength as a mainstream actor in the constitutional center, after a period of institutionalized atrophy. As Amar has noted, the perceived role of the jury has changed dramatically over time. The democratic check on the legislature has virtually disappeared. More importantly, "even the core role of the jury in criminal trials has seriously eroded over the past two centuries."[102] It is this erosion with which the *Blakely/Booker* line of cases is concerned. In the view of the majority, and of many of their supporters,[103] removing the jury from the factfinding equation distorted the criminal justice process by altering the roles of the actors in a way that upset settled expectations.[104] The judge has been tasked with finding an array of facts critical to the sentence that has expanded dramatically, while at the same time, the judge's discretion to alter the defendant's relative sentence based on those findings has been drastically curtailed.

Meanwhile, the jury had been tasked with finding facts sufficient to support the verdict, but not with finding the facts essential to support the sentence. This was unacceptable if the juror really is a critical player. For some, there is no more critical structural player for protecting individual freedoms. "If we seek a paradigmatic image

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directly when he spoke before the ABA in 2003. *See* Linda Greenhouse, *High Court Justice Supports Bar Plan to Ease Sentencing*, N.Y. TIMES, June 24, 2004, at A14. There he called on all of the participants in the system to actively evaluate the state of incarceration in America, drawing on examples from the federal courts. *Id.* In response, the ABA created the Kennedy Commission to address these issues. *Id.* Given that the sentences he deplored are being handed down based on a preponderance of the evidence standard, at hearings where the rules of evidence do not apply, it is interesting that he is a dissenter.

102. *See* AMAR, *supra* note 24, at 98.

103. Brief of Amici Curiae Nat'l Ass'n of Federal Defenders in Support of Respondents at *2, United States v. Booker, 125 S. Ct. 25 (2004) (No. 04-104), United States v. Fanfan, 125 S. Ct. 26 (2004) (No. 04–105).

104. *See* United States v. Mueffelman, 327 F. Supp. 2d. 79, 83 n.8 (D. Mass. 2004). Judge Gertner explained why this issue did not come up in indeterminate sentencing schemes, but did arise where the "Guidelines" actually mandated the sentence a judge could impose:

> The answer is that there were no Sixth Amendment challenges . . . because judge and jury has specialized roles, the jury as fact finder, the judge as the sentencing expert. However flawed the judge's decision was—and surely many were—it was not the case that he or she was "usurping a role that did not belong to him or her."

Id. (internal citations omitted).

underlying the original Bill of Rights, we cannot go far wrong in picking the jury," according to Professor Amar.[105] Amar draws this conclusion based on his textual analysis of the Constitution and the Bill of Rights, and on a historical examination of the thoughts of the Framers:

> Juries, guaranteed in no fewer than three amendments, were at the heart of the Bill of Rights . . . [w]hat's more, trial by jury in all federal criminal cases had earlier been mandated by the clear words of Article III: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[106]

The *Blakely* line of cases shows that the Court is intent on reexamining and where necessary expanding that critical structural role. The Warren Court defined the right to trial by jury as fundamental:

> The question has been asked whether [trial by jury] is among those . . . fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . [w]e believe that trial by jury is fundamental to the American scheme of justice . . . [t]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[107]

The Court has worked its way through a jury-access project that mirrors a similar project involving the right to vote. African Americans, women, and other racial minorities were all accorded jury rights, and the practice of striking jurors for an invidious purpose was reexamined.[108] The questions of who gets to sit on the jury appear to

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105. AMAR, *supra* note 24, at 96.

106. *Id.* at 83.

107. Duncan v. Louisiana, 391 U.S. 145, 148–56 (1967).

108. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 *passim* (1986) (banning peremptory challenges based on invidious racial motivation); Duren v. Missouri., 439 U.S. 357, 360 (1979) (overturning conviction where women were under-represented on venire); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial."); *id.* at 534–35 (overturning rule excluding women from jury service unless they explicitly opted in); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (overturning conviction where Mexican-Americans were excluded); Ballard v. United States, 329 U.S. 187, 195–96 (1946) (overturning federal conviction because women were barred from jury service although eligible under state law); Smith v. Texas, 311 U.S. 128, 130–32 (1940) (barring exclusion from jury service on the basis of race).

be largely resolved. The current reexamination is premised not on equal protection concerns, but on structural considerations of the role of the jury as an institution and on defining the logical contours of this key structural right.

At the very least, we will engage in a fundamental discussion of the constitutional allocation of the power to define and prosecute crimes. Under the Guidelines, Congress has attempted to recast the roles of the various actors, in part because it lacks faith in either to perform their constitutional duties. The Guidelines were designed to reduce judges' discretion because the legislators perceived that the judiciary was abusing that discretion. Rather than creating a single statutory cap, the legislature wanted an enforceable regime that would govern the imposition of sentences. But it did not trust juries to find the wide range of facts it wanted considered at sentencing, so it reallocated the finding of those facts to the sentencing judge with the aid of the probation office.

Some saw the flaw in the Guidelines as the divestiture of judges' individualized sentencing power, rather than the concentration of power in the hands of the legislature. At first blush, the *Blakely* line of cases did not appear to address concerns about the diminished discretion afforded to judges because the cases were concerned with the defendant's Sixth Amendment rights, not with the appropriate levels of punishment or the power of the judiciary. However, the *Booker* remedial majority made the Federal Guidelines advisory, which seems to directly address the issue. Whether Congress leaves the remedy as it is or restores the limits in some other form remains to be seen.

However, if the Court genuinely seeks to restore the jury as a structural check on the system, the jury might serve as a solution to many of the problems that some hoped the judge would resolve. Remember, under the vision articulated in *Blakely*, one of the jury's core historical functions is as a circuitbreaker, intended as a mediating institution interposed between the state and the individual to ensure that justice is done in each individual case. This view is contingent on the reintroduction of jury nullification as a serious, and constitutionally mandated, check. If mandatory minimum sentences are too high, the jury can correct the legislature's failure by refusing to convict. If the maximum sentencing exposure is too severe, the jury can likewise refuse to convict. Given the choice between jury factfinding on all of the issues that were previously reserved for sentencing or restoring the discretion to judges to impose sentence within the statutory cap, the legislature will have to decide who it

distrusts more.[109] Likewise, if a prosecutor has brought the case in circumstances which fall outside the heartland of cases that the law was intended to criminalize, the jury has an independent ability to acquit the particular defendant and substitute the common-sense of twelve members of the community for the interested view of the prosecutor.[110]

Why did this majority constitute itself, and what does it tell us about the constitutional center? At least in part, there was a split between the pragmatists on the Court, and the formalists,[111] between balancing tests and bright lines. Some would suggest that that distinction by its own terms means this is not a centrist line of cases. I disagree. It is possible to draw bright lines intended to defend centrist principles, and that is the project on which this Court has embarked. In this line of jury cases, the Court laid down some principles that will restrain the actions not only of the courts, but of the state and federal legislatures. In striking down mandatory guidelines sentencing with judicial factfinding, the Court has moved beyond case-by-case consideration of when a legislature may have gone "too far" to structural themes that invoke issues of separation of powers and the inherent check on the system imposed by the jury.

It may surprise some that this pro-defendant, anti-government view is espoused by Justice Scalia and echoed by Justice Thomas.[112] But it should not. Both Justices are perfectly willing to hold the government to the highest procedural standards in criminal cases, and

109. Observers have suggested that the Court may be rediscovering the jury because it is in the middle of a game of "chicken" with the legislature, designed to force precisely that choice, in the belief that the legislature will ultimately choose the judiciary. While possible, this writer believes that it is more likely that the Court means precisely what it says about the jury. In part, the jury is needed as a check on both the legislature and the judiciary. As Justice Scalia noted during oral argument on *Booker* and *Fanfan*, "The right of a jury trial is meant to protect against whom? [Judges.] The whole reason for a jury trial is we don't trust judges." *See* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-104.pdf (last visited Feb. 7, 2005) (on file with the North Carolina Law Review).

110. The preclusive effect of an acquittal operates only when the jurors are united in their opposition as to the particular application of the law. In the event of a hung jury, the state is free to try again.

111. *See* Stephanos Bibas, Blakely*'s Federal Aftermath*, 16 FED. SENT. REP. 333, 341–42 (2004).

112. The fact that Justices Scalia and Thomas, fully aware that at least in the short term the decisions will redound to the benefit of defendants, have voted for the new rule in *Blakely* certainly belies the simplification that they will be pro-government and anti-defendant. Deciding ex ante what the "policy preferences" are that really motivate the Justices is impossible without examining the doctrinal underpinnings of the case.

both have written opinions endorsing the rule of lenity.[113] In Justice Scalia's view, judges are at their most courageous when they stand up to the popular will in the criminal arena. "Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will."[114] In *Blakely*, the majority did both.

Similarly, it may be surprising to some that Justices Ginsburg, Stevens and Souter joined the *Blakely* opinion, which rejects balancing tests in favor of a bright-line rule based largely on the historic and structural role of the jury. Yet if one considers the concerns that led to the creation of both a substantive constitutional right and a procedural protection for it, it should be of little surprise that the Justices on the left have joined the opinion. Justice Souter, after all, was the author of the majority opinion that first sounded the alarm for the jury in *Jones*.[115]

The traditional centrist strategies followed by O'Connor and Kennedy—appeal to democratic values, a desire to decide cases minimally, concern over the social and political costs of the decision at bar—were all employed to no avail in the *Blakely* dissents.[116] In fact, the tone of the dissents, and of the questions during oral argument in *Booker* and *Fanfan* can fairly be described as painful indignation. One can almost hear them saying to their clerks, "I can't believe they aren't listening to us. Our position is so reasonable." One possible explanation for their failure to carry the day is that the centrists have simply reached the outer limits of centrism. They ran into an immovable structural object, the jury, and the majority has said "this far and no farther." So centrism failed in *Blakely*. Which, given the importance of the jury right, was not, on balance, a bad thing.

But let us not be too hasty. An alternative view, and in my mind the more useful one, is that it is only the short-term view of centrism—a view interested more in avoiding conflicts today than in

113. *See, e.g.*, Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (encouraging lenity when faced with an ambiguous statute); Evans v. United States, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting) (same).

114. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

115. 526 U.S. 227 (1999).

116. *See* Blakely v. Washington, 124 S. Ct. 2531, 2546–48 (2004) (O'Connor, J., dissenting); *id.* at 2550–51 (Kennedy, J., dissenting).

resolving them—that failed. Criminal sentencing raises difficult questions of political bias and institutional failure. The legislature has strong institutional imperatives to seem tough on crime—no one can reasonably expect to go home and campaign on a platform of cutting back criminal legislation and shortening sentences. Powers are separated in this area precisely because the individual is likely to suffer if they are consolidated in any one set of hands. Once we recognize that these difficult questions regarding the proportionality and justice of criminal sentences, and of periodic attempts to reallocate power to the defendant's detriment, will recur over time, it becomes clear that this is not a problem that can be sidestepped—it must be solved. The question is, who do we trust to ultimately solve it—judges making "tail-wagging" determinations, or juries applying the law to the facts at the level closest to the ground? Or perhaps more properly, at least for those of us who take textualism seriously, to whom does the Constitution allocate this decision?[117] The majority has decided that we have a constitutional mechanism in place that we should allow to operate.[118]

The renaissance of the jury serves centrist values. It is a fundamentally democratic, and thus centrist, institution in the sense that de Tocqueville and Amar have lauded. It is also a centrally located institution, interposed between the defendant and the legislature, and between the defendant and the prosecutor. It is also a localizing institution, allowing a group of people from the same community as the defendant to determine whether legislators making decisions at a significant geographical—and possibly cultural—remove from the defendant are truly expressing the condemnation of his community. The jury's general acquittal power is intended to permit it to decide that on these facts, the government has gone too far. I see no evidence that the twentieth century is so different from the eighteenth that the Framers' decision that the jury serves best as a proxy for the conscience of the nation should be overturned by granting that power to a combination of sentencing commissions,

117. One need not be a textualist to decide that this particular allocation of responsibility is correct. However, if one is a textualist, then the options for addressing these concerns are limited. I proceed on the premise that textualism is a valid interpretive mode, and that the overlap in this instance allows both textualists and those with more open interpretive views to arrive at the same place.

118. One can envision the majority as the equivalent of constitutional roommates, shaking their heads as they listen to the dissenters discuss the efficacy of stuffing pillows into their stereo speakers to lower the volume, then pointing to the volume control and saying, "Stuffing pillows in might work, but it looks like the designer had a different idea. Let's try this instead."

legislators, and judges.

There are two possible views of the Justices' motivations in reestablishing the jury. One view would accept that the majority quite reasonably decided that the Constitution's existing framework calls for the jury to play such a role, which works well enough and should be left alone. The more ambitious view is that, on balance, relegating these decisions to the jury is the better system. Either way, the majority opted for the institutional actor ultimately best suited to solving the proportionality problems recurrently posed by the criminal justice system.

One need not be a strict constructionist to believe that the Constitution properly assigns the role of democratic mediator not to the court, but to the jury. If we are truly interested, as a centrist value, in deciding one case at a time, no one does that better than the jury. It makes its decisions with the fullest possible development of the facts and with a clear view of the defendant. No one is in a better position to weigh the social costs of harsh sentencing or overly broad laws in a particular context than the jury. By moving these determinations closer to the people, all of the democracy-reinforcing functions posited by the jury's proponents are allowed to operate. Forcing the community to see the costs associated with tough-on-crime legislation by requiring its direct participation in allocating those costs is a good thing.

To allow the jury to do its job, however, the legislature must pass statutes that are sufficiently transparent for jurors to make that determination. Unless the conduct the government seeks to punish is spelled out in the elements of the crime, the jury cannot act as a check. Moreover, unless the punishment to which the defendant is exposed is clear to the jury, it cannot properly serve its buffering role as the conscience of the community, which leads to the logical extensions this view of the jury project suggests. How much of the historic role of juries will be revived? Are we about to begin addressing questions that have been thought settled? For example, if the Court is serious about reinvigorating the jury's role as a constitutionally mandated mediating institution, sentencing people on the basis of relevant conduct, dismissed conduct, and even acquitted conduct certainly seems inconsistent with this vision.[119] If the Court

119. *See, e.g.*, Kyron Huigens, Harris, Ring *and the Future of Relevant Conduct Sentencing*, 15 FED. SENT. REP. 88, 93–94 (arguing that McMillan v. Pennsylvania, 477 U.S. 79 (1984), should be overruled, and that sentencing on the basis of relevant conduct not proved to the jury is unconstitutional under the holdings of *Apprendi* and *Ring*).

follows through on the more ambitious view, the holding of cases such as *United States v. Watts*[120] are in jeopardy.[121]

III. PRACTICAL MATTERS

Notwithstanding the Court's explicit statement that it did not express an opinion on the Federal Sentencing Guidelines,[122] *Blakely* resulted in a split of authority in the federal circuit courts regarding the continued viability of the Guidelines[123] and generated more than one hundred lower court opinions, many reaching wildly disparate conclusions over appropriate post-*Blakely* sentencing procedures in the first two months.[124] Thousands of federal prosecutions were affected. The courts, prosecutors and the defense bar cobbled together proceedings in an attempt to meet the requirements of the opinion, while at the same time wondering whether all of this work

120. 519 U.S. 148, 156–59 (1997) (per curiam) (holding that acquitted conduct was properly considered by a judge in determining where to sentence a defendant).

121. *See* United States v. Mueffelman, 327 F. Supp. 2d. 79, 83 n.9 (D. Mass. 2004) (arguing that the *Watts* holding will be mooted if *Blakely* requires that the Guidelines be considered advisory, rather than mandatory).

122. *See* Blakely v. Washington, 124 S. Ct. 2531, 2538 n.9. (2004) (stating that "[t]he Federal Guidelines are not before us, and we express no opinion on them").

123. *See, e.g.*, United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004) (declaring Federal Guidelines unconstitutional as a violation of the Sixth Amendment, as per *Blakely*), *vacated and remanded by* United States v. Booker, 125 S. Ct. 738 (2005); United States v. Penaranda, 375 F.3d 238, 240 (2d Cir. 2004) (certifying question to the Supreme Court), *certified question dismissed by* United States v. Penaranda, 125 S. Ct. 984 (2005); United States v. Pineiro, 377 F.3d 464, 467–69 (5th Cir. 2004) (declaring Guidelines constitutional), *judgment vacated by* Pineiro v. United States, 125 S. Ct. 1003 (2005); United States v. Hammoud, 381 F.3d 316, 354 (4th Cir. 2004) (upholding the Guidelines, but recommending that lower courts issue a second sentence that assumes that the Guidelines are advisory), *judgment vacated by* Hammoud v. United States, 125 S. Ct. 1051 (2005).

124. It has been noted that:

> [Courts] are taking, and will likely continue to take, many divergent approaches in response to *Blakely*—from upholding the Guidelines, to declaring them unconstitutional, to declaring them unconstitutional only insofar as upward adjustments to the base offense level and then sentencing within that level, to authorizing (or refusing to authorize) juries to resolve disputed sentencing enhancements.

Blakely v. Washington *and the Future of the Federal Sentencing Guidelines*, Hearing Before the Senate Comm. on the Judiciary (statement of Alan Vinegrad, former federal prosecutor who served as United States Attorney for the Eastern District of New York) (last visited Feb. 14, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3686 (on file with the North Carolina Law Review). Cases and materials are collected at Professor Douglas Berman's weblog, *Sentencing Law and Policy*, http://sentencing.typepad.com. (last visited Feb. 12, 2005) (on file with the North Carolina Law Review).

was necessary. Superseding indictments alleging "sentencing facts" were drafted by prosecutors and handed down by grand juries. In some cases "sentencing juries" were convened, despite the absence of federal rules that contemplate such a procedure. In other courts, the decision was a windfall to the defense bar and specific criminals, with defendants in cases running the gamut from armed drug dealing to multi-million-dollar fraud schemes to child pornography receiving lighter sentences from judges who believed themselves barred from finding facts that enhance sentences. The Fourth Circuit upheld the Guidelines, while ordering courts to issue two sentences—a "Blakelyized" sentence and a sentence under the Guidelines, just in case it was wrong.[125] The Second Circuit certified the question of the Guidelines' continued vitality directly to the Supreme Court.[126] Petitions for review of sentences poured into the appellate courts.

Congress responded as well. The Senate passed a concurrent resolution explaining that it was Congress's intention that the Guidelines be applied as a whole, rather than being severed to the benefit of defendants, and asking for rapid resolution regarding *Blakely*'s application to the Federal Guidelines.[127] Proposals to "lift the lid" on the Guidelines by removing the upper end of sentencing ranges vied with proposals to make the Guidelines advisory only as first passes at a legislative fix.[128] More comprehensive restructuring of the criminal code may be in the offing. Institutional actors such as the Criminal Division of the Department of Justice, the Solicitor General, and the United States Sentencing Commission made responding to *Blakely* a top priority. The Court placed the role of the jury atop the agenda for a multitude of actors.

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125. *See Hammoud*, 381 F.3d at 353 (holding that district courts should issue one sentence formulated "in accordance with" the Guidelines, as well as another sentence treating the Guidelines as merely "advisory").

126. *Penaranda*, 375 F.3d at 240.

127. *See* S. Con. Res. 130, 108th Cong., 150 CONG. REC. S8574 (July 21, 2004) (stating "[t]hat it is the sense of Congress that the Supreme Court of the United States should act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines").

128. Also known as the "Bowman proposal." *See* Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with* Blakely v. Washington, 16 FED. SENT. REP. 364, 365–66 (June 2004). Professor Bowman reiterated his proposal in testimony before the Senate Judiciary Committee. Blakely v. Washington *and the Future of the Federal Sentencing Guidelines, Testimony*, Hearing Before the Senate Comm. on the Judiciary (statement of Frank Bowman) (last visited Feb. 5, 2004) [hereinafter Bowman Proposal], *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=647 (on file with North Carolina Law Review).

IV. AFTER *BLAKELY*, HOW DOES THIS RENEWED JURY RIGHT AFFECT THE OTHER PARTICIPANTS IN THE SYSTEM?

The problems the participants face in the criminal justice system in the post-*Blakely* world are wide-ranging.[129] The courts will be asked to consider double jeopardy and ex post facto issues arising for defendants who pled but had not been sentenced when *Blakely* was decided and to perform retroactivity analysis under *Teague v. Lane*[130] (i.e., was *Blakely* a watershed rule of criminal procedure or a logical extension of the *Apprendi* principle?[131] Will *Booker* be a watershed rule?). Some courts have imposed dual sentences, anticipating the need to re-sentence perhaps thousands of defendants after *Booker*.[132]

Prosecutors face similarly complex questions.[133] Should indictments be changed to include all potentially enhancing facts, so that they could be argued to juries? If so, which facts qualify? What should special verdict forms require? Did *Blakely* change the traditional evidentiary balances enacted in Rules 401 and 403 of the Federal Rules of Evidence, if facts once thought to be sentencing factors are now the functional equivalent of elements and now must be proved to a jury? How should one's plea-bargaining posture be changed in response to the new uncertainty? Does the change require a return to charge-bargaining, and the concomitant loss of the transparency the Guidelines were expected to create? If so, how does that affect charging decisions? Are opening statements and arguments going to include facts that were once off limits, because the jury must find them in its verdict to support the sentence ultimately sought? In the absence of charge-bargaining, how much "sentencing factor bargaining" is proper? *Booker* made the Federal Guidelines advisory, but has not answered many of these questions, nor did it answer any of them for state prosecutors.

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129. Immediately after *Blakely*, the lower courts reached fundamentally different answers to such issues as the facial validity of the Federal Sentencing Guidelines; severability of various enhancement provisions and the application of such provisions with or without jury findings of fact and whether such severance complies with legislative intent; and whether the Constitution requires that sentencing juries be empaneled, and if so, whether the Federal Rules of Criminal Procedure permitted such action.

130. 489 U.S. 288 (1989).

131. *See* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT. REP. 316, 323–24 (2004).

132. *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 354 (4th Cir. 2004) (holding that district courts should issue one sentence formulated "in accordance with" the Guidelines, as well as another sentence treating the Guidelines as merely "advisory").

133. *See* James Comey, *Department of Justice Legal Positions and Policies in Light of* Blakely v. Washington, *reprinted in* 16 FED. SENT. REP. 357, 357–59 (2004).

The defense bar's response to the logic of the *Blakely* line of cases is likely to be wide-ranging. We might reasonably expect to see the reintroduction of the arguments in favor of a Sixth Amendment right to argue for nullification, for all of the democracy-reinforcing reasons that the Framers envisioned and which the passage of time has not altered. If the role of the jury is really to serve a democracy-reinforcing function in addition to a factfinding function, the current system clearly creates an information deficit problem. Historically, jurors knew the penalty to which a felon was exposed. But, as Justice O'Connor makes clear in her *Blakely* dissent, things are different now. Juries are basing their decisions to convict or acquit in the absence of critical information—the sentence to which they are exposing the defendant—and counsel are prohibited from providing that information at trial. If juries are really to serve as constitutional circuitbreakers, they cannot act as a check on democracy failure in the legislature if they do not know what will happen to the defendant if they convict.

The democracy-reinforcing function works when the likely response of jurors has to be considered by drafters writing their statutes on Capitol Hill just as much as by the prosecutors deciding to charge in a particular case. If jurors were, as Professor Amar notes,[134] intended to serve as independent checks on abuses of legislative as well as executive power, there is a fundamental breakdown in their ability to act as a critical check on the system. The proportionality review the Framers envisioned has disappeared under a smokescreen of sentencing tables and "sentencing facts." Under such circumstances, the Court's countermajoritarian role is implicated more than ever, because the legislature is overreaching in precisely the manner the jury is intended to check. If the legislature is permitted to strip away the protection the jury is meant to provide, while at the same time reducing the transparency and hence political accountability of its sentencing schemes, there is nothing left of the intended checks and balances. This rejuvenation of the jury could be explained as part of a structural constitution project in which Justices Scalia and Thomas are key participants. The concern with checks and balances that invigorates their federalism opinions reemerges in this context as concern for reinvigorating the jury's role as a check. The structural concern seems congruent with the Rehnquist Court's rejuvenation of federalism, applying checks and balances to protect

134. *See* AMAR, *supra* note 24, at 83–96.

the structural separation of powers.[135] But Rehnquist, Kennedy, and O'Connor have abandoned this majority in the *Blakely* line of cases. Perhaps they will change their minds when their short-term fears of disrupting the system have receded.[136]

The *Blakely* line of cases has ignited a discussion among the branches over the role of the jury—and the discussion is instructive as a way to evaluate the changing perceptions of the jury's place at the constitutional center. Professor Rachel Barkow, a former clerk for Justice Scalia, testified before the Senate Committee on the Judiciary regarding the appropriate response to *Blakely*. While acknowledging that the issue of practical consequence was the future of the Federal Sentencing Guidelines, she reminded the Committee of the real issue at stake, and of its institutional role: "This hearing is, at its core, about the importance of the criminal jury.... [i]t is one of the cornerstones of our constitutional structure, and we should all strive to maintain its vitality."[137]

Professor Barkow is one of the leading proponents of the jury's role, and her pre-*Blakely* articles have proved prescient.[138] In a November 2003 article, she proposed that the Court revisit the element issue in *Blakely* and argued that "the key determinant should be whether a binding law links the presence or absence of a fact with a prescribed amount of punishment and limits judicial discretion to depart from that legislative judgment by allowing the government to

135. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551, 567 (1995) (holding that the Gun-Free School Zone Act of 1990 was an impermissible broadening of congressional power under the Commerce Clause). *See generally* John O. McGinnis, *Continuity and Coherence in the Rehnquist Court*, 47 ST. LOUIS U. L.J. 875 (2003) (noting the longstanding commitment of the Rehnquist Court to the principles of federalism and judicial restraint).

136. Or perhaps they may buy a ticket to *Apprendi*-land so they can have a larger role in shaping its future. The remedy majority in *Booker* returned us almost to the status quo, but the larger *Blakely* principle was also vindicated in the Stevens opinion for the Court. Before *Booker*, the short-term shock to the system created by *Blakely* was rapidly being absorbed as attorneys and judges adjusted their charging, negotiating and trial practices to fit the new mandate. It remains to be seen what adjustments will be necessary once Congress and the state legislatures change the various structured sentencing systems to accommodate the new mandate.

137. Blakely v. Washington *and the Future of the Federal Sentencing Guidelines*, Hearing Before the Senate Comm. on the Judiciary (statement of Rachel E. Barkow) (last visited Mar. 28,. 2005), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3684 (on file with North Carolina Law Review).

138. *See generally* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (urging increased jury participation in criminal trials—particularly at the sentencing phase—as a check on government power).

seek review of the judge's decision."[139]

This is the position ultimately reached by the Court in *Blakely*. Professor Doug Berman's weblog, *Sentencing Law and Policy*[140] has become the informational locus of the debate, with multiple courts citing it in opinions, and serious scholars of sentencing policy checking it almost daily. Opinions and other source materials appear there within hours, rendering it the equivalent of a real-time treatise that the participants consult as they shape the debate. Professor Frank Bowman also spoke to the Judiciary Committee and the United States Sentencing Commission, proposing that the upper-end of the Guideline ranges be increased to the statutory maximum as a stop-gap measure, until a more comprehensive solution to the jury issues could be enacted.[141] The way the *Blakely* debate is unfolding tells us something about the way the United States as a body politic goes about incorporating mainstream values. The widespread reaction after *Blakely*, with immediate responses from Congress, state legislatures, sentencing commissions, editorial pages and interest groups shows that the Court placed the constitutional role of the jury on the national agenda for discussion. Yet to be resolved are the second and third waves of issues that will inevitably arise as the system seeks to incorporate the *Blakely* mandate, involving reform of the federal and state sentencing schemes and criminal codes, and perhaps a renewed debate on the wisdom of mandatory minima and the incarceration rate in the United States compared to the rest of the world.

For Congress, *Blakely* has been the basis for renewed consideration of the Sentencing Guidelines. The Judiciary Committee responded with hearings within three weeks after *Blakely* was handed down, and there is no question that the members recognized that the opinion was significant, or that the Court's concerns would have to be addressed in any successor regime.[142] "While we may disagree with Justice Scalia's opinion, we must recognize that a majority of the Court has spoken. Like the federal judges, prosecutors and defense attorneys who must now grapple with the scope and impact of the *Blakely* opinion, we in Congress are

139. *Id.* at 46.

140. *See Sentencing Law and Policy*, *supra* note 124.

141. *See* Bowman Proposal, *supra* note 128.

142. *Blakely* was decided June 24, 2004. The United States Senate Committee on the Judiciary held hearings on *Blakely v. Washington* and the future of the Federal Sentencing Guidelines on July 13, 2004.

concerned."[143]

But what are the limitations Congress now faces? Does *Blakely* signal the end of the nation's twenty-five-year-old structured sentencing project with congressionally mandated limits on judicial discretion? Do we in fact live in a binary world, where the only choices are structured sentencing in its current form or wildly unrestrained sentencing disparities? Obviously not. As this is written, there is already evidence that sentencing facts can be found by juries beyond a reasonable doubt.[144]

There are proposals for quick fixes before Congress, as well as the beginnings of proposals for long-term changes.[145] There has been discussion of raising the upper end of the Guidelines' range for all sentences to the statutory maximum,[146] obviating the apparent stricture of *Blakely*'s rule, although that means that the range would be skewed upward in a way unanticipated when the Guidelines were first enacted. There has already been the beginning of a dialogue on the wisdom of enacting new statutes with mandatory minima, a response which moves the sentencing decision even further away from the individual. As many are quick to point out, this solution may amount to using a legislative sledgehammer to limit the perceived problem of runaway judging.

In the criminal context, we have a ready historical analogue for this kind of discussion in the *Miranda v. Arizona*[147] opinion and the consequent debate on the rights of the accused under the Fifth Amendment,[148] although the effects of *Blakely* may far outstrip

143. Blakely v. Washington *and the Future of the Federal Sentencing Guidelines*, Hearings Before the Senate Comm. on the Judiciary (statement of Sen. Patrick Leahy) (last visited Feb. 14, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=2629 (on file with the North Carolina Law Review).

144. *See* United States Sentencing Commission, *Preliminary Findings: Federal Sentencing Practices Subsequent to the Supreme Court's Decision in* Blakely v. Washington, at *3 (last visited Mar. 28, 2005), *available at* http://www.ussc.gov/Blakely/blakelyoutreachpreliminaryfindings.pdf (on file with the North Carolina Law Review).

145. *See, e.g.*, Testimony of Frank O. Bowman, III, Before the Subcomm. on Crime Terrorism and Homeland Security, Comm. on the Judiciary, U.S. House of Representatives, Feb. 10, 2005, *available at* http://judiciary.house.gov/media/pdfs/Bowman021005.pdf (on file with the North Carolina Law Review); Testimony of Christopher A. Wray, Assistant Attorney General, Before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, U.S. House of Representatives, Feb. 10, 2005, *available at* http://judiciary.house.gov/media/pdfs/Wray021005.pdf (on file with the North Carolina Law Review).

146. *See* Testimony of Frank O Bowman, III, *supra* note 145.

147. 384 U.S. 436 (1966).

148. *See generally* Yale Kamisar, *Foreword, From* Miranda *to* § 3501 *to* Dickerson *to* . . ., 99 MICH. L. REV. 879 (2001) (noting the Supreme Court's difficulty with defining the

Miranda.[149] Congress acted quickly to overturn *Miranda*, the executive never sought to enforce the legislation intended to repeal it, and the Court ultimately rebuffed the attempt.[150] Nonetheless, *Miranda* is a "central" opinion, that defines the contours of the Fifth Amendment right to silence in very specific terms. The role of public opinion, and of the Justices' interest in the protection of the Court's prerogatives as arbiter of the Constitution, in the *Dickerson*[151] decision was critical. In fact one could argue that *Miranda* was upheld as much because the nation can recite the warning as because all of the Justices who voted for it believe it has a firmly-rooted basis in constitutional theory. Whether the jury reaches the same status in the public's consciousness remains to be seen.

CONCLUSION

As this is written, the judicial, executive, and legislative branches are scrambling to figure out how to respond to the Court's determination that the right to a jury determination of the facts essential to a defendant's sentence is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[152] The fact that the political science models failed to predict the outcome, and that the "centrist" Justices voted against it, reminds us of the importance of considering bedrock doctrinal issues as we set about defining mainstream values. The way the debate has been shaped since the Court placed the issue on the national agenda in *Jones* reminds us of the interactive nature of the process. Multiple participants from all of the branches, as well as the public, are weighing in on the role of the jury, and the outcome is still being shaped. Our history, constitutional structure, and evolving concerns regarding fairness to the accused all overlap to establish the right to a jury trial as a mainstream value. A clear definition of what it means to define elements and set punishments in a way that respects the jury right is essential if we are going to engage in a meaningful dialogue going forward. The *Blakely* earthquake foreseen by Justice O'Connor was real, but the lasting effects will be readily absorbed by the system, once we get past the period of uncertainty brought on by the opinion. How closely we guard the right to a jury trial, and balance the structural and substantive concerns that that right

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constitutional rights of criminal defendants pursuant to *Miranda*).

149. *See Sentencing Law and Policy*, *supra* note 124.

150. *See* Kamisar, *supra* note 148.

151. United States v. Dickerson, 530 U.S. 428 (2000).

152. Blakely v. Washington, 124 S. Ct. 2531, 2538–39 (2004).

implicates, are worthy of reconsideration by the centrists.