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The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth

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THE RIGHT TO A JURY DECISION ON SENTENCING FACTS AFTER BOOKER: WHAT THE SEVENTH AMENDMENT CAN TEACH THE SIXTH

Paul F. Kirgis*

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I. INTRODUCTION

The maxim that judges do not decide questions of fact and juries do not decide questions of law is probably as old as the common law.\(^1\) Like most maxims, it is not true—at least not all the time. No neat line divides questions of law from questions of fact, and even if one did, we could not practicably assign all questions in one category to judges and all questions in the other to juries. Adjudication is never that simple. Judges always have and always will decide some questions of fact; juries always have and always will decide some questions of law.\(^2\)

Nevertheless, it is true that there is something about certain questions that leads us to conclude that they are factual and, in turn, to assign them to the jury. For civil cases in the federal courts, the Constitution expressly refers to the jury's central role as fact-finder by providing that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."\(^3\) The first Judiciary Act was even more clear, providing that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."\(^4\) And today, courts routinely invoke the fact-law distinction as a rationale for assigning a particular decision either to the jury or to the judge.

In the realm of criminal sentencing, however, the principle that juries should decide questions of fact got lost in the second half of the twentieth century. As legislatures turned to structured sentencing schemes to reduce perceived disparities in sentencing, they assigned more and more fact-finding to judges. This fact-finding was done after the defendant's guilt for a particular crime had been established, either through guilty plea or conviction. It typically involved a determination by a preponderance of the

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\(^1\) SIR EDWARD COKE, COMMENTARY ON LITLETON 460 (Thomas ed. 1818) ("[A]d questionem facti non respondent judices ... ad quaestionem juris non respondent juratores.").


\(^3\) U.S. CONST. amend. VII.

\(^4\) Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789).
evidence standard made on the basis of a presentence investigation conducted by a probation officer. Judges, acting without the benefit of evidentiary hearings, decided such clearly factual determinations as the amount of money embezzled, whether an assault was motivated by pecuniary gain, and whether the victim of sexual abuse was in the custody of the abuser. Substantial differences in actual time served turned on the outcome.

The Supreme Court allowed—indeed, encouraged—this process. The Court understood the Sixth Amendment’s right to a jury trial in criminal cases simply not to apply at sentencing. The Court embraced a distinction between the “elements” of an offense and mere “sentencing factors,” requiring a jury determination on any matter labeled an element, but not requiring one for mere sentencing factors. And it gave legislatures almost total deference to define the elements of an offense, and thus to transfer fact-finding authority to the judge.

That began to change with the Court’s decision in Apprendi v. New Jersey, in which the Court held that “[o]ther than the fact of

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5 See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(3) (2004) (providing for increase in offense level for larceny, embezzlement, or theft based on amount of loss); cf. id. § 2A2.2(b)(3) (providing for increase in offense level for aggravated assault based on degree of bodily injury to victim).

6 See id. § 2A2.2(b)(4) (providing for increase in offense level for aggravated assault where “assault was motivated by a payment or offer of money or other thing of value”).

7 See id. § 2A3.1(b)(3) (providing for increase in offense level for criminal sexual abuse based on whether victim was in custody or care of defendant or was abducted).


9 See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (“The Sixth Amendment never has been thought to guarantee a right to a jury determination of [the appropriate punishment to be imposed on an individual].”).

10 See Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (“An indictment must set forth each element of the crime . . . but it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime.”); McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (“[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”) (emphasis in original) (quoting Patterson v. New York, 432 U.S. 197, 210 (1977))).

11 See McMillan, 477 U.S. at 85 (stating that “the state legislature’s definition of the elements of the offense is usually dispositive”) (citing Patterson, 432 U.S. at 210); Larry Alexander, The Supreme Court, Dr. Jekyll, and the Due Process of Proof, 1996 SUP. CT. REV. 191, 196 (1996) (“The state’s formal definitions of crimes largely control when the burden of proof beyond a reasonable doubt can be reduced or shifted to the defendant.”).
prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Apprendi turned the analysis of the right to a jury trial away from the semantic distinction between elements and sentencing factors and toward the defendant’s real concerns about the severity of the penalty to be imposed. For that reason, it was a significant decision. But because it seemingly did not touch the issue of judicial fact-finding unless the factual determinations resulted in a sentence greater than the prescribed statutory maximum, its scope appeared limited. Most notably, the Federal Sentencing Guidelines (“Guidelines”) appeared immune from challenge under Apprendi because they expressly provide that any sentence imposed under them may not exceed the statutorily authorized maximum sentence.

With its decision in Blakely v. Washington, however, the Supreme Court appeared to take the logic of Apprendi to its natural conclusion. Blakely extended Apprendi by defining the “statutory maximum” referred to in Apprendi 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.” In other words, Blakely appeared to hold that any factual determination that operates to increase the maximum sentence to which the defendant is subject must be admitted by the defendant or made by the jury. That was, to say the least, an extraordinary holding. It called into question not just the Guidelines, but any sentencing scheme that calls on the

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12 530 U.S. 466, 490 (2000). The defendant in Apprendi was convicted of a crime carrying a maximum sentence of ten years. Id. at 470. But he was sentenced to twelve years based on the sentencing judge’s determination under New Jersey’s hate-crime statute that he had acted “with a purpose to intimidate . . . because of race.” Id. at 469-71.

13 See id. at 478-79 (noting that at founding of United States, any possible distinction between element and sentencing factor was unknown; instead, criminal procedure gave little discretion to trial judge so that defendant had no doubt what punishment would follow particular crime).

14 See U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c) (2004) (“[T]he sentence may be imposed at any point within the applicable guideline range, provided [it] . . . is not greater than the statutorily authorized maximum sentence . . . .”).


16 Id. at 2537 (emphasis in original).

17 Id. (“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” (citation omitted)).
judge to make findings of fact as a prelude to determining a sentence. It sowed so much confusion among the courts that the Supreme Court took the unusual step of granting certiorari during its summer recess to allow expedited review of two cases addressing the constitutionality of the Guidelines.

The Court's decision in those cases, reported as United States v. Booker, is convoluted even by the standards of this increasingly fractured Court. It contains two majority opinions, one that holds that judicial fact-finding under the Guidelines may violate the Sixth Amendment and a second that provides a remedy. Justice Ginsburg signed on to both opinions, but otherwise there is no overlap among the justices in the two majorities. The four justices (other than Ginsburg) who found the Guidelines constitutionally infirm rejected the second majority's remedy, and the four justices (other than Ginsburg) who crafted the remedy rejected the first majority's conclusions that the Guidelines could be applied unconstitutionally.

The result is a decision containing a fundamental internal inconsistency. The first majority reaffirmed Blakely's holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Because, in at least some cases, the Guidelines call for judges to find facts that increase the range of sentences to which the defendant is subject, the first majority found the Guidelines unconstitutional as applied in those cases. But the second majority concluded that any

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18 Id. at 2549 (O'Connor, J., dissenting) (concluding that Blakely "casts constitutional doubt over [all determinate sentencing schemes] and, in so doing, threatens an untold number of criminal judgments").
21 Id. at 746.
22 Id. at 756.
23 Id. at 746, 756 (listing first majority as Stevens, Scalia, Souter, Thomas, and Ginsburg, JJ., and second majority as Breyer, O'Connor, Kennedy, Ginsburg, JJ., and Rehnquist, C.J.).
24 Id. at 756.
25 Id. at 746-48. Although the first majority never expressly declared the Guidelines unconstitutional, it agreed with the holding of the Seventh Circuit in Booker that the
constitutional infirmity could be expunged if the Guidelines were construed as advisory rather than mandatory. The second majority’s remedy, therefore, was simply to excise the statutory language making the Guidelines mandatory, while leaving the basic structure of the Guidelines intact and expecting judges to continue to apply them essentially as drafted.

The incomprehensible product of these two opinions is that if a judge finds facts increasing a defendant’s sentence beyond the otherwise allowable maximum because Congress required her to find those facts, the resulting sentence is unconstitutional. On the other hand, if a judge finds facts increasing a defendant’s sentence beyond the otherwise allowable maximum because Congress suggested that she find those facts, the sentence is perfectly valid. What apparently matters to this Court is not whether judges remove crucial fact-finding authority from juries, but whether judges remove crucial fact-finding authority from juries because Congress has required them to do so.

It seems safe to say that the drafters of the Sixth Amendment would not have seen the issue in those terms. They were more concerned about judicial usurpations of power than about legislative usurpations of power. The abridgment by imperial judges of the right to a jury trial was one of the key grievances leading to the American Revolution. Both the first Continental Congress and the Declaration of Independence expressly referred to efforts to curtail the right in justifying the push for independence. Throughout prerevolutionary and then preconstitutional debates, there was never a suggestion that judges should be allowed to remove decisional authority from juries as long as they did so in their own

Guidelines had been unconstitutionally applied by the district court in that case. Id.

26 Id. at 756-57.
27 See id. at 764-65 (noting that remainder of act “functions independently” of that which violates Sixth Amendment).
28 See THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the [constitutional] convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury . . . .”).
29 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 69 (Worthington Chauncey Ford ed., 1904) (resolving to adopt English common law, including “privilege of being tried by . . . peers”).
30 THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).
discretion. From an originalist perspective, the Court's joint holding is unsupportable.

But *Booker* is problematic for a more fundamental reason rooted in the pragmatic concerns of real-world defendants. It takes a significant step back from the progress the Court had made in recent years toward a reinvigorated jury right. Depending on how Congress responds to the decision, *Booker* will likely allow judicial fact-finding under the Guidelines and their state counterparts to continue unchecked, with real differences in time served turning on the findings of judges and not juries. That result is troubling for several reasons, and in this Article I will focus on one reason that has received relatively little attention: the disparity the Court's jury-right decisions has produced between what a civil litigant can expect his jury to decide and what a criminal litigant can expect his jury to decide.\(^{31}\)

Notwithstanding some fundamental and well-known differences in criminal and civil procedure,\(^{32}\) in most respects the criminal jury right guaranteed by the Sixth Amendment and the civil jury right guaranteed by the Seventh Amendment have been implemented in coordinate fashion. The two types of juries are drawn from the same pools,\(^{33}\) they are subject to similar guidelines regarding composition\(^{34}\) and selection,\(^{35}\) and the manner in which they receive evidence and instruction on the law, deliberate, and render verdicts

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\(^{34}\) See Colgrove v. Battin, 413 U.S. 149, 160 (1973) (holding that federal civil jury may consist of six persons); Williams v. Florida, 399 U.S. 78, 103 (1970) (holding that state criminal jury may consist of six persons).

\(^{35}\) See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (holding that peremptory challenges may not be used to exclude women from criminal jury); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (holding that peremptory challenges may not be used to exclude black jurors in civil actions solely because of race); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that use of peremptory challenges on black jurors solely because of race violated equal protection rights of criminal defendant and jurors); Jonakait, supra note 32, at 128-34 (describing state and federal voir dire practices).
is the same. To be sure, because of the greater liberty concerns implicated by criminal trials, there are important differences in the standard of proof required to reach a verdict and in the power of the judge to overrule that verdict. And while the value of criminal juries seems beyond question, the civil jury has been subjected to steady criticism. But at bottom, criminal and civil juries have been understood to have similar societal functions, including checking the abuse of governmental power, determining disputed facts, injecting community values into legal decisions, and aiding public acceptance of legal determinations. They are, as a consequence, subject to similar procedural incidents.

With its decision in Booker cementing judicial power to find facts at sentencing, however, the Supreme Court has ensured an enduring disparity between the kinds of questions criminal and civil litigants can expect their juries to decide. The disparity appears most dramatically by comparing the assessment of punitive damages in civil cases with the imposition of a sentence in criminal cases. Both civil punitive awards and criminal sentences turn on factual considerations, such as the degree of harm inflicted on victims. The Supreme Court has recently reaffirmed that, where punitive damages are at issue in a civil case, the jury should make any factual determinations on which the award of punitive damages turns. In contrast, Booker will permit judges acting under the newly advisory Guidelines to determine exactly the same factual matters, such as the degree of harm to the victim, as a predicate for imposing a criminal sentence.

A discrepancy between the scope of the jury rights under the Sixth and Seventh Amendments would not seem unusual if it

36 See JONAKAIT, supra note 32, at 248-50 (explaining jury nullification).
38 JONAKAIT, supra note 32, at 18-86.
39 See infra notes 231-51 (comparing methodologies for determining punitive damage awards and criminal sentences).
40 See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 n.12 (2001) (noting that Seventh Amendment would not permit court to ignore jury findings when reviewing punitive damages); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (holding that Seventh Amendment guarantees "right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act").
resulted in a more expansive right for criminal defendants. After all, criminal defendants enjoy added protections from the right to proof beyond a reasonable doubt and the possibility of jury nullification. But in the allocation of decisionmaking responsibility, the Supreme Court's Sixth and Seventh Amendment jurisprudence has not created a more expansive jury right for criminal defendants. Instead, it has produced a system in which a civil litigant may demand a jury decision on questions that, if presented in a criminal case, would fall within the exclusive province of the judge.

This Article explores this anomaly and argues that the Supreme Court in *Booker* missed a critical opportunity to redress the constriction of the criminal defendant's right to have a jury decide those facts that lead to the deprivation of the defendant's liberty. There is simply no good reason to ensure that civil litigants get a jury decision on all questions of fact relevant to the imposition of a civil award while denying similar protection to criminal defendants facing imprisonment or even death. As an initial matter, both the Sixth and Seventh Amendments arguably should be understood to give constitutional force to a jury right as it existed at the framing. The black-letter rule of common-law procedure at that time was that juries decide questions of fact and judges decide questions of law. In fact, the evidence suggests that fine distinctions between fact and law were seldom drawn and that juries were given broad latitude to decide all issues in a case, legal or factual. Nevertheless, it seems to have been widely understood that judges could not take factual determinations away from the jury. Thus, to the extent they incorporate procedural standards from the time of the founding, the Sixth and Seventh Amendments should both be understood to require jury decisions on all relevant questions of fact.

41 See *Jonakait*, *supra* note 32, at 248-49 (attributing added protection of jury nullification to Fifth Amendment).
42 See *Murphy*, *supra* note 31, at 745 (noting that general language of Seventh Amendment incorporates historical practice).
43 See *Blinka*, *supra* note 2, at 138-39 (stating juries could even decide cases without regard to instructions by judges or testimony of witnesses).
44 See *Jack H. Friedenthal et al., Civil Procedure* 496 (3d ed. 1999) (discussing roles of judge and jury at common law). Judges did play a role in the fact-finding process, for example, by commenting on the witnesses and on the evidence. *Id.*
Beyond this argument rooted in logical consistency and original intent, there are powerful normative reasons for giving fact questions to the jury. As our system has implicitly recognized for centuries, juries are simply the best actors to decide fact questions.\textsuperscript{45} Fact questions involve speculative judgments about unknown events. In order to allow the parties and the legal system to put disputes behind them, adjudication must result in final determinations about the matters contested by the parties. Only the jury, with its veiled, democratic decisionmaking structure, has the societal imprimatur to render acceptable final decisions on matters that are inherently unknowable. Accordingly, even for those who do not subscribe to an originalist conception of constitutional rights, the Sixth and Seventh Amendments should be read to guarantee that juries decide questions of fact, whether those questions arise in connection with establishing liability or in connection with determining the appropriate award or punishment.

My argument on these points will proceed in three steps. In Part II, I will trace the evolution of the criminal jury right to show how the jury’s role was constricted prior to the partial recovery of jury power in the \textit{Apprendi} line of cases. In Part III, I will trace the parallel evolution of the civil jury right to show how it has remained fairly consistent in requiring jury decisions on important fact questions. In Part IV, I will demonstrate the consequences of this disparity by comparing the scope of the civil jury right as it is applied to punitive damages to the scope of the criminal jury right as it is applied to sentencing. In Part V, I will explain why, as a normative matter, it makes sense to give questions of fact to the jury, and then I will address the practical implications of interpreting the Sixth Amendment to confer a right to a jury decision on questions of fact at sentencing.

\textsuperscript{45} See Murphy, \textit{supra} note 31, at 745 ("[T]he Founders preferred the jury to judge because they believed the jury to be a more rational factfinder, a body less susceptible to bias, and a vital check on official power.").
II. THE SCOPE OF THE JURY RIGHT IN CRIMINAL CASES

A. THE CRIMINAL JURY'S HISTORICAL PREROGATIVES

One of the ways in which royal courts attempted to rein in the jury right during the colonial period was by the use of special verdicts; that is, verdicts in which the jury determines the facts of the case and the judge applies the governing legal principles to those facts. The most famous example of that practice, and in fact the case that effectively doomed the practice in America, was the failed prosecution of John Peter Zenger for the crime of seditious libel in 1735.46 Zenger was the editor and printer of The New York Weekly Journal, the first paper devoted to political commentary in the colonies.47 There was little question that Zenger's criticisms fit the existing standards for sedition.48 Nevertheless, three separate grand juries refused to indict him.49 He finally faced trial after the New York Attorney General charged him in an information.50

At trial, Zenger was represented by Andrew Hamilton, the leading lawyer in colonial America.51 Hamilton conceded that Zenger had published the statements charged, but argued—contrary to the clear law of the day—that truth was a defense and that it should be submitted to the jury.52 The presiding judge responded that the only issue for the jury to decide was the factual one of whether Zenger published the papers; it was then up to the judge to determine whether the publication constituted libel.53 Hamilton disagreed. "I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so . . . . [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders

47 Id. at 872.
48 Id.
49 Id.
50 Id.
51 Id. at 872-73.
52 Id. at 873.
53 Id.
juries useless . . . ." The judge ultimately allowed the jury to render a general verdict, and the jury found Zenger not guilty.\textsuperscript{55}

The \textit{Zenger} case helped enshrine the power of colonial criminal juries to render general verdicts encompassing both law and fact.\textsuperscript{56} That understanding of the jury's prerogatives prevailed after independence as well. In \textit{Georgia v. Brailsford}, one of the few jury trials in the Supreme Court, Chief Justice John Jay instructed the jurors that they had the "right to take upon [them]selves to judge of both [fact and law], and to determine the law as well as the fact in controversy."\textsuperscript{57} Later, when Justice Samuel Chase was impeached, one of the charges against him was that, while sitting as a trial judge, he had attempted "to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law, as well as on the question of fact, involved in the verdict they are required to give."\textsuperscript{58} By 1851, at least fifteen states had established, either by statute or through judicial decision or custom, that juries had the right to decide questions of law as well as questions of fact.\textsuperscript{59}

During this period, most crimes carried definite sentences.\textsuperscript{60} In her study of the history of structured sentencing, Professor Ilene H. Nagel, a former U.S. Sentencing Commissioner, found that

\begin{quote}
Throughout the colonial period, and up through 1870, legislators retained most of the discretionary power over criminal sentencing. Each crime had a defined punishment; the period of incarceration was generally prescribed with specificity by the legislature. Judges were given some sentencing discretion, but only within ranges that were narrow compared to later developments.\textsuperscript{61}
\end{quote}

\textsuperscript{54} \textit{Id.} (alteration in original).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 873-75 (noting that pamphlet describing Zenger's trial "became the American primer on the role and duties of jurors" and discussing cases in which juries rendered verdicts contrary to apparently governing legal rules).
\textsuperscript{57} 3 U.S. (3 Dall.) 1, 4 (1794).
\textsuperscript{58} Alschuler & Deiss, \textit{supra} note 46, at 908.
\textsuperscript{59} \textit{Id.} at 910.
\textsuperscript{61} \textit{Id.} (citations omitted).
Federal judges had wider discretion than state judges at that time, but federal judges played a comparatively small role in the overall sentencing scheme because of the narrow range of federal crimes.\footnote{See Frank O. Bowman, III, \textit{Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines}, 44 \textit{St. Louis U. L.J.} 299, 312-14 (2000) (discussing history of judicial sentencing discretion in federal versus state courts).}

As a result of these two factors—juries' right to decide legal questions and the determinacy of sentencing—there was little reason to debate the scope of the jury right in criminal cases. Juries decided virtually all disputed questions of fact and many questions of law as well. Even where crimes did not carry definite sentences, juries frequently made sentencing decisions.\footnote{See \textit{id.} at 311-12 (noting historical prevalence of jury sentencing).}

But that began to change in the mid-1800s. Although courts came to reject the notion that jurors should decide questions of law,\footnote{See \textit{Sparf v. United States}, 156 U.S. 51, 106 (1895) (holding that jury may not resolve disputes of law); Alschuler & Deiss, \textit{supra} note 46, at 910 (noting that between 1850 and 1931, courts in at least eleven states held that juries do not have power to decide questions of law).} American jurisdictions continued to disallow special verdicts in criminal cases.\footnote{See \textit{JONAKAIT}, \textit{supra} note 32, at 251 ("Federal and state courts usually do not allow special verdicts or special interrogatories if the criminal defendant objects to their use.").} With general verdicts protected by the uniform view that judges could not direct a guilty verdict or overturn an acquittal, juries continued to have de facto power to decide questions of law (at least when favoring the defendant) in criminal cases.\footnote{This process began in the late nineteenth century but reached fruition with the promulgation of the Model Penal Code in 1962, which unified and simplified multiple criminal}

With respect to criminal sentencing, however, the law began to change in a way that dramatically decreased the power of juries. As reform-minded legislatures gradually codified or recodified their states' criminal laws, they changed the way criminal punishments were determined in two major respects. First, the new legislation replaced multifarious crimes with statutory schemes whereby a single basic crime was punishable by different penalties depending on the presence of aggravating circumstances.\footnote{Despite the overwhelming preference for general verdicts, American courts have on occasion allowed special verdicts in criminal cases. \textit{See, e.g., United States v. O'Looney}, 544 F.2d 385, 392 (9th Cir. 1976) (arguing on appeal that use of special verdict resulted in prejudice in conviction for conspiracy to engage in exportation of arms).} Second, reflecting
contemporary notions about penal reform, most penalty provisions were modified to give judges discretion to set sentences within broad penalty ranges. Those sentences were typically indeterminate, with the actual sentence determined later by a parole board after some part of the sentence had been served.

Although the evidence is incomplete at best, it appears from the reported decisions that most courts faced with the first type of innovation concluded that the aggravating facts were part of the crime that had to be pleaded in the indictment and proved to the jury. In other words, where a legislature had expressly spelled out matters for decision bearing on the defendant's culpability, these courts assumed that it would be juries and not judges who made those decisions.

With respect to the second type of innovation, courts and commentators seem to have failed to recognize the potential for incursion into the jury's traditional bailiwick. That fact can probably be explained by two considerations. First, the reforms were intended to reduce the severity of sentencing. The idea was to offenses into a few broad, general categories. See Kate Stith & Jose A. Cabranes, Fear of Judging 24-25 (1998) (discussing place of Model Penal Code in history of sentencing reform). The Model Penal Code converted many of the factors that had formerly been elements of discrete crimes into sentencing considerations that a court could take into account at the sentencing stage. Id. at 25-26.

69 See id. at 17 ("By the middle of the nineteenth century, these early theories of reform through isolation or hard labor—through court-ordered suffering—gave way under the weight of failure to a new understanding of rehabilitation."); Nagel, supra note 60, at 893 (noting late-nineteenth century shift in attitudes from retributive to rehabilitative theory of punishment).

70 See Bowman, supra note 62, at 303 (discussing broad discretion of federal judges to set sentences prior to Sentencing Reform Act of 1984).


72 See Williams v. New York, 337 U.S. 241, 249 (1949) In general, these modern changes [in sentencing] have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.

Id.
make sentences flexible so that the offender could be released on parole when he had been sufficiently rehabilitated.\footnote{Id. at 247-48. Explaining the need for flexibility in sentencing procedures, the Court characterized innovations in sentencing as follows: Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. Retribution is no longer the dominant objective of the criminal law. Reformulation and rehabilitation of offenders have become important goals of criminal jurisprudence. Id. (citations omitted).} Thus, it probably would not have occurred to anyone to view the changes as infringing on defendants' jury rights. Second, judges' exercise of discretion was largely hidden from view. There were few legislative commands as to the factors to be considered in setting penalties, and judges were not required to make formal findings justifying their decisions.\footnote{See Bowman, supra note 62, at 303-04 (noting virtually unlimited discretion of judges to consider sentencing factors so long as final sentence fell within statutory range of penalties).} For that reason, to the extent judges had invaded the traditional province of the jury, those incursions would have been difficult to pinpoint and address.

The Supreme Court expressly approved this system, and the corresponding transfer of sentencing power from juries to judges and parole authorities, in \textit{Williams v. New York}.\footnote{337 U.S. 241 (1949).} In \textit{Williams}, the jury found the defendant guilty of first-degree murder but recommended life imprisonment.\footnote{Id. at 242.} The trial judge imposed a sentence of death based on information obtained through the Parole Department and never introduced at trial.\footnote{Id.} Under New York law, the judge had discretion to impose the sentence and was encouraged in doing so to
consider “information about the convicted person’s past life, health, habits, conduct, and mental and moral propensities,” including information obtained outside the courtroom and without confrontation or cross-examination. Extolling the virtues of the then prevailing rehabilitative model of punishment, the Court approved this scheme:

In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

Thus, as of the 1950s, the Supreme Court interpreted criminal defendants’ trial protections against a background understanding in which sentencing decisions were presumed to be part of a “progressive” effort to improve justice. Although the unfortunate defendant in Williams was sentenced to death, the underlying assumption was that these progressive sentencing decisions would be more understanding of and sympathetic to defendants’ unique personal characteristics. With that background understanding, it is not surprising that the Court allowed more and more fact-finding authority to be shifted from juries to judges. But that background understanding was soon undermined by shifts in attitudes about the efficacy of rehabilitation. Moreover, the impending due process revolution dramatically increased protections for criminal defendants in other procedural areas, exposing the ever growing gap between the promise of the criminal jury right and its application in practice.

78 Id. at 245.
79 Id. at 251.
B. THE JURY'S ROLE IN AN ERA OF STRUCTURED SENTENCING

The Supreme Court's complacency about the roles of judge and jury continued through most of the remaining twentieth century. As late as 1984, in holding that a Florida judge could constitutionally override a jury's recommendation against the death sentence, the Court declared without elaboration that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination [of the appropriate punishment to be imposed on an individual]." But the rapid spread of structured sentencing schemes in the 1980s changed that. The Court began to understand that the sentencing phase of a criminal proceeding could not be mechanically separated from the culpability phase. The seeds of this new approach were sown in the Court's due process decisions of the 1970s and then germinated to bear fruit in the Apprendi line of cases at the turn of the century.

1. The Elements Test. In the seminal case In re Winship, the Court announced a bedrock principle of criminal law: The prosecution bears the burden of proving beyond a reasonable doubt all the facts that constitute the crime charged. Winship focused only on the burden of proof; it did not address the question of who should decide the various issues raised in a criminal proceeding. But Winship and its progeny—most importantly Mullaney v. Wilbur—came to be understood as attaching special significance to the elements of the crime charged. In effect, the Supreme Court

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51 397 U.S. 358, 364 (1970) ("We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").
52 421 U.S. 684 (1975). Under the Maine statute at issue, both manslaughter and murder were defined as unlawful and intentional homicide. Id. at 685. Once the prosecution proved those elements, the defendant was presumed to have acted with malice aforethought, the additional element required for murder. Id. at 686. To reduce the conviction to manslaughter, the defendant bore the burden of proving the absence of malice aforethought. Id. The Supreme Court held that this scheme violated In re Winship's holding that all elements be proved by the prosecution beyond a reasonable doubt. Id. at 703-04.
53 See Alexander, supra note 11, at 192 ("The Court reasoned [in Mullaney] that because Maine had made malice an element of the crime of murder and defined it to preclude provoked/heat-of-passion killings, it had violated Winship's requirement that the prosecution bear the burden of proving the crime beyond a reasonable doubt.").
gave legislatures and courts wide latitude to alter criminal law schemes, as long as basic procedural protections regarding the determination of the elements of the crime charged were retained.\footnote{See id. at 196 ("The state's formal definitions of crimes largely control when the burden of proof beyond a reasonable doubt can be reduced or shifted to the defendant.").}

With the advent of the Guidelines in 1986, as well as the contemporaneous adoption of statutory sentencing schemes in many states, the issue that had up to that point remained latent, judicial fact-finding in sentencing, suddenly rose to the surface. The Guidelines were expressly intended to reduce judicial discretion, thought to be too lenient on convicted defendants.\footnote{See Charles J. Ogletree, Jr., \textit{The Death of Discretion? Reflections on the Federal Sentencing Guidelines}, 101 Harv. L. Rev. 1938, 1942-43 (1988) (discussing retrenchment of sentencing reform movement).} They represented a return to a retributive model of punishment after the long ascendancy of the rehabilitative model.\footnote{See Albert W. Alschuler, \textit{The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next}, 70 U. Chi. L. Rev. 1, 9-10 (2003).} Furthermore, they made explicit the determinations that went into the calculation of a given sentence. Judicial fact-finding was no longer either benevolent or hidden. Consequently, defendants had both the incentive and the means to challenge postconviction findings.

In the initial cases challenging judicial fact-finding under the Guidelines and state analogs, the Court gave little indication that it would find any constitutional infirmity in the new framework of structured sentencing. In \textit{McMillan v. Pennsylvania}, for example, the Court upheld a Pennsylvania sentencing statute increasing a convicted defendant's minimum sentence based upon a trial judge's determination that the defendant visibly possessed a firearm during...
a felony.\textsuperscript{87} It emphasized the distinction between elements and sentencing factors and deferred to the legislature to define the elements of an offense.\textsuperscript{88} The Court concluded that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."\textsuperscript{89} Having found that the Pennsylvania legislature expressly stated that visible possession of a firearm was a sentencing factor rather than an element, the Court held that the right to a jury decision did not apply.\textsuperscript{90}

The Court relied on McMillan in Almendarez-Torres v. United States, which addressed a recidivism provision in the federal immigration laws.\textsuperscript{91} The trial judge in Almendarez-Torres had increased a defendant's sentence based on the judge's determination at sentencing that the defendant had committed a prior felony.\textsuperscript{92} The Supreme Court again gave the legislature almost total deference in defining the elements of an offense.\textsuperscript{93} Based on its reading of the statutory text, the legislative history, and the fact that recidivism is a traditional sentencing factor, the Court had little trouble finding that Congress intended the provision to operate as a sentencing factor rather than a separate crime.\textsuperscript{94} Although the case did not raise a Sixth Amendment question since the defendant had waived his right to a jury by pleading guilty, it strongly suggested that the issue of recidivism was a sentencing factor to which the right to a jury decision did not apply.

But the Court's certainty began to crack in Jones v. United States.\textsuperscript{95} At issue in Jones was the federal carjacking statute, 18
U.S.C. § 2119. The statute contained an initial paragraph describing the basic prohibited conduct and three subsections providing for three different penalties. Subsection (1) provided the basic penalty of a fine and a maximum prison term of fifteen years. Subsection (2) increased the maximum prison term to twenty-five years if the crime resulted in "serious bodily injury." Subsection (3) increased the maximum prison term to life if death resulted from the crime. Neither the indictment nor the jury instructions in Jones’s trial mentioned the factors in subsections (2) or (3), and Jones was convicted solely with reference to the elements described in the initial paragraph of the statute. Based largely on the presentence report, however, the trial judge found by a preponderance of the evidence that serious bodily injury occurred and imposed a twenty-five year sentence.

In its previous cases, the Supreme Court had barely looked twice where a statute defined a basic offense in one section and then conditioned penalties on other facts in a separate section, as the carjacking statute did. In Jones, however, the Court cast a decidedly skeptical eye on just that sort of statutory scheme. Emphasizing the dramatic increases in prison time provided in subsections (2) and (3), the Court stated that "[t]he 'look' of the statute . . . is not a reliable guide to congressional intentions." The Court seems to have been searching for ambiguity and found it by disregarding the apparent structure of the statute. Once it determined that the statute was ambiguous, the Court imposed on itself a duty to interpret the statute so as to avoid constitutional difficulties. Finding that the factors in subsections (2) and (3)
were elements rather than sentencing factors, the Court reversed Jones's sentence.\(^ {106}\)

The holding in \textit{Jones} might have been unremarkable, except for what turned out to be an enormously important footnote. The Court declared that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”\(^ {107}\) The Court immediately qualified that bold statement by noting that its previous cases “suggest[ed] rather than establish[ed] this principle,”\(^ {108}\) and the Court saved itself from facing the issue directly by holding that the statute should be interpreted to make bodily injury an element rather than a sentencing factor.\(^ {109}\) Nevertheless, a barrier was broken. For the first time, the Court suggested that the application of the Sixth Amendment jury right, as well as the Due Process Clause, might turn on considerations beyond the mere labeling of elements and sentencing factors. “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 . . . .”\(^ {110}\) \textit{Jones} stopped short of putting those constitutional safeguards to the test. The Court's next case, however, took that step.

2. A New Understanding of the Jury's Role at Sentencing.

\textit{Apprendi v. New Jersey} involved a challenge to a New Jersey hate-crime statute, under which a defendant's sentence was increased beyond the normal statutory maximum based upon the trial judge's finding that the defendant acted “with a purpose to intimidate.”\(^ {111}\)

Where in \textit{Jones} the Supreme Court had avoided facing the issue of whether a matter that a legislature designated a sentencing factor

\begin{table}
\begin{tabular}{ll}
106 & Id. \\
107 & Id. at 243 n.6. \\
108 & Id. at 243. \\
109 & Id. at 239. \\
110 & Id. at 243 n.6. \\
111 & 530 U.S. 466, 469-70 (2002). \\
\end{tabular}
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could trigger the jury-trial guarantee, in \textit{Apprendi}, the Court addressed that issue head-on:

New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.\textsuperscript{112}

Instead of focusing on the legislature's intent in designating matters as elements or sentencing factors, the Court stressed the punishment the defendant faced:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.\textsuperscript{113}

On that basis, the Court overturned Apprendi's sentence.\textsuperscript{114} This was the first time the Court declared a statutory sentencing scheme unconstitutional on Sixth Amendment grounds, and for that reason, it foreshadowed potentially revolutionary changes to sentencing.

\begin{footnotes}
\item[112] Id. at 476.
\item[113] Id. at 484.
\item[114] Id. The Court rejected New Jersey's argument that "purpose to intimidate" was merely an aspect of motive, a traditional sentencing factor. Id. at 493-94. The Court concluded that because a finding of purpose to intimidate increased the maximum penalty, the factor was more akin to a second mens rea determination for a separate crime. Id.
\end{footnotes}
schemes around the country, most prominently to the Guidelines. But the Court seemed determined to mute Apprendi’s revolutionary potential. The Court limited the scope of its holding so as to avoid contradicting its decisions in McMillan and Almendarez-Torres. First, it appeared to leave intact the power of trial judges to make factual findings affecting punishment, as long as the resulting penalty was below the maximum authorized by the statute whose elements were proved at trial. 115 It also refused to reconsider the holding of Almendarez-Torres allowing the trial judge to make a determination of recidivism even where that determination increased the possible maximum sentence. 116 Having said that, the Court hinted that it might revisit its decisions in both those cases if faced with similar situations again. 117

Despite its limited holding, Apprendi soon had a practical impact, most prominently in the area of capital sentencing. In 2002, the Supreme Court decided Ring v. Arizona, a case addressing Arizona’s capital sentencing scheme. 118 Under that scheme, first-degree murder is punishable by either death or life imprisonment. 119 Death may be imposed only if the judge determines at a sentencing hearing that certain aggravating circumstances are present 120 and that those facts are not outweighed by any mitigating circumstances. 121 Furthermore, where the underlying charge is felony-murder, as it was in Ring, the judge could impose the death penalty only if she found that the accused was a “major participant in the armed robbery that led to the killing and exhibited a reckless disregard or

115 Id. at 487 n.13 (“We limit [McMillan’s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict . . . . [W]e reserve for another day the question whether stare decisis considerations preclude reconsideration of [this] holding.”).
116 Id. at 488.
117 See id. at 489 (“[I]t is arguable that Almendarez-Torres was incorrectly decided.”).
118 536 U.S. 584, 592 (2002).
119 Id.
120 Id. at 593 n.1. The Court listed ten aggravating circumstances, including whether the defendant had been previously convicted of other serious offenses, whether the defendant created a risk of death to persons other than the victim, whether the defendant committed the offense in return for pecuniary gain, whether the victim was a police officer, and other factors. Id. (citing ARIZ. REV. STAT. ANN. § 13-703(G) (West Supp. 2001)).
121 Id. at 593 n.2. The mitigating circumstances could consist of “any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death.” Id. (citing ARIZ. REV. STAT. ANN. § 13-703(H) (West Supp. 2001)).
indifference for human life." In its pre-
Apprendi decision in Walton v. Arizona, the Court had held this scheme constitutional in the face of a Sixth Amendment challenge.

Applying Apprendi, the Court in Ring overruled Walton and held that the jury must determine the existence of the aggravating facts that make the defendant eligible to receive the death penalty.

Walton had relied on the traditional distinction between elements and sentencing factors and found that, because the aggravating circumstances constituted sentencing factors, the judge could determine their existence. The Ring Court recognized that Apprendi had rejected that type of formulaic analysis. It also rejected the argument that the Arizona scheme fit within Apprendi's mandate because the statute defining first-degree murder listed death as the maximum penalty. The Court explained that "[t]his argument overlooks Apprendi's instruction that 'the relevant inquiry is one not of form, but of effect.' In effect, 'the required finding [of an aggravated circumstance exposed Ring] to a greater punishment than that authorized by the jury's guilty verdict.'" Finding that "the aggravating factors operate as 'the functional equivalent of an element of a greater offense,' " the Court held that the Sixth Amendment required the jury to decide those factors.

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122 Id. at 594. The requirement that these additional factors be present for a felony-murder defendant to receive the death penalty is constitutionally required by the Eighth Amendment. See Tison v. Arizona, 481 U.S. 137, 158 (1987) (modifying Enmund by holding Eighth Amendment permits execution of felony-murder defendant who did not kill or attempt to kill, but who was "major participant in the felony committed" and who demonstrated "reckless indifference to human life"); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding Eighth Amendment requires finding that felony-murder defendant killed or attempted to kill).

123 497 U.S. 639, 649 (1990). The majority in Apprendi had argued that Apprendi and Walton could be reconciled because under the sentencing scheme at issue in Walton, death was the maximum penalty provided in the first-degree murder statute. Apprendi v. New Jersey, 530 U.S. 466, 496 (2000). The Court rejected that argument in Ring, finding that Apprendi and Walton were irreconcilable. Ring, 536 U.S. at 609.

124 Ring, 536 U.S. at 589 ("Apprendi's reasoning is irreconcilable with Walton's holding in this regard, and today we overrule Walton in relevant part.").

125 Walton, 497 U.S. at 648.

126 Ring, 536 U.S. at 609.

127 Id. at 586.

128 Id. at 604 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

129 Id. at 609. In Summerlin v. Stewart, No. 98-99002, 2003 U.S. App. LEXIS 18111, at *110-*118 (9th Cir. Sept. 2, 2003), the Ninth Circuit held that the rule of Ring applies retroactively to overturn death penalty sentences imposed unconstitutionally.
When Apprendi was decided, many predicted that it would have dramatic consequences for the Guidelines. At first, it appeared that those predictions would not come true. The lower courts that initially faced challenges to the Guidelines in the wake of Apprendi uniformly held that Apprendi does not apply to them because the Guidelines expressly provide that any sentence imposed thereunder may not exceed the statutorily authorized maximum sentence. Virtually all the courts assumed that, outside the death penalty context, a judge could make any determinations as long as the resulting sentence fell within the statutory maximum. But all of that changed with the Supreme Court's decision in Blakely v. Washington.

Washington's sentencing scheme, at issue in Blakely, divides felonies into three classes with legislatively prescribed maximum sentences for each class. Within each class, a "standard" sentence range is provided, but the judge has the authority to impose an "exceptional" sentence above the standard range, but still within the statutory maximum for the class, if the judge finds certain facts. The defendant, Blakely, pleaded guilty to a Class B felony carrying a standard sentence range of forty-nine to fifty-three months. Despite the prosecution's recommendation that Blakely receive a sentence at the high end of that range, the judge imposed a sentence of ninety months based on his finding that the defendant committed the crime with "deliberate cruelty." Blakely argued that this sentence could not be imposed on him consistent with Apprendi.

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130 E.g., Erron W. Smith, Apprendi v. New Jersey: The United States Supreme Court Restricts Judicial Sentencing Discretion and Raises Troubling Constitutional Questions Concerning Sentencing Statutes and Reforms Nationwide, 54 ARK. L. REV. 649, 650 (2001) (arguing that Apprendi's bright-line constitutional standard "will result in an inflexible, unfair, and ultimately unworkable system for sentencing criminal offenders").


132 U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c) (2004).


134 Id. at 2535.

135 Id.

136 Id. at 2537.

137 Id.

138 Id.
The State argued that Apprendi posed no bar to the imposition of this exceptional sentence because the sentence Blakely received was still within the legislatively prescribed maximum of ten years for a Class B felony.\textsuperscript{139} The Supreme Court disagreed. Although Apprendi had expressly addressed judicial determinations leading to "punishment beyond that provided by statute," the Court in Blakely concluded that the "‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," regardless of whether that maximum comes from a statute or from sentencing guidelines.\textsuperscript{140} Since the judge’s determination that Blakely committed the crime with "deliberate cruelty" resulted in a sentence greater than that to which he would have been subjected solely on the basis of the jury’s verdict, the sentence was unconstitutional.\textsuperscript{141}

Blakely was immediately understood to cast serious constitutional doubt on the Guidelines. Many district courts and circuit courts of appeal held the Guidelines unconstitutional.\textsuperscript{142} The uncertainty caused by the decision was so great that the Supreme Court took the unusual step of granting certiorari and expedited briefing during its summer recess for two of those cases, United States v. Booker\textsuperscript{143} and United States v. Fanfan.\textsuperscript{144} The long-awaited result in those cases, unfortunately, represents a significant setback for jury-right advocates.

3. United States v. Booker: The Jury Right in Retreat. In Booker, the maximum sentence authorized by the jury verdict in the defendant’s drug trial was twenty-one years and ten months.\textsuperscript{145} At sentencing, the trial judge found additional facts, including that the defendant had possessed an additional 566 grams of crack not proved at trial, and sentenced the defendant to thirty years in

\textsuperscript{139} Id.
\textsuperscript{140} Id. (emphasis in original).
\textsuperscript{141} Id. at 2538.
\textsuperscript{143} 125 S. Ct. 738 (2004).
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 746.
prison. In Fanfan, under very similar circumstances, the trial judge relied on Blakely in declining to increase the defendant's sentence as called for by the Guidelines, despite finding after a sentencing hearing that the defendant distributed substantially more cocaine than the amount found by the jury. The Supreme Court affirmed the judgment in Booker, vacated the judgment in Fanfan, and remanded both cases.

The opinion for the Court addressing whether the Sixth Amendment applies to the Guidelines was written by Justice Stevens. Stevens began by reaffirming the holding in Blakely that the Sixth Amendment is implicated "whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" He then devoted much of his opinion to responding to the argument that the Guidelines are immune from challenge because they do not allow sentences to exceed statutorily prescribed maxima. Without analysis, he implicitly accepted the contention that judges may find facts in exercising their discretion to set a sentence within a statutory range:

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.

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146 Id.
147 Id. at 746-47.
148 Id. at 747.
149 Id. at 769.
150 Id.
151 Id. at 750-52.
152 Id. at 750.
But he concluded that because the Guidelines are mandatory, they function as laws; that is, they are the equivalent of statutes.\textsuperscript{153} So, if the Guidelines call for a particular sentence range based on the findings made by the jury, the judge may not make additional findings that result in an increase in the sentence range.\textsuperscript{154} To do so would be the equivalent of setting the sentence outside a statutory range.\textsuperscript{155}

Stevens's preferred remedy, explained in his separate dissent, was to leave the Guidelines intact but require that they conform to the Sixth Amendment requirements spelled out in \textit{Apprendi}, \textit{Blakely}, and the other cases.\textsuperscript{156} Under Stevens's remedy, a judge would use the Guidelines to determine a sentencing range based on the jury's findings or on the offense to which the defendant pleaded. The judge could then also rely on the Guidelines and make any findings of fact called for in setting a particular sentence within that range.\textsuperscript{157} But the judge could not set the sentence outside that range based on additional fact-finding, unless either the jury found those facts or the defendant waived the right to have a jury decide those facts.\textsuperscript{158}

Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, did not agree that judicial decisionmaking under the Guidelines implicates the Sixth Amendment.\textsuperscript{159} Preferring to retain the formal elements—sentencing facts distinction, that group had dissented in \textit{Apprendi} and \textit{Blakely}.\textsuperscript{160} In \textit{Booker}, Breyer argued on behalf of the dissenters that \textit{Blakely} did not compel the application of the Sixth Amendment at sentencing even if \textit{Blakely} were valid.\textsuperscript{161} Breyer's primary argument was that the Guidelines are not statutes but merely "administratively written sentencing

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} \textit{Id.} at 779 (Stevens, J., dissenting).
  \item \textsuperscript{157} \textit{Id.} at 780.
  \item \textsuperscript{158} \textit{Id.} at 779.
  \item \textsuperscript{159} \textit{Id.} at 802 (Breyer, J., dissenting).
  \item \textsuperscript{160} \textit{Blakely} v. Washington, 124 S. Ct. 2531, 2543 (2004) (O'Connor, J., dissenting); \textit{id.} at 2550 (Kennedy, J., dissenting); \textit{Apprendi} v. New Jersey, 530 U.S. 466, 523 (2000) (O'Connor, J., dissenting); \textit{id.} at 555 (Breyer, J., dissenting).
  \item \textsuperscript{161} \textit{Booker}, 125 S. Ct. at 805-07 (Breyer, J., dissenting).
\end{itemize}
rules" that operate to guide and cabin judicial discretion to set sentences within statutorily prescribed ranges. He would have preferred to leave the Guidelines intact and operative as written. Faced with the majority's conclusion that the Guidelines implicate the Sixth Amendment, however, Breyer devised a remedy that leaves them intact for most practical purposes, but with greater judicial discretion to depart from them.

Breyer's remedy rests on the implicit assumption made by Stevens that the constitutional infirmity resulted because the Guidelines are mandatory. Stevens was attempting to fit his conclusion about the unconstitutionality of the Guidelines into the framework the Court had established from Apprendi through Blakely. That framework focused on judicial fact-finding that pushes a sentence beyond a statutory maximum. To fit the holding within that framework, Stevens had to find that the Guidelines had the effect of statutes. To do that, he relied on the fact that application of the Guidelines was mandatory. And the corollary to that conclusion is that, were the Guidelines merely advisory, they would not run afool of the Sixth Amendment. Breyer seized on that line of reasoning to conclude that an equal and alternative remedy to requiring increased jury fact-finding would be to make judicial fact-finding discretionary. The apparent rationale, which Breyer never explained, is that any exercise of judicial discretion at sentencing—no matter what it consists of—is constitutional as long as it operates within statutorily prescribed ranges. Concluding that Congress would have preferred this remedy either to Stevens's remedy or to the total invalidation of the Guidelines, Breyer and his majority held that the Guidelines should be left intact, but made advisory rather than mandatory.

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162 Id.
163 Id. at 803.
164 Id. at 757.
165 See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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.").
166 Booker, 125 S. Ct. at 750.
167 Id. at 756-57.
168 Id. at 758-59.
To implement this remedy, the Breyer majority severed and excised two statutory provisions. First, in order to make the Guidelines advisory rather than mandatory, the Court excised the provision that requires courts to impose a sentence within the applicable Guidelines range. Then, to ensure that trial judges genuinely have discretion in sentencing under the Guidelines, the Court excised the provision providing for de novo appellate review of departures from the applicable Guidelines range. Other provisions, such as those requiring judges to consider the applicable Guidelines sentencing range, Sentencing Commission policy statements, the need to avoid sentencing disparities, the seriousness of the offense, and the need for just punishment and adequate deterrence, remain operative. So a judge inclined to follow the letter of the Guidelines is entirely within his rights to do so. For a defendant being sentenced by such a judge, absolutely nothing has changed.

Putting Stevens's majority opinion together with Breyer's majority opinion yields the following constitutional principle: The Sixth Amendment bars a judge from imposing a sentence not solely based on the facts reflected in the jury's verdict or admitted by the defendant; except that the judge may impose a sentence greater than that countenanced by the jury's verdict or the defendant's admissions as long as he does so pursuant to his own discretion. Where the right to a jury trial used to extend exactly as far as Congress chose to allow it, today, the right to a jury trial extends exactly as far as any individual judge chooses to allow it.

As a matter of logic, this principle makes no sense. It simultaneously confers and negates the right to a jury decision on sentencing facts. Jurisprudentially, it seems difficult to justify in light of the strong wording of Apprendi and Blakely. A more logically consistent holding would have been to conclude simply that the Guidelines do not implicate the Sixth Amendment because they operate exclusively within statutory minima and maxima. But that

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169 Id. at 764; see 18 U.S.C. § 3553(b)(1) (2000) (mandating that courts impose sentences within applicable statutory ranges).


171 Booker, 125 S. Ct. at 764-65.
holding would have had the same practical weakness as the one the Court in fact handed down: Both approaches exacerbate the disparity between the scope of the criminal jury right under the Sixth Amendment and the scope of the civil jury right under the Seventh Amendment. As I show in Part III, the Court has been much more assiduous in protecting the right to a jury decision on important questions of fact in the civil context than in the criminal context.

III. QUESTIONS OF FACT UNDER THE SEVENTH AMENDMENT

While the scope of the criminal jury right has fluctuated over the years with changes in the philosophy of punishment, the scope of the civil jury right has remained fairly consistent. That is largely because the Seventh Amendment commands that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved," and courts have interpreted that to mean the right should be preserved in approximately the same condition it was in at the founding. Consistent with understandings of the scope of the jury right at that time, courts have ensured that civil juries have primary authority to decide questions of fact, whether those questions arise in the liability stage or in the remedy stage of litigation. In cases in which a civil jury has been properly demanded, therefore, civil litigants can expect a jury to decide virtually all questions going to the merits that require inferences about the historical events in dispute.

A. THE SEVENTH AMENDMENT AND THE PRIMACY OF FACT QUESTIONS

Although the Seventh Amendment does not expressly grant juries the responsibility for deciding questions of fact, it suggests that finding facts is the jury's primary role in its second clause, the "Re-examination Clause," which provides that "no fact tried by a jury

172 U.S. CONST. amend. VII (emphasis added).
173 The Re-examination Clause was motivated by the fear that the federal appellate jurisdiction provided in Article III of the Constitution would allow creditors to overturn local jury verdicts favorable to debtors. See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 673-74 (1973)
One cannot read through Jonathan Elliot's collection of debates in the
shall be otherwise re-examined . . . than according to the rules of the common law."\(^{174}\) The Judiciary Act enacted by the first Congress used the same terminology in its assignment of decisional responsibility by providing that "the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."\(^{175}\)

In keeping with these constitutional and statutory commands, the Supreme Court has traditionally relied on the fact–law distinction to define the roles of judge and jury in civil litigation. In *Walker v. New Mexico & Southern Pacific Railroad Co.*, for example, the Court concluded that the aim of the Seventh Amendment is not to preserve mere matters of form and procedure but substance of right. *This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative.*\(^{176}\)

Similarly, in *Ex parte Peterson*, the Court approved tentative fact-finding by an auditor but stated that "[t]he limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."\(^{177}\) And in *Byrd v. Blue Ridge*...
Rural Electric Cooperative, Inc., the Court declared that "[a]n essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."\(^{178}\)

These decisions came without any cogent analysis of how to distinguish a question of fact from a question of law. The Court seems to have simply assumed that fact questions are intuitively recognizable and left it to judges to intuit the correct results. Over the last century, sophisticated legal thinkers have seized on courts' failure to enunciate standards for distinguishing questions of fact from questions of law to challenge both the validity of the fact–law distinction in general and its usefulness in guiding the allocation of decisional responsibility in particular.\(^{179}\) These scholars have argued that courts invoke the fact–law distinction in order to camouflage their normative conclusions that a question should go to the judge or to the jury.\(^{180}\)

\(^{178}\) 356 U.S. 525, 537 (1958) (emphasis added); see also Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931) ("All of vital significance in trial by jury is that issues of fact be submitted for determination . . . .").

\(^{179}\) See, e.g., JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (1898) ("[T]here is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury."); Nathan Isaacs, The Law and the Facts, 22 COLUM. L. REV. 1, 1 (1922) ("The delusive simplicity of the distinction between questions of law and questions of fact has been found a will-of-the-wisp by travellers approaching it from several directions."); Clarence Morris, Law and Fact, 55 HARV. L. REV. 1303, 1304 (1942) ("The naive assumption that law and fact stand naturally apart draws attention away from the role that law plays in the selection and description of facts, and that facts play in impelling the adoption of rules and in limiting the scope of their application.").

\(^{180}\) See LON. L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 593 (6th ed. 1996)

It is commonly said that questions of fact are for the jury and questions of law are for the judge. A more realistic analysis would be that questions the legal system assigns to the jury are called 'questions of fact,' and questions the legal system assigns to the judge are called 'questions of law.'

In a series of recent cases applying the Seventh Amendment, the Supreme Court has adopted this skepticism about the fact–law distinction and proposed alternative considerations to govern the selection of a decisionmaker. The most important of the Court’s recent cases in this regard is Markman v. Westview Instruments, Inc. Markman raised the issue of whether the Seventh Amendment requires a jury decision on the construction of the claims in a patent. On this issue, the Court seemed to break with prior practice. Although earlier decisions had described the function of the Seventh Amendment as “preserving the substance of the common-law right” to a jury, they had linked the “substance of the right” to the determination of facts. But in Markman, the Court ostensibly divorced the “substance of the right” from the question of fact determination. After an inconclusive historical and precedential analysis, the Court turned its attention to “functional considerations,” finding that

when an issue “falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”

[T]he quest to find “the” essential difference between the [law and fact] that can control subsequent classifications of questions as legal or factual is doomed from the start, as there is no essential difference. There are only pragmatic differences, which are reflected in the three dichotomies of the conventional meaning of the terms, the judge-jury relationship, and the general-specific spectrum.

Id. 517 U.S. 370 (1996).

Id. at 372.

Gasoline Prods. Co. v. Chaplin Ref. Co., 283 U.S. 494, 498 (1931) (“[T]he Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination [by the jury].”); Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897) (holding that purpose of Seventh Amendment “is not to preserve mere matters of form and procedure but substance of right” and that “[t]his requires that questions of fact in common law actions shall be settled by a jury”).

Markman, 517 U.S. at 388 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).
Citing the “highly technical” nature of patents and noting that “[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis,” the Court found that “judges, not juries, are the better suited to find the acquired meaning of patent terms.” Based on that conclusion, the Court held that the judge may permissibly construe the claims in a patent.

The Court relied on *Markman* in *City of Monterey v. Del Monte Dunes, Ltd.*, in which the Court faced due process, equal protection, and takings challenges to a municipality’s refusal to grant development applications. The district court had granted Del Monte Dunes’s request for a jury trial on the takings and equal protection claims but denied it on the substantive due process claim, reserving that claim for the court’s determination. The central issue on appeal was whether the takings claim was properly submitted to the jury. The Court’s analysis of this issue mirrored that in *Markman*. As in *Markman*, the Court purported to rely on “functional considerations.” The functional analysis, however, focused almost exclusively on the fact–law distinction. The Court began by noting that “[i]n actions at law predominantly factual issues are in most cases allocated to the jury.” The Court then cited its takings precedents for the proposition that “determinations of liability in regulatory takings cases [are] essentially ad hoc, factual inquiries, . . . requiring complex factual assessments of the purposes and economic effects of government actions.” It concluded that “the issue of whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question.” The Court found the question of whether the

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185 *Id.* The Court also concluded that the importance of uniformity in treatment of a patent was reason to assign claim construction to a judge, whose decision becomes precedent available in future cases involving the same product. *Id.* at 390.

186 *Id.* at 391.


188 *Id.* at 699.

189 *Id.* at 701. The jury returned a general verdict for Del Monte Dunes on the takings claim and awarded $1.45 million in compensatory damages. *Id.*

190 *Id.* at 718.

191 *Id.* at 720.

192 *Id.* (citations omitted).

193 *Id.*
regulation substantially advances legitimate public interests to be a mixed question of law and fact. But the Court concluded that the question was so "essentially fact-bound [in] nature" that it required a jury decision.

Taken together, *Markman* and *Del Monte Dunes* ostensibly move the analysis of the civil jury right away from the fact–law distinction. By introducing "functional" considerations into the analysis of decisional responsibility, *Markman* suggested that courts should pragmatically evaluate the skills of judge and jury to determine which is best suited to decide a particular issue. *Del Monte Dunes* at least payed lip service to that admonition. Still, both decisions explicitly refer to the traditional role of the civil jury as a paramount concern, and it is impossible to divorce the jury's traditional role from the finding of fact. Indeed, although it purports to rely on *Markman*’s "functional considerations," *Del Monte Dunes* reemphasizes the fact–law distinction as a basis, or at least as a justification, for assigning a particular decision to the jury instead of to the judge. It suggests that the jury’s proper function is to decide issues of fact, so that *Markman*’s "new" analysis is nothing more than a new way of talking about the fact–law distinction.

In two other recent cases, the Court addressed the scope of the Seventh Amendment jury right in the remedies context. Perhaps echoing the trends in criminal cases, these cases betray an underlying ambivalence about the jury’s role in determining remedies. Unlike its jurisprudence interpreting the Sixth Amendment jury right, however, the Court’s decisions in this context seem finally to have embraced the view that the jury should decide questions of fact in both nodes of the civil trial.

The first case, *Tull v. United States*, involved a suit by the federal government seeking an injunction and civil penalties against Tull, a real estate developer, for dumping fill on wetlands in violation of

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194 *Id.* at 721.
195 *Id.*
196 *Id.*
the Clean Water Act. The Act provided for "a civil penalty not to exceed $25,000 per day" during the period of any violation. The district court denied Tull's demand for a jury trial and then, after finding that Tull had illegally filled in wetland areas, imposed $325,000 in civil penalties. The Supreme Court affirmed the imposition of the civil penalty by the trial judge. The Court found that the Seventh Amendment operates to preserve "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury." The Court concluded that, because Congress has the power to fix civil penalties statutorily, the assessment of civil penalties is not a fundamental element of a jury trial. Therefore, the Court reasoned, Congress may appropriately delegate that responsibility to judges.

Feltner v. Columbia Pictures Television, Inc. raised the question of whether the Seventh Amendment requires a jury decision on statutory damages to be awarded for violation of the Copyright Act. The Supreme Court held that it does. After finding that suits for statutory damages under the Copyright Act were essentially "legal," so that the Seventh Amendment applied, the Court held that the specific question of the amount of statutory damages had to go to the jury, based on the traditional preference for jury determinations of damages and on the fact that, under the Copyright Act of 1831, juries had determined statutory damages. The Court distinguished Tull, noting that there had been no

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200 Tull, 481 U.S. at 415-16. The court also entered an injunction ordering the removal of fill and restoration of the properties still owned by Tull. Id.
201 Id. at 427.
202 Id. at 426.
203 Id.
204 Id. at 426-27. Justice Scalia, joined by Justice Stevens, dissented. Id. at 427. He pointed out that, while Congress could choose to create a statutory cause of action with a fixed recovery, it did not do so in this case. Id. at 427-28 (Scalia, J., dissenting). Instead, Congress provided for a recovery very similar to a punitive damage award, to be assessed on a case-by-case basis. Id. Scalia argued that, just as punitive damages are typically assessed by the jury, this civil penalty should be assessed by the jury. Id.
206 Id. at 351-52.
207 Id. at 350-55.
evidence in *Tull* that juries historically determined the amount of civil penalties paid to the government and that civil penalties are analogous to sentencing in a criminal proceeding.\footnote{Id. at 355.}

The Court in *Feltner* gave almost no justification for its decision beyond its bare historical analysis. Although the Court did not discuss it, the determination of the damages under the Copyright Act depended on a decision that the violations were committed "willfully."\footnote{See 17 U.S.C. § 504(c)(2) (2000) (stating that if infringement is committed willfully, court "may increase the award of statutory damages to a sum of not more than $150,000," whereas if it is found that "infringer was not aware and had no reason to believe his or her acts constituted infringement," then it is within court's discretion to reduce damages "to a sum of not less than $200").} Columbia put in evidence of willfulness, and the lower court found that Feltner had acted willfully.\footnote{*Feltner*, 523 U.S. at 344.} The assessment of the defendant's mental state has always been considered a matter of fact, so in practical effect, the decision reinforces jury control over the findings of fact.

Moreover, the majority opinion was authored by Justice Thomas, who has emerged as a prominent advocate for an expanded jury right in criminal cases.\footnote{See Apprendi v. New Jersey, 530 U.S. 466, 521-22 (2002) (Thomas, J., concurring) (arguing that Sixth Amendment applies not only to facts increasing maximum penalty, but also to facts increasing mandatory minimum penalty).} Thomas hinted that *Tull* might have been wrongly decided:

> It should be noted that *Tull* is at least in tension with *Bank of Hamilton v. Lessee of Dudley*, in which the Court held in light of the Seventh Amendment that a jury must determine the amount of compensation for improvements to real estate, and with *Dimick v. Schiedt*, in which the Court held that the Seventh Amendment bars the use of additur.\footnote{*Feltner*, 523 U.S. at 355 n.9 (citations omitted).}

Thus, the Court may have been using *Feltner* to correct a wrong turn taken in *Tull*. Certainly, *Feltner* suggests that most damages issues in civil cases should remain the province of the jury.
And while Tull suggests that the determination of the amount of a civil penalty might be removed from the jury, Feltner suggests that remedies issues should normally be left to the jury, at least where they involve factual determinations such as whether the defendant acted willfully. In short, despite its discomfort, the Court continues to affirm that the jury's primary role in civil cases is to decide questions of fact, and it has never allowed a court to take from the jury a question that has traditionally been understood to involve factual determinations.

IV. CONSEQUENCES OF THE SUPREME COURT'S DIVERGENT JURY-RIGHT JURISPRUDENCE

With respect to jury-right issues such as the characteristics and selection of the jury, the Supreme Court has treated civil and criminal juries similarly. As explained in Parts II and III of this Article, however, with respect to the assignment of decisionmaking responsibility, the Court has treated civil jury rights and criminal jury rights as entirely distinct. As a consequence, an anomalous and unjustifiable divergence between the types of issues civil and criminal litigants can expect to have a jury decide has emerged. A comparison of the methods for determining civil punitive awards and criminal sentences shows why this is so. A focus on the reasons for why we value the jury shows why the divergence is unjustifiable.

A. COMPARING THE JURY RIGHTS: CIVIL PUNITIVE AWARDS VERSUS CRIMINAL SENTENCES

In civil cases, punitive damages are awarded to punish a defendant who has committed a willful wrong. The Supreme Court has expressly called punitive damages "quasi-criminal" and equated states' power to authorize punitive damage awards with their power to sentence in criminal cases.213 Just as for many years courts

213 Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001)
As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. . . . Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process
assumed that juries had near total power over the punishment a
criminal defendant would face, for many years courts simply
assumed that the award of punitive damages was an issue to be
decided by the jury. In its 1886 decision in *Barry v. Edmunds*, for
example, the Supreme Court declared that "[n]othing is better
settled than that . . . it is the peculiar function of the jury to
determine the amount [of punitive damages] by their verdict."214
More recently, several circuit courts have expressly declared that
the Seventh Amendment protects the right to a jury decision on the
amount of punitive damages.215

In recent years, however, as the Court has taken up the perceived
excessiveness of punitive damages, it has begun to restrain the
jury's power to award punitive damages. In the landmark case
*BMW of North America, Inc. v. Gore*, the Court held that a jury's
punitive award may violate due process if it is "grossly excessive."216
To ensure that punitive awards do not fail that test, judges must
now scrutinize punitive awards to a degree they had not in the past.
Borrowing from its Eighth Amendment jurisprudence, the Court in
*Gore* directed trial judges to examine awards for excessiveness using
three "guideposts": "the degree of reprehensibility of the
nondisclosure, the disparity between the harm or potential harm
suffered by [the plaintiff] and his punitive damages award, and the
difference between this remedy and the civil penalties authorized or
imposed in comparable cases."217

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the
Court considered the appropriate standard of review an appellate
court should use in reviewing the trial judge's excessiveness
determination.218 The Court concluded that appellate courts should
review that determination de novo because the underlying punitive

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214 116 U.S. 550, 556 (1886).
215 Defender Indus., Inc. v. Nw. Mut. Life Ins., 938 F.2d 502, 507 (4th Cir. 1991) (en banc);
O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1447-48 (10th Cir. 1987); McKinnon v. City of
Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984).
217 Id. at 575; see also Cooper, 532 U.S. at 435 (citing Eighth Amendment cases).
218 532 U.S. at 432-36.
award reviewed by the trial judge constitutes a question of law rather than one of fact. Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury. The Court concluded further that, because the amount of punitive damages awarded is not a fact question, it does not implicate the Seventh Amendment's Re-examination Clause.221 "Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its amicus."222

Gore and Cooper call into question the long-standing assumption that it is the jury's prerogative to determine the amount of punitive damages to be awarded. To that extent, these cases seem to move the civil jury right closer to the Court's current interpretation of the criminal jury right, in that the Court seems to believe that judges are the appropriate actors to impose punishment, whether the punishment is considered civil or criminal.223 But there is an important caveat in Cooper that reaffirms the traditional view that juries should make all relevant findings of fact that underlie the award, even if a judge has ultimate power to set an amount of punishment.224

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219 Id. at 424.
220 Id. at 437 (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996)).
221 Id. at 437-39.
222 Id.
223 Id. at 437; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996); see also Tull v. United States, 481 U.S. 412, 426-27 (1987) (holding that Seventh Amendment does not require jury decision on amount of statutory civil penalties under Clean Water Act).
224 This is, in fact, a distinction the Court had already drawn in addressing the standard of review to be used in Eighth Amendment excessive punishment cases. Cooper, 532 U.S. at 435 (citing United States v. Bajakajian, 524 U.S. 321, 336-37 n.10 (1998))

The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous . . . . But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate.

Id.
The factors that go into determining the amount of punitive damages that should be awarded differ from state to state and court to court, but they typically include consideration of the character of the defendant's conduct, the defendant's motive, and the amount of money required to deter the defendant and others from engaging in similar conduct in the future. For example, in *TXO Production Corp. v. Alliance Resources Corp.*, a recent case in which the Court upheld a punitive award against a due process challenge, the jury had been instructed by the trial court to consider "all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages." And the jury in *Cooper* was instructed to consider the following factors: "(1) 'The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims'; (2) 'The defendant's motive'; (3) 'The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future'; and (4) 'The defendant's income and assets.' "

The Supreme Court in *Cooper* expressly distinguished between the jury's factual findings on those matters and the determination

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225 *Id.* at 440 n.12 (quoting jury instructions).
226 509 U.S. 443, 464 n.29 (1993); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (affirming very large punitive damages award over due process objection). In *Haslip*, the Supreme Court cited as providing adequate procedural protections the following factors that the Alabama courts took into account in assessing the fairness of punitive awards:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

499 U.S. at 21-22.
227 *Cooper*, 532 U.S. at 440 n.12.
of the amount of the award, indicating that the right to a jury decision covers the former: "Although the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings." Justice Ginsburg, writing in dissent, listed some of the "fact questions" that would fall within the jury's purview: "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously."

The Court in Cooper thus segregated out a category of "fact questions" consisting of questions about the historical events in dispute—what the defendant did and the circumstances surrounding it, what the defendant was thinking, and what the consequences of the defendant's actions were—and suggested that those questions are reserved for the jury. A court is not free to supplant the jury's judgment on those questions with its own. On the other hand, the Court concluded that other sorts of questions that go into the punitive damages calculus, such as questions about the moral reprehensibility of the defendant's conduct and about the sanctions imposed for comparable conduct in other contexts, fall outside the jury's bailiwick.

Compare that decisionmaking structure with the structure for imposing sentences in criminal cases under the Court's current

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228 Id. The Court had earlier suggested such a distinction in Feltner v. Columbia Pictures Television, Inc., in which, distinguishing Tull v. United States, the Court held that the Seventh Amendment required a jury decision on statutory damages to be awarded under the Copyright Act. 523 U.S. 340, 341 (1998). The Court emphasized the importance of the determination of willfulness—clearly a factual issue—with respect to the damages calculation. Id.

229 Cooper, 532 U.S. at 446 (Ginsburg, J., dissenting).

230 Id. at 424, 437-40. The Court has drawn similar distinctions with respect to other issues. For example, in discussing whether a lower court could disregard the plaintiff's claim for exemplary damages in determining the amount in controversy for jurisdictional purposes, the Court said: "In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award." Barry v. Edmunds, 116 U.S. 550, 565 (1886).
Sixth Amendment jurisprudence. The Guidelines contain numerous provisions that tie the sentence to be imposed to exactly the sorts of factual determinations that the Court said the jury must decide in a civil case involving punitive damages. On the issue of the "extent of harm" caused by the defendant's conduct, for example, the Guidelines increase the sentence for aggravated assault based on the degree of bodily injury suffered by the victim.\footnote{U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(3) (2004); cf. id. § 2B1.1(b)(providing for increase in offense level for larceny, embezzlement, or theft based on amount of loss).} On the issue of whether the conduct was isolated or part of a broader pattern, the Guidelines increase the sentence for fraud based on whether the offense involved "sophisticated means" or a scheme to defraud a large number of victims.\footnote{Id. § 2B1.1(b)(2)(A), (B); cf. id. § 2A3.1(b)(3), (b)(5) (providing for increase in offense level for criminal sexual abuse based on whether victim was in custody or care of defendant or was abducted); id. § 2B1.1(b)(5) (providing for increase in offense level for property crimes based on whether offense involved misappropriation of trade secret and defendant knew or intended that offense would benefit foreign instrumentality).} And on the issue of whether the defendant acted in good faith or maliciously, the Guidelines decrease the sentence for criminal infringement of copyright where the offense "was not committed for commercial advantage or private financial gain."\footnote{Id. § 2B5.3(b)(3); see also id. § 2A2.2(b)(4) (providing for increase in offense level for aggravated assault where "assault was motivated by a payment or offer of money or other thing of value"); id. § 2C1.1(c)(1) (providing for increase in offense level for bribery where "offense was committed for the purpose of facilitating the commission of another criminal offense").} 

Under Booker, trial judges must still "consider" the Guidelines and may not depart from them in ways that would produce "unreasonable" sentences.\footnote{See infra notes 312-16 and accompanying text (explaining standards for fact-finding under Guidelines).} Undoubtedly, many judges will continue to apply the Guidelines just as they always have, making those determinations on a preponderance of the evidence standard, in a posttrial proceeding in which the rules of evidence do not apply.\footnote{United States v. Booker, 125 S. Ct. 738, 764-65 (2004).} The Sixth Amendment offers no bar. Indeed, following the Guidelines appears to be a safe harbor; Booker implies that judges will only need to demonstrate the reasonableness of any sentence not reached according to the Guidelines' methodology.\footnote{See Booker, 125 S. Ct. at 767 (discussing "unreasonableness" standard of appellate
To see how the disparity between the civil and criminal jury rights plays out in practice, consider the Supreme Court’s recent punitive damages case *TXO Production Corp. v. Alliance Resource Corp.*[^237]  *TXO* was a civil action in which punitive damages were awarded against TXO in connection with a counterclaim by Alliance for “slander of title.”[^238] The counterclaim asserted that TXO had falsely claimed that there was a cloud on the title of property owned by Alliance, in an effort to force Alliance to negotiate favorable royalty terms with TXO.[^239] Thus, the case was effectively based on an intentional misrepresentation, or fraud. In determining punitive damages, the jury was instructed to consider “all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages.”[^240] Under the rationale of *Cooper*, the Court could not have taken the determination of those factual questions away from the jury.

If TXO had faced criminal prosecution instead, many of the same factors would have been considered, but the judge could have made the determinations free of any jury input. TXO’s “crime” would fall under section 2B of the Guidelines, which addresses “offenses involving fraud or deceit.”[^241] A judge following that section would have determined the “offense level,” and hence the severity of the sentence to be imposed, by considering a wide range of “specific offense characteristics.”[^242] The judge would have determined the “loss” suffered by the victim or victims in dollars, in increments from $5,000 to $400,000,000.[^243] She would have determined how many

[^238]: Id. at 447.
[^239]: Id. at 450.
[^240]: Id. at 464 n.29; see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (listing allowable considerations). In *Haslip*, the Supreme Court affirmed a very large punitive damages award over a due process objection, implicitly relying on the Jury's determination of a number of factual matters very similar to those considered in TXO. See supra note 226 (citing *Haslip* factors).
[^242]: Id. § 2B1.1(b).
[^243]: Id. § 2B1.1(b)(1)(A)-(N).
victims were affected, increasing the sentence if the number of victims equaled or exceeded ten and again if the number equaled or exceeded fifty. And she would have considered evidence about the methodology the defendant used to determine whether the offense involved "sophisticated means."  

Assume that this hypothetical criminal case against TXO involved the prosecution of an individual defendant for fraud. The jury in TXO found that Alliance had suffered actual damages of $19,000 from defending the frivolous lawsuit. But the evidence suggested that TXO had hoped to see a windfall of millions of dollars if its fraudulent scheme had succeeded. A hypothetical TXO defendant convicted of criminal fraud would not have had a right to a jury determination on either of those amounts. Instead, a judge could have determined the "loss," which is defined as the greater of actual or intended loss. All other things being equal, a judicial determination that the fraud produced a loss of $19,000 would have doubled the sentence range the defendant would face—from zero to six months to six to twelve months. But if the judge had determined that the intended loss was, say, $1,000,001—a modest figure given the evidence—the TXO defendant's sentence range would jump to three to four years. Other factual determinations could increase the sentence further.

In sum, because of the Supreme Court's cramped interpretation of the Sixth Amendment, judges implementing most modern

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244 Id. § 2B1.1(b)(2).
245 Id. § 2B1.1(b)(9)(C).
247 See id. at 460-61 ("[T]he [court] concluded that TXO's pattern of behavior 'could potentially cause millions of dollars in damage to other victims.'").
249 Id. §§ 2B1.1(b)(1)(C) & ch. 5, pt. A.
250 The apparent goal of TXO's fraudulent scheme was to renegotiate its royalty agreement with Alliance, which gave Alliance 22% of royalties from oil and gas wells drilled on the subject property. TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 875 (W. Va. 1992). The evidence suggested that the value of the income stream from the wells would be between $22.5 million and $37.5 million. TXO, 509 U.S. at 451 n.10. A reduction of even a few percentage points would have resulted in a windfall to TXO of more than a million dollars. Id.
determinate sentencing schemes—most importantly the Guidelines—make many determinations at sentencing that unequivocally involve the finding of facts. These determinations include such clearly factual determinations as the amount of money embezzled, whether an assault was motivated by pecuniary gain, and whether the victim of sexual abuse was in the custody of the abuser. In a civil case, in contrast, where issues such as those are relevant to either the liability or the damages calculation, the jury would decide them.

B. THE IMPORTANCE OF JURY FACT-FINDING

The disparity in the issues civil and criminal litigants can expect to have the jury decide, so vividly demonstrated in the punitive damages context, runs contrary to our fundamental notions about the right to a jury trial. The right to a jury trial in criminal cases has always been valued more highly than the right to a jury trial in civil cases. That principle is evident in the Constitution, which expressly guarantees the right in criminal cases in Article III but leaves the civil jury right to the Bill of Rights. In keeping with that hierarchy, criminal juries have the power, if technically not the right, to decide cases contrary to the governing law. Civil juries have no such power. Yet in the allocation of decisionmaking between judge and jury, the hierarchy is turned on its head, with the civil jury having broader authority than the criminal jury.

Simple logical consistency would suggest this disparity should be removed. For constitutional rights to remain vital, they need to make sense to the citizens subject to them. While empirical data on this point would be hard to find, it seems almost self-evident that a typical citizen would assume that the scope of the criminal jury

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252 For an overview of determinate sentencing schemes, see Cassia C. Spohn, How Do Judges Decide? The Search for Fairness and Justice in Punishment 223-31 (2002).
254 See id. § 2A2.2(b)(4) (providing for increase in offense level for aggravated assault where "assault was motivated by a payment or offer of money or other thing of value").
255 See id. § 2A3.1(b) (providing for increase in offense level for criminal sexual abuse based on whether victim was in custody or care of defendant or was abducted).
256 U.S. Const. art. III, § 2, cl. 1 & amend. VII.
right matches or exceeds the scope of the civil jury right. Reality should match that expectation. But beyond a reliance on logical consistency, compelling normative reasons exist for giving fact questions to the jury, whether those questions appear in the liability or the penalty phase of adjudication.

Fact-finding—in the sense suggested by the Supreme Court in Cooper—involves making probabilistic judgments about the existence or nonexistence of postulated historical events.257 Because these events occurred in the past, there is no way to test them and conclusively establish their existence or nonexistence. Any decision about them will necessarily be speculative. Nevertheless, our system requires conclusive judgments about them. Professor Geoffrey Hazard has explained how courts deal with this dilemma:

The facts in a legal dispute usually are past events that, having occurred in their own time and circumstance, now are eclipsed by succeeding events and exist only in partial and partisan memories. When an injunction is under consideration, the relevant events are prospective and in a strict sense wholly imaginary. A court therefore does not “find” facts. It postulates them by an official process—a trial, in which the legal system pronounces on the basis of imperfect evidence what will be considered perfect truth. The transformation from indeterminacy to certainty is presented as empirical inquiry and discovery, and indeed, a trial involves both inquiry and discovery. But the transformation into certainty also entails an unavoidable element of official fiat and thus an institutional and political element. The facts are as the court says they are. The ultimate reason why the court’s ipse dixit prevails is because the pronouncement is ex officio and the political sovereign has said through organic law that judicial pronouncements shall prevail.258

257 See supra notes 213-30 and accompanying text.
In other words, the lynchpin of our system of dispute resolution is finality. We cannot actually know with certainty what happened or what will happen, so we proclaim an outcome and then preclude reconsideration of that outcome.\(^{259}\)

This kind of absolute finality is not required for most of the decisions made in adjudication. It is required only with respect to those events on which the parties have staked their claims and defenses. That is, it is required only with respect to historical (or sometimes future) events that the parties claim trigger the application of legal rules. Other matters more commonly considered issues of law, such as the meaning of statutes or of decisions made by other courts, and the policy implications of formulating legal rules in particular ways, must be resolved for that dispute but can change over time.\(^{260}\) Unlike specific past or future events, those matters are subject to ongoing interpretation and application, and as circumstances in the world change, the interpretation and application can change.\(^{261}\)

For finality to have its desired effect, the judicial system must provide a decisionmaking method that both the parties and society

\(^{259}\) See JOFAKAIT, supra note 32, at 75 ("We want disputants and others to accept court determinations so that the dispute ends and is not continued outside the courtroom.").

\(^{260}\) Professor Hazard describes the lesser degree of finality required for these questions of law as follows:

In a sense, to which Holmes adverted, rules of law do not "exist" but are only forecasts of the terms in which the power of the state will be brought to bear if push comes to shove. In a strict chronological or existential sense, the law that "is" when a transaction occurs is not the same law that "is" when the transaction is sued on, or the same law that "is" when the suit goes to judgment. For many reasons, however, it is useful, indeed institutionally vital, to ignore these discontinuities. It is morally intolerable that the incidence of the state's authority appears to depend simply on the date at which it is exercised. Therefore, the social order undertakes to say that rules of law exist intertemporally—that the law has been, is, and shall continue to be—and that the rules will be consistently applied regardless of the temporal sequence of events.

Hazard, supra note 258, at 82.

\(^{261}\) But see id. at 88 (arguing that decisions on questions of fact have less entitlement to finality than decisions on questions of law because judges learn about law "through direct judicial perception, not by perception through the medium of informants, which is how a court apprehends the facts of a case"). For a criticism of Hazard's argument, see RONALD J. ALLEN & MICHAEL S. PARDO, FACTS IN LAW AND FACTS OF LAW, 7 INT'L J. EVID. & PROOF 153, 162 (2003) (arguing that issues of law are ambiguous or unclear and that Hazard fails to distinguish this from factual questions, where there is conflicting evidence).
will accept as final. The jury trial is the method we have created for that purpose. Randolph Jonakait describes the legitimating function of the jury in these terms:

A community is more likely to accept verdicts when the decisions reflect or incorporate societal norms. The jury, as both the symbolic and actual representative of the community, is more likely to render verdicts based on widely accepted standards than are other authorities. The shared responsibility of a jury verdict also aids its acceptance within the community. When a single judge makes a legal determination that produces dissatisfaction, the discontent centers on that individual decision maker. The displeased can see the outcome as resulting from one person's whims, caprices, prejudices, stupidity, or lack of common sense. With the shared accountability of a jury's decision, however, the locus of any discontent is more diffuse and, consequently, less intense.\(^{262}\)

Because juries are generally perceived to be neutral and because social science research shows that even losing disputants will accept the outcome if they believe the process was fair,\(^{263}\) juries help guarantee acceptability for the parties, as well as for the community.

Beyond this acceptability argument, a further reason for assigning fact questions to the jury is the jury's apparent competence at deciding them. While there is much conflicting evidence, social science research suggests that juries have certain clear decisionmaking advantages over individuals when it comes to drawing inferences about past events based on incomplete evidence. Perhaps most importantly, groups are able to remember and interpret evidence more fully than individuals.\(^{264}\)

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\(^{262}\) **JONAKAIT, supra note 32, at 76.**

\(^{263}\) **See id. at 80 (reviewing research).**

\(^{264}\) **See REID HASTIE ET AL., INSIDE THE JURY 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism.").**
Furthermore, the diversity of the jury may make it a better fact-finder. Individuals, including individual judges, have biases and prejudices that can cloud their judgment. The impact of those biases and prejudices is reduced in a group setting where multiple perspectives may be brought to bear.265

The point of this discussion is not to argue that juries are perfect decisionmakers or even the best decisionmakers for all purposes.266 Rather, it is to show that sound reasons exist to support our traditional assignment of questions of fact to juries. Making the jury the primary—if not the sole—decider of facts in both civil and criminal cases would produce a variety of positive results. It would achieve logical consistency in what civil and criminal litigants may expect from the adjudicatory process. It would improve the acceptability of the results flowing from that process. It might improve the quality of the decisionmaking. And it would do all this while maintaining the fundamental precepts of our legal system as established in our Constitution.

V. PRACTICAL ISSUES IN ASSIGNING QUESTIONS OF FACT AT SENTENCING TO THE JURY

In recent years, several scholars have called for full jury sentencing. They have advocated giving juries rather than judges the power to set sentences within statutory ranges.267 That is not my objective. My focus is on fact questions. Judges are well positioned—that is, better positioned than juries—to make the systemic judgments, based on matters such as traditional practice, legislative intent, and judicial precedent, necessary to apply legal

265 See JONAKAIT, supra note 32, at 46-49 (discussing juries' ability to overcome biases and prejudices).

266 For a good overview of empirical studies examining whether juries differ in predictable ways from judges in sentencing patterns, see generally Adriaan Lanni, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 YALE L.J. 1775 (1999). The author concludes that "[t]he studies do not support the popular assumption that juries mete out harsher, more disparate, and more racially biased punishments than judges." Id. at 1790.

267 Hoffman, supra note 31, at 951; Lanni, supra note 266, at 1775. A handful of states currently use jury sentencing, including Arkansas, Missouri, and Virginia. See Lanni, supra note 266, at 1791 (noting that these states revamped, rather than outright abolished, their jury sentencing schemes in early 1990s).
rules to established facts. Judges are not as well positioned as juries to determine those facts. Accordingly, my objective is not jury sentencing, but jury determination of the fact questions pertinent to the imposition of sentence. And this has also been the Supreme Court's focus. The rule that the Court announced in Apprendi, extended in Blakely, and ostensibly reaffirmed in Booker addresses only fact questions.\textsuperscript{268} The Court held that any fact that increases the maximum allowable sentence must be decided by the jury.\textsuperscript{269}

The Breyer majority's constitutional remedy effectively neutralizes that holding.\textsuperscript{270} By allowing the Guidelines to operate as discretionary guidelines rather than mandatory rules, that remedy allows judges to continue to determine all the matters they determined prior to Blakely. The remedy suggested by Justice Stevens would be somewhat better. Stevens emphasized that "judicial factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant."\textsuperscript{271} In Stevens's view, a judge could always follow the Guidelines to set the base offense level dictated by the offense for which the defendant was convicted.\textsuperscript{272} The base offense level, when matched with a criminal history category, provides for a fairly large range of possible sentences. The judge could then find facts to set the sentence within that range. Even if the facts exceeded those found by the jury, and even if the judge's fact-finding called for an increase in the offense level, the resulting sentence would be constitutional as long as it did not exceed the maximum allowable sentence as determined from the base offense level.

Stevens's remedy, while better than the majority's, still gives judges too much decisional authority. Its flaw lies in its failure to

\textsuperscript{268} See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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.").

\textsuperscript{269} Id.

\textsuperscript{270} See supra notes 166-68 and accompanying text (discussing second part of Booker, which made Guidelines advisory).


\textsuperscript{272} Id.
contemplate meaningfully the definition of "question of fact." Stevens cites *Apprendi* and *Blakely* for the proposition that juries must determine the "facts" triggering an increase in the maximum allowable sentence. But neither he nor the Court in its earlier opinions ever explains what a question of fact is. The Court simply assumes that the questions of fact that the jury must decide are self-evident. In this section, I will suggest a narrow way to define "questions of fact" designed to reach only those matters at the very heart of the jury right. I will then show how adoption of that approach leads to a different approach to sentencing under the Guidelines than that proposed by Stevens. Finally, I will address some of the issues my approach would raise regarding the implementation of jury fact-finding at the sentencing stage, such as how and when to submit issues for the jury's consideration, the appropriate standard of proof, and the possibilities for waiver. I will offer some suggestions on these issues, but my main objective is to point out some of the key problem areas that need to be thought through if an expanded jury right were to be implemented.

A. IDENTIFYING THE QUESTIONS OF FACT THE JURY SHOULD DECIDE AT SENTENCING

Modern scholars have criticized the fact–law distinction as an artificial construct that simply serves to mask or justify normative conclusions about which actor is better situated to decide a particular question. In a recent article, Professor Ronald Allen and Michael Pardo conduct a comprehensive review of both case law invoking the fact–law distinction and scholarship attempting to explain the distinction. They forcefully demonstrate that there is no ontological, epistemological, or analytical distinction between

273 *Id.*
274 See *supra* notes 179-80 (citing articles critical of fact–law distinction).
275 See generally *Allen & Pardo, supra* note 180 (chronicling history of fact–law distinction). Allen and Pardo's analysis rests on several insights: that everything we think of as law exists and requires proof through evidence just like all the things that we think of as facts, that fact-finding requires the invocation of norms just like the identification of legal rules does, and that propositions of law have truth values just like propositions of "fact." *Id.* at 1805-06. See also *Allen & Pardo, supra* note 261, at 153-54 (noting fallacies of fact–law distinction in Western legal systems).
things in the real world that are facts and things in the real world that are law. Allen and Pardo conclude that when judges use the terms “fact” and “law,” they are using those terms conventionally to describe a normative conclusion that a particular matter should be decided by a judge (law) or should be decided by a jury (fact).

These claims are undoubtedly correct. The question of what constitutes valid law in any given context is a factual question, and one that can be answered only by examining the activities of legal officials in their identification of law. Law is a social institution manifested in and constructed by the actions of legal actors. It is, therefore, thoroughly factual in nature. Efforts to distinguish laws from facts at this level—in relation to questions about the nature of law—will always fail. That does not mean, however, that it is impossible to distinguish “questions of law” from “questions of fact” as those terms are and traditionally have been used by judges in practice. In fact, judges make those distinctions in fundamentally consistent ways all the time. As proof of that point, consider the following two questions: (1) “How fast was the car going?” and (2) “What was the speed limit?” We do not have to believe that law and fact are severable ontological categories to recognize that any judge encountering those questions in a typical adjudicative context would label the first one a question of fact and the second a question of law. The challenge is to identify the characteristics of the questions that judges typically label “law” or “fact.”

As I have argued extensively elsewhere, in the civil context, questions of fact are determined by reference to the “transactions or occurrences in dispute.” In an adversarial system such as ours, the decisionmaker, whether judge, jury, or some other referee, does not have the power to seek out and resolve disputes. The parties must invoke the machinery of adjudication by bringing their dispute

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276 See Allen & Pardo, supra note 180, at 1790-1806 (rebutternt ontological, analytical, and epistemological distinctions between fact and law).

277 See id. at 1778 (“[O]ne might suppose that courts utilizing the [fact-law] distinction (such as the Court in Cooper) were appealing to a relatively secure foundation. However, this has not been the case, for what is now a familiar reason: the legal system makes pragmatic allocative choices in the guise of principled analysis.”).

to a proper forum. In civil cases, the plaintiff must always assert that some event or condition occurred and impacted the plaintiff or will impact the plaintiff in a negative way. The plaintiff thus sets the terms of the debate by identifying something that happened (or in some cases, will happen) causing an injury that the plaintiff claims is remediable in a court of law. The defendant responds by challenging the plaintiff's version of the events and adding new events or conditions that have a logical connection to those posited by the plaintiff and that are necessary for a full understanding of the events or conditions described by the plaintiff. The transactions or occurrences in dispute are simply the events or conditions that the plaintiff has pointed to as causing his injury, plus the injury itself, plus logically connected events or conditions identified by the defendant.

When judges in civil cases talk about questions of fact, they are talking about questions requiring inductive inferences about the transactions or occurrences in dispute. That is, they are talking about questions that require a decisionmaker to make probabilistic judgments about whether events in the real world happened, might have happened, or will happen. Other decisions—those involving deductive inferences or inductive inferences about matter such as the intentions of legislatures, the holdings of other courts, or the social consequences of postulated adjudicative decisions—do not constitute questions of fact.

Criminal law differs from civil law in important ways. Whether the justification for civil law is rooted in utilitarianism or in either corrective or distributive justice, its primary function is the compensation of private injuries. The existence of an injury is the

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279 Id. at 1147.

280 Id. at 1158-60.

281 Unlike inductive inferences, deductive inferences do not require probabilistic judgments. The following syllogism is an example: Anyone who intentionally and unlawfully kills a human being is guilty of murder; A intentionally and unlawfully killed B; therefore, A is guilty of murder.

Once the decisionmaker knows that murder is defined as “the intentional and unlawful killing of a human being” and knows that a particular defendant has intentionally and unlawfully killed another, the conclusion that the defendant is guilty of murder follows without any conjecture or speculation required. For other examples of deductive reasoning in adjudication, see Richard A. Posner, The Problems of Jurisprudence 42-43 (1990).

282 See Kirgis, supra note 278, at 1160 (describing questions of law).
precondition to the maintenance of a civil action. The lawsuit is the attempt by the injured party to recover from the injuring party, and the nature of the injury defines the terms of the lawsuit. The injury is thus the central fact from which everything flows. That is why in my formulation of fact questions the transactions or occurrences in dispute consist of the injury plus those events or conditions identified by the parties as logically connected to the injury.

In criminal adjudication, however, the injury is not always as apparent or as central to the process. Some crimes are victimless—they do not cause an identifiable compensable injury. Even where there is a clear and identifiable injury, the injured party does not initiate the litigation. The state, having defined the offense, initiates the litigation with the consequence that society as a whole has interests at stake. Compensation for an injury to a private party is not the touchstone of criminal adjudication, as it is in civil adjudication. Instead, the focus of criminal adjudication is on society’s interest in punishing and deterring the wrongdoer.

Given that difference, the method I have suggested of identifying fact questions in civil cases—by reference to the transactions or occurrences in dispute—will not precisely fit the criminal context. The transactions and occurrences in dispute in civil cases are not the equivalent of the central issues in dispute in criminal cases. Nevertheless, the basic concerns that underlie the choice between judge and jury pertain in both civil and criminal cases. Because of that fundamental consistency, it is possible to translate the test for identifying fact questions in civil cases into the criminal context.

The central function of criminal law is the punishment of culpable wrongs. Because our society values individual liberty and because the criminalization of conduct constricts individual liberty, the decision by a legislature to criminalize conduct must be justified by reference to some competing value. Legal theorists

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283 See MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 168 (discussing culpability). Moore defines “wrongdoing” as “constructed out of the elements of action, causation, and (lack of) justification.” Id. He defines “culpability” as consisting of “the mental states with which an action may be done, and with the (lack of) excuse for the otherwise culpable doing of a wrongful action.” Id. I will use the term “wrongs” to incorporate both those concepts.

284 See id. at 282 (“[T]he good of punishing culpable wrongdoers must outweigh the bad of coercively interfering with choice.”).
differ on the values that may justify the constriction of individual liberty, but most would agree that retribution for wrongs ranks high on the list of current justifications for criminal law. Virtually all would accept that some combination of the following four categories of wrongs warrant retribution: (1) harms to others, (2) acts that give offense to others, (3) harms to the wrongdoer herself, and (4) moral offenses.\footnote{See generally 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984) (describing criminal law regarding crimes involving harm to others); 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985) (describing criminal law regarding crimes involving offense to others); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) (describing criminal law regarding crimes including harm to offender); 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) (describing criminal law regarding crimes considered moral offenses).}

While the focus of civil adjudication is on an identifiable injury, the focus of criminal adjudication is on the wrong allegedly committed by the defendant. For offenses falling within the first three categories of wrongs, the circumstances of the wrong generally are easily identified. The wrong consists of the harm the victim suffered, the offense caused by the defendant's act, or the harm the defendant visited on himself. For offenses, such as tax fraud, that harm the public rather than a specific individual victim, the wrong consists of the harm to the joint public interest.\footnote{See 4 FEINBERG, supra note 285, at 33 (discussing tax fraud as example of public harm causing public grievance).} For attempt crimes in all of these categories, the wrong consists of the harm or offense that would have occurred if the defendant's act had its intended effect.\footnote{Contra MOORE, supra note 283, at 193. Moore argues that attempt crimes do not constitute wrongs, but nevertheless make the offender culpable. \textit{Id}. I find this distinction unpersuasive. A person who attempts to kill another has indeed committed a wrong. See 4 FEINBERG, supra note 285, at 20 (using incest as example of violating societal taboo).}

Offenses in the fourth category, moral offenses, are by definition victimless. There is no apparent harm. Still, in most cases the circumstances of the wrong are evident. Examples of this category include incest between consenting adults\footnote{See id. at 126-28 (discussing examples of actions that are deemed generically and morally evil).} and voluntary participation in private sado-masochistic sex shows.\footnote{See 4 FEINBERG, supra note 285, at 20 (using incest as example of violating societal taboo).} For these
crimes, the wrong consists of engaging in conduct that violates society's moral standards. Harm is not required because the conduct itself is inherently wrong.

Legislatures define wrongs, and they have very wide latitude in doing so. Subject to limits imposed by the Constitution, most notably by the implied right of privacy,\textsuperscript{290} legislatures may criminalize almost anything. But they must clearly identify the wrongs they have chosen to proscribe, so that citizens have sufficient warning to avoid conduct that will provoke society's retribution. The criminal law must make clear exactly what conduct constitutes the wrong by designating the harm to others, offense to others, harm to self, or moral offense constituting the wrong.

This emphasis on the wrong makes possible the delineation of a category of questions of fact. Criminal punishment is justified only if the defendant actually committed the wrong with which he is charged. If the defendant is not morally culpable—\textit{if he has not committed the wrong}—he does not deserve society's retribution.\textsuperscript{291} The circumstances surrounding the wrong are the essential factual issues in a criminal case. If a question of fact in a civil action is one requiring inductive inferences about the transactions or occurrences in dispute, defined in relation to the injury suffered by the plaintiff, the corollary proposition is that a question of fact in a criminal action is one requiring inductive inferences about the wrong with which the defendant is charged. To identify the questions of fact in a criminal case, we must start with the wrong and then incorporate all matters raised by the parties that are logically connected to that wrong. For example, with a murder charge we begin with the killing of a human being and then consider the logically related conduct of the defendant, the victim, and other involved parties surrounding that event; the defendant's mental state; and any mitigating factors raised by the defendant, such as circumstances that might justify or excuse the killing. Questions requiring inductive inferences about those matters are questions of fact, which


\textsuperscript{291} See MOORE, supra note 283, at 91 (explaining retributivist approach to punishment).
must go to the jury whether raised in the liability or sentencing phase of the trial.

It should be apparent that these are not the only questions that juries decide in criminal cases. Juries do not merely decide whether the circumstances surrounding the wrong occurred in the way claimed by the prosecution. Juries also decide whether to apply the governing legal rules so as to hold the defendant criminally responsible for that conduct. Where the jury decides to acquit, their decision is final. The judge may not disturb it. Where the jury decides to convict, on the other hand, the judge has the power to overrule them and grant an acquittal. These decisions involve questions of law. Once the decisionmaker has determined what happened in the real world, the application of rules of law to those facts involves a combination of deductive inferences and inductive inferences about matters such as community standards of behavior, need for deterrence, and legislative intent. These are questions of law, not questions of fact, because they do not involve inductive inferences about the circumstances of the wrong.292

Courts are free to give those questions to juries, and again, the decision to convict must always be made by the jury in a case in which the right to a jury is properly invoked. But the right to have a jury decide questions of law was not a part of the Apprendi line of cases. The Supreme Court has not said that the jury must decide every question of law pertinent to the imposition of criminal punishment. The Court has said that the jury must decide the facts pertinent to the sentence imposed.293

B. QUESTIONS OF FACT IN THE FEDERAL SENTENCING GUIDELINES

Under the holding—if not the logic—of Booker, judicial decisionmaking under the Guidelines seems safe from constitutional challenge.294 If juries were given all fact questions pertinent to the

292 See Kirgis, supra note 278, at 1146-60 (explaining distinction between questions of fact and questions of law in civil cases).
293 See supra notes 12, 17 and accompanying text.
294 See U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c)(2004) (providing that “sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not greater than the statutorily authorized maximum sentence”).
imposition of sentence, however, significant changes in sentencing
practice would be required. Many of the matters that judges
currently decide when applying the Guidelines constitute fact
questions, as I define that term, and would have to be decided by the
jury, at least in cases in which the jury right has been properly
invoked.

The Guidelines work by assigning points to various offenses and
then translating those points into specific sentences. Initially,
each offense for which a defendant has been convicted is assigned a
set point value called a “base offense level.” Then points are
added to or subtracted from the base offense level based on a variety
of factors. Technically, these modifications come in three types.
First, the base offense level is modified to take into account the
“specific offense characteristics.” Specific offense characteristics
include matters such as whether a firearm was discharged in the
course of an assault or whether the victim of a sexual assault
suffered serious bodily injury. Next, “adjustments” are made to
the offense level. Adjustments are factors that are not offense
specific such as whether the defendant played an organizing role in
the offense or was merely a minimal participant, or whether the
defendant obstructed justice in the investigation and prosecution of
the offense.

These three factors, base offense level, specific offense character-
istics, and adjustments, combine to provide the “offense level.” To
derive the sentencing range, the offense level is then adjusted to
account for the defendant’s criminal history category. The
defendant fits into one of six criminal history categories, depending
on consideration of matters such as the number of prior crimes, the
seriousness of those crimes, and whether the defendant is a “career

295 Id. § 1B1.1 (describing general application principles).
296 Id. § 1B1.1(b).
297 Id.
298 Id.
299 Id. § 2A2.2(b)(2).
300 Id. § 2A3.1(b)(4).
301 Id. § 3B1.1.
302 Id. § 3B1.2.
303 Id. § 3C1.1.
304 Id. § 4A.
offender." Using a sentencing table with offense level on one axis and criminal history category on the other, the judge determines the applicable sentencing range measured in months of imprisonment.

The sentencing range provides the "heartland" within which the sentence should fall in a typical case. But the Guidelines also provide for departures from the prescribed sentencing range in unusual cases. As a general matter, departures are permissible where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The Guidelines permit departures on a number of specific grounds. The most common ground is "substantial assistance to authorities," under which the defendant may receive a sentence below the prescribed range if he cooperates in securing convictions of other defendants. Other grounds include aggravating factors such as seriousness of the offense, use of weapons, and extreme conduct by the defendant, and mitigating factors such as the victim's conduct and whether the defendant was acting under duress or with diminished capacity.

With the exception of adjustments based on hate crime motivation, all the determinations necessary to arrive at the sentence are to be made by the judge. In making these determinations, the judge is to consider all "relevant conduct," which includes not just the elements of the convicted crime, but "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "in the case of a jointly undertaken criminal activity... all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken

305 Id. § 4B1.1.
306 See id. ch. 5 pt. A (providing table of figures for sentencing determination).
307 See id. ch. 1, pt. A, intro. cmt. 4(b) (describing when judge may depart from specified sentence).
310 Id. §§ 5K2.1-5K2.3, 5K2.6, 5K2.8.
311 Id. §§ 5K2.10, 5K2.12-5K2.13.
312 Id. § 3A1.1.
criminal activity." Evidence may include "without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." While the Guidelines do not express a particular standard of proof on these matters, the Sentencing Commission said in its commentary to the Guidelines that it believes a preponderance of the evidence standard satisfies due process, and courts seem to have adopted that position. Booker effectively ratifies that system, while giving judges greater flexibility to depart.

Were courts to give juries all questions requiring inductive inferences about the wrong, much in this process would have to change. Offense-related factors represent by far the most important considerations in the sentencing determination. At each step—from establishing the offense level, through making adjustments, to considering departures—the sentencing judge is invited to consider the circumstances surrounding the offense. This includes matters such as the use of weapons, planning, and motive, as well as the nature and severity of the injury suffered by the victim. Questions about these matters touch directly on the wrong of which the defendant was accused. For example, the judge must determine whether a defendant convicted of criminal sexual abuse "knowing[ly] misrepresented[ed] . . . a participant's identity" in order to "persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct." Answering this question requires probabilistic inferences about what the defendant did (was there really a misrepresentation?), what the defendant knew (did the defendant know he was making a misrepresentation?), and what the defendant intended (was the purpose of the misrepresentation to induce sexual conduct?). These matters clearly constitute questions of fact in the sense I advocate. Other examples of similar "factual" determinations

313 Id. § 1B1.3.
314 Id. § 1B1.4. The information a court relies on need not be admissible at trial as long as it has "sufficient indicia of reliability to support its probable accuracy." Id. § 6A1.3(a).
315 Id. § 6A1.3 cmt. background.
abound throughout the Guidelines. All of those determinations would have to be made by the jury at some point in the process if the defendant has properly invoked a right to a jury trial and the result of the determination would be an increase in the maximum allowable sentence.

On the other hand, much in the Guidelines would remain unaffected by the change I propose. Most importantly, the determination of the defendant’s criminal history could remain the province of the judge. While criminal history is a fact in the colloquial sense of the term, it is not the sort of question of fact that lies at the core of the jury right. Except in cases in which a statute conditions criminal liability on felon status, the defendant’s prior criminal acts are not part of the wrong of which the defendant is accused. In fact, the law of evidence specifically precludes the jury from hearing about the defendant’s prior conduct unless that conduct is directly probative of the events the parties have identified as triggering the legal rules at issue. The reason for that limitation is that we have made a conscious choice to impose guilt for bad conduct rather than for being a bad person. Even where character evidence is allowed, we do not allow the jury to hear evidence of past conduct as proof of that character because of the potential for that evidence to distract the jury and unduly complicate the proceedings.

Because the goals of criminal punishment include both specific deterrence and incapacitation, any sentencing authority must evaluate matters beyond the specific conduct on which guilt is based. The defendant’s personal character takes on a heightened importance, as the sentencing authority must determine the defendant’s tendency toward recidivism. That determination depends on the accurate assessment of the defendant’s past conduct. While juries could, in theory, make those assessments, the same pragmatic concerns about inefficiency and confusion of issues that exclude evidence of prior acts as proof of character in the liability phase militate toward judicial determinations of prior conduct for purposes of sentencing. Thus, when the Supreme Court held in *Almendarez-Torres v. United States* that a defendant could be sentenced based on a determination of recidivism that was not
pleaded and proved beyond a reasonable doubt, it announced a rule consistent with my approach to the Sixth Amendment.\textsuperscript{318}

Furthermore, while many of the determinations required to set the sentencing range could not be made by the judge under my approach, the specification of a determinate sentence within that range could remain in the judge’s hands. The Sentencing Commission stated that “[i]n determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics.”\textsuperscript{319} In spelling out the statutory purposes of sentencing, Congress directed courts to consider the need

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.\textsuperscript{320}

Assuming the circumstances of the crime have already been established, these determinations do not require further fact-finding that should be done by the jury. The judge evaluates the seriousness of the offense by comparing the defendant’s conduct with social norms and with the judge’s sense of moral responsibility. The assessment of the need for general and specific deterrence involves inferences about the likelihood of other people and this defendant, respectively, committing similar crimes in the future. And consideration of the possibility for rehabilitation involves inferences about the defendant’s circumstances, history, and mental and physical condition. Finally, sentencing will always take into account the sentences imposed on similarly situated defendants, a matter that involves inferences about other prosecutions and reported cases.

Significantly, giving fact questions that arise at sentencing to the jury would leave judges with discretion to make many of the same sorts of findings that characterized sentencing decisions prior to the adoption of the Guidelines. The rehabilitative sentencing model in ascendency prior to the adoption of the Guidelines was defendant-oriented, in the sense that the judge's focus in the sentencing stage was on the defendant's characteristics. Judges sentencing under the rehabilitative model typically considered the circumstances of the offense in order to assess the defendant's moral culpability and the risk to society. But judges seem to have relied primarily on the facts stated in the indictment (in the case of guilty pleas) or on the elements of the crime as proved to the jury. To the extent judges relied on new information in sentencing, they emphasized matters such as the defendant's work history, family situation, education, and criminal history. The Supreme Court in *Williams v. New*

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321 Evidence for this proposition comes from the fact that presentence investigations in the pre-Guidelines era typically did not involve detailed investigations of the circumstances of the offense. See Julian Abele Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENTENCING REP. 112, 112 (1991)

To the defendant, the probation officer before the guidelines was viewed as a neutral—standing between the defense counsel and the prosecutor, serving as a conduit for pertinent information to the sentencing judge. To the judge, the probation officer provided much needed background information about the defendant, and served as a consultant with regard to the laws, sentencing regulations and policies that could affect the sentence.

*Id.*

322 See Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 313-14 (1994) (describing sentencing process prior to adoption of Guidelines). Professor Young describes the proof process at sentencing prior to the Guidelines in these terms:

A defendant might present past achievements in education and employment, relationship to the community, and relationship to family. Evidence of these factors often was simply an oral summary by defense counsel at sentencing. Letters of support for the defendant from family, employers, or neighbors were common. Ongoing responsibilities of the defendant that would be impeded by incarceration were also brought to the attention of the court, particularly the need to support a family by continued employment. Because there were no limits on what a court could choose to consider as a basis for sentencing, anecdotal evidence on any topic could be presented.

The prosecution also relied on anecdotal evidence, commonly to show the defendant's other past transgressions, including previously uncharged conduct. The prosecution might also describe the terrible crime or drug or fraud problem in America and the outrageous part this defendant had
York expressly approved this focus on the defendant's characteristics: "[H]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."\(^{323}\)

In large measure, the Guidelines represent a shift from that defendant-oriented sentencing model to an offense-oriented model. With the exception of criminal history, almost all the factors the Guidelines use to determine the appropriate sentencing range involve consideration of the circumstances of the offense.\(^{324}\) Indeed, the Guidelines expressly proscribe—for purposes of setting the offense level and making departures—consideration of aspects of the defendant's background such as age, education, mental or physical condition, employment history, or family circumstances.\(^{325}\) This shift in emphasis was motivated by a concern that the wide discretion permitted under the rehabilitative model was producing unjustifiable disparities in sentencing.\(^{326}\) The focus on offense characteristics rather than the defendant's characteristics is an aspect of the shift toward a retributive model of punishment.

In effect, my argument is that an offense-oriented sentencing model cannot survive constitutional scrutiny if the judge is given the authority to make factual determinations about the circumstances of the offense. Judges are the appropriate actors to make determinations about the seriousness of the offense—as a moral and societal matter—for purposes of ensuring that the defendant gets his "just

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\(^{324}\) Substantial assistance does not focus on the offense, but it is really a separate category because it is included in the calculation for utilitarian reasons rather than as an aspect of punishment. See Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 Vand. L. Rev. 1, 1 (2003) (discussing role of cooperation with prosecutors in sentencing).

\(^{325}\) U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-5H1.6 (2004). The Guidelines provide that these factors may be considered "in determining the conditions of probation or supervised release." Id. The defendant's race, sex, national origin, creed, religion, and social status may never be considered. Id. § 5H1.10.

\(^{326}\) See Ogletree, supra note 85, at 1941-43 (discussing changes in sentencing philosophy leading to promulgation of Guidelines).
deserts." Judges are also the appropriate actors to make determinations about the defendant's personal circumstances and character in order to determine the social utility of incarcerating or otherwise punishing the defendant. They are not the appropriate actors to decide what happened to trigger punishment where the defendant has properly invoked her right to a jury trial.

Obviously, taking away those fact questions would leave judges with significantly less decisionmaking authority than they will have under Justice Breyer's *Booker* holding. But it would also leave judges with less authority than they would have under Justice Stevens's remedy. Stevens would allow judges to make any determinations, including those involving fact questions, as long as the resulting sentence is within the range allowable given the base offense level for the crime for which the defendant was convicted. In my view, judges simply should not make determinations of fact questions. So a judge should not make a determination about, for example, the amount of money embezzled, regardless of where the resulting sentence would fall within a given sentence range. But a judge could make any determination about matters not involving fact questions, including the moral seriousness of the crime as demonstrated by predetermined conclusions about what happened, the defendant's criminal history, and other factors such as the defendant's acceptance of responsibility and substantial assistance to prosecutors.

C. IMPLEMENTING JURY FACT-FINDING AT SENTENCING

My contention is that the Sixth Amendment should be read to include within the jury right the power to determine the historical events surrounding the wrong of which the defendant is accused, whether those events are relevant at the liability or the penalty phase of the proceeding. Whenever a defendant has properly exercised her right to a jury trial, the jury should certainly make those determinations. The easiest way for that to happen is to treat all offense-related considerations as elements of the crime and to prove them to the jury at the same time that the jury determines

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327 See *supra* notes 152-58 and accompanying text.
the basic culpability issue. In many cases, however, lumping what are currently considered sentencing factors in with the culpability determination will hurt the defendant. As Jacqueline Ross has argued, the pre-Apprendi system gave the defendant the advantage of remaining silent while culpability was determined at trial and then presenting mitigating evidence during the sentencing phase.\footnote{Jacqueline E. Ross, Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The Apprendi Debate, 12 FED. SENTENCING REP. 197, 198-99 (2000).} Under Apprendi, defendants face a Hobson's choice of allowing the prosecution's evidence on sentencing factors such as drug quantity to go unchallenged or presenting evidence on those matters and thereby implicitly conceding culpability.\footnote{Id.}

Beyond that concern, an even greater problem is the fact that jury trials rarely occur. Well over 90% of criminal convictions are the result of plea bargains.\footnote{See United States v. Booker, 125 S. Ct. 738, 772 (2005) (stating that "over 95% of all federal criminal prosecutions are terminated by a plea bargain") (Stevens, J., dissenting).} If judges are to take the circumstances of the offense into account—as our current sentencing model indicates—conclusions must be drawn about the facts of the case in plea-bargained cases as well.

This could happen in several ways. The most obvious is to treat the many offense-related factors as elements that must be pleaded in the indictment. Then, when the defendant pleads guilty, he pleads to an offense that includes the relevant sentencing considerations. That is how prosecutors and courts have responded to Apprendi with respect to statutes that allow for increases in the maximum penalty based on statutory aggravators that would previously have been determined by the judge at sentencing. In the most prominent example, prosecutors now plead in the indictment the amount of drugs that they allege the defendant possessed or sold. Prosecutors could also plead such Guidelines-denominated factors as seriousness of the injury to the victim, amount of money embezzled, or pecuniary motive.

The criticism of this approach is that it gives inordinate power to prosecutors. Professor Stephanos Bibas explains:
Even before *Apprendi*, prosecutors used statutory minima and maxima to charge bargain where multiple offenses overlapped. *Apprendi* poured fuel on that fire by fragmenting crimes, creating more minima and maxima and thus more ways to charge bargain. For example, the maximum federal sentence for carjacking is fifteen years, or twenty-five years if a victim suffers serious bodily injury, or life imprisonment (or death) if a victim dies. Courts used to interpret this statute as a single crime plus two sentence-enhancement provisions. But now, under the *Apprendi* rule, each enhancement is an element of a distinct offense. In other words, what used to be a single crime is now three separate crimes.

Prosecutors now have more power to exploit these varying minima and maxima as bargaining chips. They can do so by charging one favored defendant with the lowest grade of a crime (subject to the lowest minimum and maximum) while charging an identical defendant with a higher grade. If a minimum or maximum applies, the judge's hands are tied regardless of the true seriousness of the offense. Prosecutors thus have more power to use collusive charge bargains to set sentence levels unilaterally, and judges have less power to check them.\(^\text{331}\)

To the extent this is a real problem now, it would become a much greater one if all the many offense-related factors in the Guidelines were treated as elements to be charged and subsequently bargained. In what would be a radical departure from the current system of charge bargaining, prosecutors and defendants would haggle over the facts of the offense, thereby tying the hands of the judge at sentencing. A major innovation of the Guidelines—the move toward “real offense sentencing”\(^\text{332}\)—would be lost.


Of course, not everyone would agree that giving prosecutors and defendants greater bargaining autonomy is a bad thing. Clearly a move in that direction would give prosecutors more power vis-à-vis judges. But it would also give defendants more power and, perhaps more importantly, a much clearer picture at the time they agree to plead guilty of the likely sentence they will face. And the fact that the prosecution would ultimately face the burden of proving sentencing considerations beyond a reasonable doubt if the bargain fails would confer even greater leverage on defendants.

Still, treating all of the Guidelines’ offense-related factors as elements to be pleaded and proved could represent a change so radical as to be infeasible at this time. And again, for cases that actually get to trial, defendants might not want all those factors to be determined in conjunction with culpability. For these reasons, an alternative approach might be preferable.

Treating all offense-related factors as elements to be pleaded in the indictment might be required if the right to a jury decision rested on the Due Process Clauses of the Fifth and Fourteenth Amendments. Winship, the case that requires all elements of a criminal offense to be pleaded in an indictment and proved beyond a reasonable doubt, rested on the Fourteenth Amendment’s Due Process Clause, not on the Sixth Amendment. Both Blakely and Booker, however, rested expressly on the Sixth Amendment. The Trial-by-Jury Clause of the Sixth Amendment has never been used to justify procedural requirements with respect to pleading. As it did in Apprendi, the Court in Blakely and Booker focused solely on the requirement that the jury determine the facts resulting in an increase in the defendant’s sentence. It said nothing about pleading requirements. Consequently, none of the Court’s decisions compels the conclusion that facts relevant to sentencing must be pleaded in the indictment.

The question remains how to get fact questions that are pertinent only to sentencing before the jury if they are not part of the offense charged in the indictment. Probably the best answer is to bifurcate the proceedings into culpability and sentencing phases, with the jury issuing a general verdict of guilty or not guilty first, and then

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answering a set of interrogatories regarding the offense-related sentencing factors only if the initial verdict was guilty. Both state and federal courts already use special interrogatories to determine certain factual matters relevant to sentencing. For example, a number of states have used special interrogatories in capital cases to determine the existence of statutory aggravators warranting death.\(^{334}\) The number of states using such procedures will surely rise after \textit{Ring}\.\(^{335}\) Some states also require the jury to answer special interrogatories where the presence of firearms is a sentencing factor not pleaded in the indictment.\(^{336}\) After \textit{Apprendi}, some federal district courts have used special interrogatories to determine whether a statutory drug quantity is met.\(^{337}\) These examples demonstrate that limited fact-finding by the jury for sentencing purposes can be achieved without imposing unacceptable complexity or cost.

If sentencing factors are not pleaded in the indictment, the question arises of how to handle them in plea-bargained cases. But that problem can be handled through waiver rules. Arguably, a defendant should have a right to a jury decision on the sentencing facts only if she had also demanded and received a jury trial on the question of culpability. A defendant who has waived the right to a jury trial on the question of culpability by pleading guilty could reasonably be considered to have concomitantly waived the right as

\(^{334}\) \textit{E.g.}, ARK. CODE ANN. §§ 5-4-603(a)(1)-(3) (Michie 1997) ("The jury shall impose a sentence of death if it unanimously returns written findings that: (1) Aggravating circumstances exist beyond a reasonable doubt; and (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.").


\(^{337}\) \textit{See, e.g.}, United States v. Vazquez, 271 F.3d 93, 114 (3d Cir. 2001) (en banc) (Becker, C.J., concurring) ("Since \textit{Apprendi}, federal district courts have proceeded in this manner, submitting special interrogatories to the jury for determination of drug type and quantity, and many have been operating in this manner since \textit{Jones}").
to the determination of sentencing facts. If such a rule were adopted, then for the more than 90% of cases that end in plea bargain, the sentencing process would not change at all. Another alternative, which prosecutors used in the interval between Blakely and Booker, is to require defendants to waive the right to a jury decision on sentencing facts as a condition to entering into a plea bargain. In either case, the judge could continue to determine the sentencing facts on a preponderance of the evidence standard based on the information in the presentence report.

The rules on waiver might also be modified in another way to protect defendants from the negative effects of jury fact-finding at sentencing. Defendants do not have a unilateral right to waive a jury trial on the elements of an offense. But they should probably have the right to waive the jury decision on the sentencing factors. Where a defendant finds unpalatable the prospect of arguing for leniency before a jury that has just convicted him, he should have the option of submitting those issues to the judge to be decided according to the usual sentencing procedures.

If implemented in this way, Blakely and its progeny would entail much less sweeping revisions of criminal procedure than might at first be assumed. In the vast majority of cases—all cases ending in plea bargain plus all cases tried before a jury in which the defendant waives the right to a jury determination of offense-related sentencing factors—the sentencing process will remain exactly as it stands. But where the government conditions punishment on the answers

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338 Cf. CAL. PENAL CODE § 190.4 (2004) (requiring trier of fact to make special finding of truth of special circumstances statutorily required to impose death). The California statute provides for a jury determination of those facts even if the defendant waived a jury trial or accepted a plea bargain:
If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

Id.

339 Booker, 125 S. Ct. at 758-64.
given to fact questions—questions requiring inductive inferences about the wrong of which the defendant is accused—a defendant who wants a jury trial would have a jury decision on those questions.

VI. CONCLUSION

Despite superficial similarity in the civil and criminal jury, the Supreme Court has, until recently, treated the right to a jury trial in criminal cases as consisting of something markedly different from the right to a jury trial in civil cases. The difference is manifest in the parallel distinctions the Court has relied on in allocating decisional responsibility in the criminal and civil contexts. In the criminal context, the Court has traditionally given the determination of “elements” to the jury, while allowing judges to determine “sentencing factors.” In the civil context, the Court has given juries the power to determine “facts,” while allowing judges to decide issues of “law.” In practice, these semantic differences produced concrete discrepancies in the issues criminal and civil litigants can expect a jury to resolve. The same questions for which a civil litigant could demand a jury decision, such as in the determination of punitive damages, would go to the judge if the case fell on the criminal side of the docket.

That makes no sense. If anything, criminal defendants should be able to demand a broader scope of decisionmaking for the jury than civil litigants. But what makes the most sense in this context is to interpret the scope of the jury right to include the determination of the same types of questions, regardless of whether the case is considered civil or criminal. In Blakely v. Washington, the Court took an important step in that direction by holding that any fact that increases the maximum allowable sentence must be admitted by the defendant or found by the jury. In United States v. Booker, however, the Court eviscerated that principle by holding that judges can continue to determine questions of fact at sentencing as long as they are not required to do so by Congress. To fulfill the promise

340 See supra note 140 and accompanying text.
341 See supra notes 167-71 and accompanying text.
of the Sixth Amendment to criminal defendants, a greater role for the jury is required. A criminal defendant should have a right to a jury decision on all questions requiring inductive inferences about the wrong of which the defendant is accused, whether those inferences come up in the liability or sentencing phase of the prosecution.

Implemented in the way I suggest, this approach will require relatively modest procedural changes. In order to give full effect to the jury right, defendants who invoke their right to a jury trial and have a jury trial on the issue of culpability should also have a waiveable right to a jury determination on offense-related sentencing factors. But the relevant facts should not necessarily be pleaded in the indictment, and if a defendant waives the right to a jury trial on the issue of culpability, the defendant should also be understood to waive the right to a jury decision on sentencing facts. This proposal will result in a jury right that is consistent for both criminal and civil litigants and that ensures juries decide the questions they are best suited to decide. And it will achieve these objectives in a way that will not unnecessarily alter the basic processes of the criminal justice system or unduly tax that system's resources.