RECONCILING THE BOOKER CONFLICT:
A SUBSTANTIVE SIXTH AMENDMENT IN A REAL OFFENSE SENTENCING SYSTEM

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INTRODUCTION

A federal jury found Freddie Joe Booker guilty of possession with intent to distribute 92.5 grams of crack cocaine. As a result, Booker faced a minimum of 210 months and a maximum of 262 months in prison. At one point in United States history, the judge would have been required to sentence Booker within the sentencing range of the crime of conviction. In the Booker case, however, the judge during sentencing made additional findings of fact concluding that Booker actually possessed with the intent to distribute an additional 566 grams of crack cocaine. The jury, once noted as the “bulwark” of our liberties and protector against oppressive government power, could not constrain the judge's power to sentence on the basis of these additional facts.

Booker now faced a sentence of 360 months to life, at least eight years greater than the sentence appropriate for the crime of conviction on the basis of the jury determination.

The case of Freddie Joe Booker showcased a tension in sentencing. Should Booker's sentence have been based purely on the crime of conviction? An argument in favor of basing Booker's sentence on the crime of conviction is supported by a broad and substantive understanding of the Sixth Amendment right to trial by jury. This understanding recog-

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1 This example is derived from United States v. Booker, 543 U.S. 220 (2005), which is discussed in further detail in Part II. See infra Part II.

2 This understanding of the jury's function is derived from the court's examination of the Framers' intent behind the Sixth Amendment right to trial by jury in Jones v. United States, 536 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000). See infra Part III.C.4

3 U.S. Const. amend. VI.
nizes that trial does not simply mean guilt determination. Trial also encompasses sentencing. As a result, a jury role in sentencing is just as important as a jury role in determining guilt to protect the individual against the oppressive power of the state. According to this understanding, in the Booker case, the ultimate sentence should be based on the jury’s conviction and the judge should have been constrained by the maximum guideline sentence for the crime of conviction, which was 262 months.

On the other hand, what if Booker did possess 566 additional grams of crack cocaine for distribution? Should Booker be subjected to the same sentence as someone that only possessed 92.5 grams of crack cocaine for distribution? There is a strong argument for individualizing sentences on the basis of all factors related to the crime of conviction (real offense factors). The judge, free from procedural and evidentiary constraints, may be best situated to individualize the sentence based on the finding of real offense factors. If the judge is not provided with this power to find additional facts related to the crime then prosecutorial charging decisions will be the basis for individualizing sentences. In other words, the determination of whether Booker faces a term of 210 to 262 months or 360 months to life would be based on what the prosecutor decides to charge rather than what the offender did. The question posed to those that support a substantive Sixth Amendment is whether it is better to have a biased prosecutor or a neutral judge individualize the sentence.

The case of Freddie Joe Booker reveals the conflict between a substantive Sixth Amendment right to trial by jury and individualized, real offense sentencing. A substantive Sixth Amendment, in which the jury stands as a bulwark between the individual and the state, requires a jury role in all findings of fact that lead to, and increase, the sentence. Real offense sentencing requires the judge to find additional aggravating factors and

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4 A charge conviction system is one in which the judge can only sentence on the basis of the jury’s conviction. A major critique of such a system is that it would increase prosecutorial power in the sentencing determination as the jury could only convict on what the prosecutor charges. As a result, the prosecutor would control the potential sentencing consequences for each offender and be able individualize sentences according to her own discretion. For critiques of the charge conviction system see infra notes 187-200 and accompanying text.

5 An example of an aggravating factor is possession of a gun while engaging in the underlying crime of robbery. Real offense sentencing would allow the judge to differentiate between a person who simply commits robbery and a person who commits robbery while in possession of a gun, which would create a greater danger to the public.
mitigating factors related to the crime of conviction in order to individualize the sentence for each offender. This conflict came to a head in the Supreme Court case of United States v. Booker.

While the majority in the substance opinion (Booker I) espoused the virtues of the jury as a bulwark between the individual and the government and as a check on the imposition of sentences by judicial actors, another majority in the remedy opinion (Booker II) nullified the jury role in favor of maintaining a system of individualized, real offense sentencing. The resolution of the case is a testament to the importance of real offense sentencing. The Booker II majority, in essence, held that the need for real offense sentencing overrode the Sixth Amendment constitutional imperative. The resolution is also a testament to the fact that the Supreme Court is willing to allow the judicial power over sentencing to go unchecked and to limit the jury’s role to that of determining guilt.

The conflict between a substantive right to trial by jury and a system of individualized sentencing was not inevitable and it is not irreconcilable. The conflict grew out of a fundamental mismatch that resulted from a separation of functions sentencing framework, derived from a rehabilitation theory of sentencing being mapped onto a guideline sentencing system based on a retributive theory of punishment. The separation of functions framework understood sentencing to be separate and distinct from guilt determination. Under this framework, the jury determined guilt, and the judge, alone, determined the sentence. Dur-

6 An example of a mitigating factor could be that the offender committed robbery for the purpose of providing food for her family. The judge may want to take this into account in reducing the sentence because the beneficial purpose of the robbery may be viewed as decreasing the offender’s moral culpability. The mitigation of factors by the judge does not introduce a threat to the civil and political liberties of offenders and is argued to not necessitate a jury role.

7 An alternative would be the legislative establishment of sub-categories of crimes to take into account all real offense factors. In his dissent in Blakely v. Washington, Justice Breyer discounts the establishment of such a system because of the complexity and because it would lead to a charge conviction system, which he argues would increase prosecutorial power. See infra notes 189-201 and accompanying text.


9 The majority in the substantive opinion (Booker I) included Justices Stevens, Scalia, Thomas, Souter, and Ginsburg. The majority in the remedy opinion (Booker II) included Justices Rehnquist, O’Connor, Kennedy, Breyer and Ginsburg.

10 During the rehabilitation era, the judge-determined sentence was subject to revision and review by a parole board. See infra notes 64-65 and accompanying text.
ing rehabilitation era real offense sentencing, this separation of functions framework was consistent with a substantive understanding of the Sixth Amendment because, in theory, judges sentenced based on the necessary level of treatment, not on the appropriate level of punishment. Therefore a role for the jury as a bulwark between the individual and the state at sentencing was unnecessary. When retribution replaced rehabilitation in the guidelines era, sentencing predominantly served the purpose of punishment, not treatment. A jury's role in sentencing under the Sixth Amendment became vital, but the separation of functions framework persisted. As a result, a conflict between judge-based individualization of sentences and a substantive understanding of the Sixth Amendment developed.

The two goals can be reconciled by putting aside the separation of functions framework. Sentencing, under the current retributive punishment model, should be understood as a component of the trial for which a jury role is imperative. This does not mean that the judge's function should be merely ministerial. However, any discretion to sentence above the maximum of the crime of conviction should be subject to jury oversight and check. Under the punishment model, the judge should be able to engage in the individualization of sentencing on the basis of real offense factors, but the jury is constitutionally required to serve as a bulwark between the individual and the government at sentencing.

This article will advocate for such a system of jury check on judicial discretion at sentencing. It will be argued that in a system based on a punishment model, the jury has a constitutionally protected substantive role to play in checking government power under a sentencing system in which judges are allowed to aggravate sentences on the basis of factors not found by the jury. It will also be argued that this role of the jury can coexist alongside a system of real offense sentencing that both individualizes sentencing and maintains the balance of power between the prosecutor and the judge at sentencing.

This article will proceed in four parts. The first part will describe the conflict between real offense sentencing and a substantive under-

11 Real offense sentencing during the rehabilitation era served the function of individualizing sentences based on the rehabilitative potential of the offender. See infra notes 71-78 and accompanying text.

12 Real offense sentencing for the purpose of this paper is the aggravation or mitigation of sentences by judges on the basis of real offense factors during the sentencing phase.
standing of the Sixth Amendment as exemplified in Booker. The second part will describe the sources of the conflict between a substantive understanding of the Sixth Amendment and a system of real offense sentencing. This historical examination will identify the emergence and evolution of real offense sentencing during three distinct eras that embodied different purposes of sentencing: the colonial era and early Republic, the rehabilitation era, and the guidelines era. This part will also briefly examine the emergence and development of the separation of functions framework that became the primary source of the conflict between individualized, real offense sentencing and a substantive Sixth Amendment during the guidelines era. Finally, this part will examine a series of cases leading up to Booker that recognized the conflict between a substantive Sixth Amendment and real offense sentencing under the guidelines era punishment model of sentencing and tried unsuccessfully to reconcile the conflict within the separation of functions framework.

Part three will discuss the primary post-Booker alternatives and their failure to resolve the conflict between real offense sentencing and a substantive Sixth Amendment. This part will also introduce a proposal that would reconcile the conflict by moving beyond the separation of functions framework.

I. UNITED STATES v. BOOKER

In January 2005, the Supreme Court sent shockwaves through the criminal justice system by invalidating the Federal Sentencing Guidelines in United States v. Booker.13 Booker presented an unusual case in which the substance (Booker I) and the remedy opinion (Booker II) comprised almost two completely different majorities, with Justice Ginsburg providing the switchover vote.14 As a result, the substantive opinion bore little relationship to the remedy imposed. The primary reason for the lack of relationship between the two opinions is that the two majorities were concerned with different aspects of sentencing. The majority in Booker I was concerned about the substantive role of the jury under the Sixth Amendment while the majority in Booker II was concerned about maintaining real offense sentencing and particularly the need to individualize sentences while limiting prosecutorial discretion.

13 Booker, 543 U.S. at 249.
14 To date, there has been no clear explanation or rationale for Justice Ginsburg's seemingly conflicting vote in support of the Booker I majority and the Booker II majority.
Booker involved the consolidation of two sentencing cases. In the first case, as described in the introduction, Booker had been found guilty by the jury for possession with intent to distribute 92.5 grams of cocaine base (crack cocaine). The guideline sentence on the basis of the jury's determination of the quantity possessed and Booker's criminal history was not less than 210 or more than 262 months. The trial judge, in a post-trial sentencing proceeding, found by a preponderance of the evidence that Booker possessed 566 additional grams of cocaine base, and that the defendant was guilty of obstruction of justice. The relevant guideline range increased to 360 months to life imprisonment. The trial judge sentenced at the low end of that range; 360 months, approximately eight years longer than the highest sentence appropriate on the basis of the jury's verdict. The Seventh Circuit Court of Appeals reversed the district court on the basis of a prior Supreme Court holding, Apprendi v. New Jersey; concluding that the judge improperly found a fact that increased the sentence beyond the statutory maximum, which the Seventh Circuit interpreted to be the guideline maximum of 262 months. Instead, according to the Seventh Circuit, these facts had to be found by the jury and proved beyond a reasonable doubt.

In the second case, Fanfan was found guilty by the jury of possessing with the intent to distribute at least 500 grams of cocaine, which had a maximum guideline sentence of seventy-eight months. The trial judge found in a separate sentencing hearing that Fanfan possessed to distribute 2.5 kilograms of cocaine powder and 261.6 grams of crack. The judge's finding of fact increased the guideline range to 188 to 235 months. Instead of sentencing within the enhanced range, the trial judge, citing as precedence the Court's decision in Blakely v. Washington,
concluded that only the jury could find the enhancements beyond a reasonable doubt. Since these facts were not found by a jury and proved beyond a reasonable doubt, the judge sentenced Fanfan to seventy-eight months.

Thus, in the first case involving Booker, the trial judge relegated the jury to the role of finding guilt on a particular conviction and then proceeded to find additional facts that enhanced the sentence. The enhancement was a form of real offense sentencing that had the purpose of ensuring that the sentence was individualized and proportionate to the crime and related criminal conduct. In the second case involving Fanfan, the judge maintained the link between the jury’s conviction at the guilt determination phase and the ultimate sentence. At the same time, the trial judge disregarded factors unique to Fanfan’s case that would have authorized a different, more individualized sentence under the guidelines.

The Supreme Court, in the Booker I majority opinion written by Justice Stevens, held consistent with the Fanfan resolution that the Sixth Amendment trial by jury required substantively more than the determination of guilt for the underlying crime. Stevens framed the issue of the preservation of the Sixth Amendment right to trial by jury as “guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.” According to Justice Stevens, it was the Framers who gave this substance to the Sixth Amendment trial by jury. Justice Stevens relied on historical sources such as Federalist No. 83 to support his view of the Sixth Amendment.

In Federalist No. 83, Alexander Hamilton, one of the Framers of the Constitution, expressed his concerns for “‘judicial despotism’ that could arise from ‘arbitrary punishment upon arbitrary conviction’ without the benefit of a jury in criminal cases.’” Thus the substance of the jury’s role under the Sixth Amendment is “‘[t]o guard against a spirit of oppression and tyranny on the part of the rulers,’ and ‘as the great bulwark of [our] civil and political liberties. . .’” According to the Booker I majority, the jury is required to find all facts that enhance a sentence beyond the guideline maximum, and these facts must be found beyond

26 See infra notes 193-98 and accompanying text.
27 Booker, 543 U.S. at 237.
28 Id. at 239 (quoting Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton)).
29 Id. (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)).
a reasonable doubt in order to preserve a substantive Sixth Amendment role for the jury.\textsuperscript{30}

The Supreme Court, in the \textit{Booker II} majority opinion authored by Justice Breyer, took a fundamentally different approach towards the issue, subordinating concerns for a substantive Sixth Amendment right to trial by jury to the maintenance of a system of real offense sentencing. Instead of requiring that a jury find beyond a reasonable doubt all facts that enhance a sentence above the guideline maximum, the Court, as a remedy, severed the mandatory provisions of the guideline and held that the guidelines were instead advisory.\textsuperscript{31} As a result, the guideline maximum was no longer binding on the judge. Instead, the statutory maximum was the relevant bound on the judge's authority for Sixth Amendment purposes. In other words, the judge, on the basis of the remedy, was free to sentence within the much broader statutory range of the conviction offense without any constraints or checks imposed by the jury for factoring in real offense characteristics into the sentence.

The \textit{Booker II} majority held that allowing the jury to find the facts that enhance the sentence beyond the guideline maximum would be incompatible with the Sentencing Reform Act, which established the guidelines.\textsuperscript{32} The \textit{Booker II} majority asserted that the overriding goal of Congress was reducing unwarranted sentencing disparity.\textsuperscript{33} The system was premised on the idea of real offense sentencing in which punishment would be based on "the real conduct that underlies the crime of conviction."\textsuperscript{34} Justice Breyer argued that the system of jury fact finding that would be imposed by the \textit{Booker I} majority would "destroy" the real offense sentencing regime by preventing the judge from finding additional facts that would individualize the sentence and make the sentence proportionate to the crime and additional underlying conduct. The \textit{Booker II} majority offered examples of how a jury fact-finding system would introduce both unwarranted uniformity and unwarranted disparity in sentencing.\textsuperscript{35} The first example involved a hypothetical

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 244.
  \item \textsuperscript{31} \textit{Id.} at 245 (Breyer, J.).
  \item \textsuperscript{32} See infra notes 202-03 and accompanying text.
  \item \textsuperscript{33} \textit{Booker}, 543 U.S. at 249 (Breyer, J.).
  \item \textsuperscript{34} \textit{Id.} at 250.
  \item \textsuperscript{35} See \textit{id.} at 252 (asserting that jury fact-finding would "undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.").
\end{itemize}
Smith and Jones convicted of violating the Hobbs Act. Under the hypothetical:

Smith threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company’s till; Jones, after similarly threatening the co-worker, causes far more harm by seeking far more money, by making certain that the co-worker’s family is aware of the threat, by arranging for deliveries of dead animals to the co-worker’s home to show he is serious, and so forth.

Justice Breyer argues that since the two defendants are convicted only of violating the Hobbs Act, the judge under the Booker I jury fact-finding solution would be limited to sentencing on the basis of the charge and conviction rather than any additional factors that are involved in the real offense. As a result both Jones and Smith would have to be sentenced within the same guideline range, thus introducing unwarranted uniformity into the system of sentencing.

In the second hypothetical, Johnson and Jackson commit the identical felony of threatening a bank teller, stealing $50,000 and “injuring an innocent bystander while fleeing the bank.” In this hypothetical, the prosecutor charges Johnson and Jackson for two different crimes, bank robbery and illegal gun possession. Justice Breyer argues that under the Booker I jury fact-finding solution, the judge would be limited to sentencing on the basis of the two different convictions for identical conduct resulting in unwarranted disparity in sentencing.

The two hypotheticals presented by the Booker II majority demonstrate two of the concerns with establishing a substantive Sixth Amendment right to trial by jury along the lines presented by the Booker I majority. The first concern is that such a system would transform sen-

36 The Hobbs Act makes it a crime to “interfere[] with commerce by threats or violence.” Section (a) stipulates:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts to conspire to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.


37 Booker, 543 U.S. at 252.

38 Id. at 253.

39 Id. at 253, n. 10.

40 Id. at 253.

41 Id.
tencing from one based on the real offense, in which the judge can find additional facts relevant to the individualization of the punishment, to a system of charge-based sentencing in which the punishment is based on what the prosecutor charges. The *Booker II* majority argues that such a system would lead to unwarranted uniformity in sentencing such that Jones and Smith in the above hypothetical receive the same sentence for crimes that involve distinct real offenses.

The second concern is that the *Booker I* system would increase the power of prosecutors to ultimately determine the sentence. The prosecutor's charging decision becomes the basis for the ultimate punishment because the jury can only find and convict on the basis of the prosecutor's charges. Therefore, if the prosecutor charges Johnson with illegal gun possession and not bank robbery, the jury has no choice but to determine guilt or innocence solely on the illegal gun possession and the judge can only sentence according to, and within, the sentencing range for the illegal gun possession conviction. In contrast, if another prosecutor decides to charge Jackson with bank robbery and not illegal gun possession, his conviction and punishment will be based solely on the bank robbery and not the gun possession. This introduces unwarranted disparity into the system on the basis of the prosecutor's charging decision. As a result, the "[p]rosecutors would...exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment."43

Instead of limiting the power of judges and enhancing the power of the jury in the determination of sentences as called for in *Booker I*, the majority in *Booker II* did the exact opposite. Under the remedy, judges are no longer constrained by the guideline minimums and maximums and can impose whatever sentence they want within the statutory range. In addition, judges can reason on the basis of the purposes of punishment to reach any result they want without any substantive constraints. At the same time, the jury has been relegated to the increasingly subordinate role of guilt determination at trial, which in a system of broad statutory ranges usually requires a minimal finding by the jury to

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42 In addition, the prosecutor's bargaining power, according to the *Booker II* majority, would be greatly increased under a system in which 96% of criminal convictions in 2002 were decided through a plea arrangement. See U.S. Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics available at http://www.ojp.usdoj.gov/bjs/fed.htm (last visited Jul. 6, 2005).

43 *Booker*, 543 U.S. at 257.
incur substantial punishments by the judge that may have little or no relationship to the punishment appropriate for the crime of conviction. At the same time, the judge is not subject to even minimal checks in cases of judicial overreaching in sentencing. As a result of the Booker remedy, the jury has emerged as a cog, albeit an important one, in the criminal justice wheel rather than serving as the idealized bulwark between the individual and the government in the criminal justice process.

The question is how did the Sixth Amendment evolve to the point where it could be completely disregarded in substance by the Supreme Court? What is the basis for real offense sentencing? Can a substantive Sixth Amendment be established within a sentencing system that revolves around real offense sentencing? These are some of the questions that will be addressed in the next two parts.

II. SOURCES OF THE BOOKER CONFLICT

At the time of the framing of the Constitution, the right to trial by jury had been an embedded feature of the political order. The colonists conceived of the jury as a defender of liberty against the unchecked royal power of the British. The colonists feared governmental overreach through “arbitrary exercises of power by judges.” These concerns motivated the Framers of the Constitution to create a Bill of Rights that would protect individual liberty against excessive governmental power. The Sixth Amendment served this function in the criminal trial context, but what exactly the Framers meant by the term “trial by jury” in the Sixth Amendment is not clear as the legislative history on the Amendment is sparse.

A major issue relevant to this article is whether the trial by jury and its function of protecting individual liberty from governmental power included the determination of the sentence as well as the determination

44 Sentencing at the trial level is subject to appeals under 18 U.S.C. § 3742, but the appeals court can only review guideline departures and misapplication of the Guidelines, which usually involve guideline miscalculations. See generally, United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform (2004). The appeals court can only assess the reasonableness of non-guideline sentences under 18 U.S.C. § 3742(d), but cannot address the reasonableness of real offense factor increases authorized by the Guidelines.


of guilt. This is not an argument about whether the jury is the constitutional sentencing authority because this was not the case in either the pre or post-colonial eras. Instead, it is an argument about whether the jury’s function as a check on governmental power extended to the sentencing of criminal defendants or whether it was relegated to checking governmental power in the determination of guilt. 47

An historical analysis of the role of the judge and the jury through the three major eras of sentencing is necessary to answer this question. The first era is described as the early Republic in which the jury’s guilt determination had a direct relationship to the ultimate sentence such that the jury was the arbiter of both. The early Republic will be compared to the subsequent two eras, the rehabilitation era and the guidelines era in which the relationship between the jury’s guilt determination and the ultimate sentence grew increasingly attenuated. The reason for this growing attenuation was the emergence of real offense sentencing in the rehabilitation era that continued in modified form through the guidelines era.

A. Sentencing in the Early Republic

Sentencing during the period of the early Republic bore little resemblance to current day sentencing practices. The primary purposes of sentencing during this early period based on the available methods of punishment were retribution, punishment, and deterrence. 48 The primary sentences were death, corporal punishment such as whipping, and fines. 49 The legislature prescribed the fixed penalty of death for most

47 See Judge Nancy Gertner, Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing, 32 Suffolk U. L. Rev. 419, 423 (1999) (for views on the Founders’ understanding of the Sixth Amendment right to trial by jury). “An independent judiciary was not enough to protect the public against abuses of power; the Founders wanted the commonsense judgment of lay citizens applied to issues of guilt or innocence.” Id. Am. supra note 46, at 88 (“Ordinary citizens would check executive overreaching and monitor the professional judiciary.”); Sauer, supra note 45, at 1248 (“The founders... allocated juries considerable power to assure community oversight over potential misuses of governmental power. By involving ordinary citizens in the execution of the laws, trial by jury was intended to safeguard individual liberty and prevent unjust governmental action.”).


49 Jails existed during this period but served the primary purpose of holding criminal defendants while they awaited trial. Id. at 892.
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During this period the role of the jury over sentencing was expansive while that of the judge was greatly circumscribed. Due to the mandatory nature of the punishment, the jury not only determined guilt, but also served as the ultimate arbiter of the sentence that a criminal defendant would receive. The judge in contrast had the primarily ministerial role of pronouncing the sentence after the trial and verdict.

The verdict had a direct relationship to the sentence, and the jury understood the consequences of the verdict. The jury maintained a veto power over the imposition of a capital sentence through its power to acquit or convict of a lesser crime of misdemeanor in which an alternative punishment could be imposed. Only in the less serious misdemeanor cases was the jury's role in sentencing circumscribed.

During this early period, guilt determination and sentencing were understood to be two components of the broader trial process. In this early system, the jury stood between the individual and the state in the determination of guilt and innocence as well as the determination of the sentence, which was usually death. Thus, it is difficult to imagine the Framers' understanding of the Sixth Amendment as not conceiving of the jury as a check on governmental power to protect the liberty of

50 See id. at 892 ("Capital and corporal punishment remained the norm, with fines being levied for economic crimes."); Erik Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About Apprendi, 82 N.C. L. REV. 621, 628 (2004) ("In less serious cases, the jury had no role in setting the punishment. But prior to the late eighteenth and early nineteenth centuries, noncapital cases encompassed only relatively minor crimes.").

51 Jack H. McCall Jr., The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines, 60 TENN. L. REV. 467, 476 (1993) ("Until the early nineteenth century, American judges traditionally had little sentencing discretion because each crime had its own fixed penalty."); Gertner, supra note 47, at 421 ("In colonial times, [the sentencing sphere] . . . was a sphere of limited impact because most crimes were capital offenses or had fixed penalties."); Susan N. Herman, The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. CAL. L. REV. 289, 302 (1992) (At the early common law, both in England and in the Colonies, sentences were usually mandatory. The facts on which sentencing was based were decided by the jury, so there was little need for a separate proceeding. Sentencing was merely a ministerial act.). But see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great majority of federal criminal statutes have stated only a maximum term of years and a minimum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum.").

52 Since there was only one consequence of death for most felony convictions, it is difficult to conceive of a jury not knowing the consequences of a guilty verdict.

53 Lillquist, supra note 50, at 628.
individuals in both the guilt and sentencing determinations since it was the jury that ultimately made both of these determinations.

In cases in which a jury convicted on a lesser misdemeanor charge, the judge had no power to enhance sentences through the finding of additional facts, and in cases of jury nullification, the judge could not impose a verdict or sentence that was contrary to that of the jury. The jury was ultimately conceived of "as a mainstay of liberty and an integral part of democratic government." This understanding would change dramatically during the second sentencing era, the rehabilitation era, in which the jury would be relegated to a minor role in the sentencing process.

B. The Rehabilitation Era

A different understanding of punishment emerged during the early nineteenth century. In what commentators have described as the "penalogical revolution," a sentencing system that relied primarily on imprisonment replaced the system that principally relied on the imposition of death. Imprisonment as a form of punishment emerged as a result of both dissatisfaction with the harsh punishment of death for many crimes and an evolving theory of sentencing and the purposes of punishment. Whereas retribution and deterrence were the dominant goals in the early Republic, an idea began to emerge in the early nineteenth century that punishment should not only serve to protect society but also rehabilitate the criminal so that he or she can re-emerge as a productive member of the society. The death penalty remained in place for the most serious crimes such as murder, but for less serious crimes the idea developed that criminals could be rehabilitated.

Crime came to be seen as "a moral disease" that required treatment and the penitentiary was understood as the institution that would provide this treatment. The rehabilitation era sentencing system spurred

54 There were instances in which the judge could mitigate the sentence, but such mitigations are not a threat to individual liberty in a way that sentencing enhancements are. Instead they go to the issue of the propriety of the granting of mercy by non-jury actors. See Gertner, supra note 47, at 424 ("Most sentences were fixed and determinate... unless the defendant could offer a legal reason to excuse the penalty.").
56 See Sauer, supra note 45, at 1234.
57 McCall, supra note 51, at 476-77.
the need for the individualization of sentences so that they were proportionate to the moral disease and need for treatment.\textsuperscript{59} The need for individualized sentencing introduced flexibility and discretion into the sentencing decision.\textsuperscript{60} In order to fulfill the idea of rehabilitative sentencing, a charge conviction system based on fixed mandatory sentences gave way to a real offense sentencing system. The judge had the discretion to sentence on the basis of real offense factors relevant to the offender’s prospects of rehabilitation.

The need for expertise meant that judges would determine the appropriate sentence.\textsuperscript{61} Initially, this required judges, alone, to make a “future oriented inquiry” of the sentence required for rehabilitation, but over time it evolved into one in which other institutional actors such as parole commissioners and probation officers had input into the sentencing determination.\textsuperscript{62} During the rehabilitation era, the legislature enacted open-ended statutes that set the maximum and, at times, the minimum sentence.\textsuperscript{63} Judges had the discretion to sentence anywhere within the legislatively prescribed range. The sentences handed down by judges were indeterminate, such that offenders were only required to serve approximately one-third of the sentence imposed by the judge and beyond that point a parole board\textsuperscript{64} would control the release date up to the statutory maximum.\textsuperscript{65}

The role of the jury fundamentally changed during the rehabilitation period from that of the ultimate arbiter of the sentence during the early Republic to an institution that played no role in sentencing. A guilty verdict imposed on different criminals for the same crime could result in a broad range of punishments from no incarceration at all to imprisonment up to the statutory maximum. However, the idea of sentencing had changed from one of punishment to one of treatment, and thus the necessity of the jury as a buffer between the individual and the state diminished dramatically in the sentencing phase. Sentencing

\textsuperscript{59} See Gertner, \textit{supra} note 47, at 424.
\textsuperscript{60} McCall, \textit{supra} note 51, at 477.
\textsuperscript{61} Sauer, \textit{supra} note 45, at 1234.
\textsuperscript{62} Herman, \textit{supra} note 31, at 302-03.
\textsuperscript{63} STITTH & CABRANES, \textit{supra} note 51, at 20; Lillquist, \textit{supra} note 50, at 643.
\textsuperscript{64} \textsc{United States Parole Commission, History of the Federal Parole System} 10 (2003). Congress established the federal parole system in 1910. Each federal penitentiary had a parole board, which consisted of “the superintendent of prisons in the Department of Justice and the warden and physicians of the particular penitentiary.” \textit{ld}.

\textsuperscript{65} The judge also maintained the power to sentence the offender to no prison at all under the National Probation Act.
under the rehabilitation model was ideally intended to help offenders and not to impose the power of the state onto the individual through punishment.

1. Williams v. New York and Real Offense Sentencing during the Rehabilitation Era

Real offense sentencing was the primary mechanism by which judges individualized sentences during the rehabilitation era so that the sentence accorded with the necessary amount of treatment. The best description of how the real offense system typically worked is provided in the seminal case of Williams v. New York. In Williams, the Court approved of the real offense sentencing system and held that it was not a violation of Due Process. Williams was a death penalty case but its holding was as much directed towards non-capital cases.

The trial court convicted Williams of first-degree murder. The jury recommended life imprisonment. The judge ignored the jury's recommendation and imposed the death penalty on the basis of additional information provided by a report from the Probation Department and other sources as allowed by New York law.

The trial judge relied on additional real offense factors that took into account "every aspect of the defendant's life" as guidance in the sentencing determination. First, the trial judge took into account the crime of conviction and the surrounding circumstances describing the

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66 McCall, supra note 51, at 485 ("[t]he desire to create a real offense system, taking into consideration . . . all of the conduct surrounding a defendant's crime and prior history, and getting away from a traditional charge-offense system based more or less purely on counts in the indictment" was "a high priority of many of the reformers [in favor of the rehabilitative model]").


68 Williams, 337 U.S. at 242.

69 Id.

70 Id. at 243.

Pursuant to § 482 of the New York Criminal Code, before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric [sic] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Id.

71 STITH & CABRANES, supra note 51, at 150.
"shocking details" of the crime and his "belief in appellant's guilt." Second, the trial judge relied on information about the defendant's background that indicated to the judge that Williams "possessed 'a morbid sexuality' and [was] a 'menace to society.'" Third, the trial judge incorporated into his sentencing determination uncharged conduct involving thirty additional burglaries in the vicinity of the murder that the judge determined Williams had committed on the basis of prior confessions and witness identification. The judge found these facts without applying the procedural protection available at the guilt determination phase. These findings led the judge to believe that no amount of treatment was enough to rehabilitate the defendant. The judge accordingly sentenced Williams to death despite the jury recommendation of life imprisonment.

The Supreme Court upheld the death sentence and in the process also held that the distinct and lower procedural protections provided in the sentencing phase were consistent with the Due Process Clause. This marked the emergence of the idea of separation of functions between the judge and jury that would relegate the jury to the guilt determination phase and leave sentencing primarily under the domain of the judge.

Implicit in both the Supreme Court's recognition of sentencing as being within the sound discretion of the judge and its upholding of lower procedural protections during the sentencing phase under the Due Process Clause was an understanding of the underlying purposes of sentencing during the rehabilitation era. The Court described the evolu-

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72 Williams, 337 U.S. at 242.
73 Id.
74 Id. Other courts during this era also took into account prior conviction offenses and most importantly biographic information such as the criminal's age, family background and employment history in their sentencing determinations. See, e.g., Kevin R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993).
75 The procedural protections not provided at sentencing included findings by juries beyond a reasonable doubt, confrontation of witnesses, the prohibition of double jeopardy, aspects of privilege against compelled self-incrimination, and the rules of evidence, including those relating to hearsay and prejudice. See Williams, 337 U.S. at 253.
76 It is not absolutely clear what the judge's ultimate justification was for sentencing to death as opposed to life imprisonment. There is no recorded opinion, but given that the judge sentenced under a treatment model of punishment, it is reasonable to assume that he must not have felt that treatment could "cure" the defendant on the basis of the real offense factors that he cited.
tion of sentencing from one based on charge offense sentencing during the colonial era in "which the death sentence was an automatic and commonplace result of convictions" to the rehabilitation era indeterminate sentencing system in which sentences were individualized on the bases of real offense factors based on information not subject to procedural restraints.

A real offense sentencing system in which the judge has the discretion to take into account all of these additional factors was justified because "[r]etribution [was] no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." In other words, a system based primarily on the ideal of reformation and rehabilitation requires the judge to individualize the sentence on the basis of all relevant information to apply the appropriate sentence for rehabilitation purposes. The Court understood sentencing to not be about punishment, but instead to be about treatment, such that the procedural protections, including the jury's role as a check on excessive governmental power, were no longer necessary.

This due process understanding of the distinct attributes of sentencing and guilt determination developed into a general understanding of the role of the judge and jury during the rehabilitation era. While the Supreme Court during the post-Williams period would approve of the Framers' substantive understanding of the Sixth Amendment role of the jury as a buffer between the individual and the state, the Court also relied on a separation of functions framework that limited the jury's role to the guilt determination of the trial phase. The separation of functions framework forestalled the application of a substantive Sixth Amendment when rehabilitation receded and retribution re-emerged as the dominant purpose of sentencing. This would result in a fundamental mismatch between an understanding of the jury's role and the emergent purposes of sentencing during the guideline era such that the jury no longer played its constitutionally intended role.

being "influenced by two considerations that no longer govern today," a system without guidelines and a system guided by rehabilitation as the purpose of sentencing). Id.

78 Williams, 337 U.S. at 248.
2. Separation of Functions Understanding of the Role of the Judge and Jury

Sentencing evolved from being a component of the broader trial phase in which the judge performed the perfunctory and ministerial task of announcing the sentence to one in which sentencing was viewed as a distinct and separate phase in which judicial authority over the sentence was much broader. At the same time the purposes of sentencing evolved from retribution, in which it was important for the jury to serve as a buffer between the individual and the state to prevent government overreach, to rehabilitation in which sentencing served as a form of treatment such that the expertise and discretion of the judge was necessary and the jury checking function was not.

The courts established a separation of functions framework after the Supreme Court's decision in *Williams*. The courts developed an understanding of the jury's role that was limited to the determination of guilt and separate from sentencing. The separation of functions rationale developed in a set of cases involving the question of whether the jury should have knowledge of the sentence during the trial phase.

In the Fifth Circuit case of *Pope v. United States*, Lawrence Pope appealed a robbery conviction in the lower court because of the judge's refusal of Pope's request to instruct the jury that a not guilty verdict on the basis of insanity would result in him being committed to a mental hospital until the point at which he was cured and safe for release. The court upheld the lower court's refusal to provide the instructions to the jury because of concern over a compromise verdict in which the jury would hold the defendant not guilty on the basis of insanity. The court was concerned that the jury would be prejudiced by its knowledge of the consequences of the verdict. More importantly, the court held that instructing the jury on sentencing consequences of a verdict was contrary to the traditional understanding of the role of the judge and the jury. The court without any attribution to historical sources, law or precedence put forward the separation of functions rationale, asserting "[i]t is the responsibility of the jury to determine whether the accused in a criminal case is guilty or not guilty; and upon the courts rests the duty of fixing the punishment. . .the problem presented

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79 298 F.2d 507 (5th Cir. 1962).
80 Id. at 507-08.
relates to the fundamental division of duty between the court and the jury."\(^{81}\)

Other circuits and ultimately the Supreme Court would subsequently follow the Fifth Circuit’s lead. Thus, any arguments that the jury should have been provided with instructions on the consequences of the verdict\(^{82}\) and any instructions in which the judge asserted that the jury could recommend leniency\(^{83}\) were struck down on appeal. The courts in each of these cases were guided, at least in part, by the separation of functions framework. The framework, combined with the rehabilitation purpose justification in Williams for sentencing being a separate and distinct phase, led to the elimination of a jury role in sentencing.

3. **Duncan v. Louisiana:** A Substantive Sixth Amendment Right to Trial by Jury

The rehabilitation era also saw the heyday of the criminal procedure revolution and the support of the courts of a substantive understanding of the jury role under the Sixth Amendment. In the seminal case of **Duncan v. Louisiana**\(^{84}\), the Court invalidated a Louisiana statute that only provided for a trial by jury “in cases in which capital punishment or imprisonment at hard labor may be imposed.”\(^{85}\) The Court

\[^{81}\] Id. at 508-09.

\[^{82}\] See, e.g., Chapman v. United States, 443 F.2d 917, 920 (10th Cir. 1971) (denying the argument of the defense that the judge should have allowed the defense to comment on sentencing because “[t]he statute involved in the case . . . leaves nothing for jury determination beyond guilt or innocence of an accused. That, then, was the exclusive function of the jury.”).

\[^{83}\] See, e.g., Rogers v. United States, 422 U.S. 35, 40-41 (1975) (holding that the instruction that the court would accept a guilty verdict with extreme mercy was invalid because of the potential for prejudicing the jury verdict); United States v. Patrick, 494 F.2d 1150, 1153 (D.C. Cir. 1974) (invalidating the trial judge’s instruction that the jury “could recommend psychiatric treatment if it returned a guilty verdict,” stating “[i]t is well established in this jurisdiction that the jury’s only function is to assess guilt or innocence on the basis of their independent view of the evidence. Sentencing decisions, on the other hand, are within the exclusive province of the court and it is the court’s responsibility to insure that these functions are kept separate.”); United States v. Glick, 463 F.2d 491, 494 (2d. Cir. 1972) (invalidating a judge’s instruction that the jury could recommend leniency because of the potential for prejudice and the "total failure to make clear to the jury that its function was to decide guilt or innocence and that sentencing was the judge’s province and his alone"); United States v. Davidson, 367 F.2d 60, 63 (6th Cir. 1966) (overturning the judge’s instruction to the jury that the jury could recommend leniency, asserting, "[i]t is axiomatic that it is the exclusive function of juries to determine whether defendants are guilty or not guilty, and of the courts to determine matters of punishment.").

\[^{84}\] 391 U.S. 145 (1968).

\[^{85}\] Id. at 146.
elaborated on the functional role of the jury under the Sixth Amendment.

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . . [T]he jury trial provision in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power . . . a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.\textsuperscript{86}

Thus, the Court understood the underlying role of the jury as “preventing oppression by the Government” and as a “safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”\textsuperscript{87} In other words, the Court was concerned about unchecked judicial power over the life and liberty of individuals in the criminal justice process.

The substantive role of the jury acting as a “bulwark” between the individual and the state could be limited to the guilt determination phase because the sentencing phase did not involve the use of government power to impose punishment. Instead, sentences served the function of reformation and rehabilitation. These conditions existed during the rehabilitation era, but as rehabilitation fell out of favor and was replaced by a more retributive system of punishment, the conflict between the separation of functions framework and a substantive Sixth Amendment role of the jury became irreconcilable.

4. The Decline of Rehabilitation

The rehabilitation ideal quickly fell out of favor in the 1960s and 1970s. Several studies purported to demonstrate that imprisonment did not reduce recidivism.\textsuperscript{88} Commentators critiqued the reliance on penitentiaries as treatment facilities since they lacked any of the institutional apparatus necessary to treat criminals.\textsuperscript{89} At least one commentator ar-

\textsuperscript{86} \textit{Id.} at 155-56.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} See, e.g., Robert Martinson, What Works? - Questions and Answers About Prison Reform, 35 PUB. INTEREST 22, 25 (1974) (finding that “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”)
\textsuperscript{89} MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 91-93 (1973).
gued that “prisoners deteriorate rather than improve in prison.” Finally, psychologists and sociologists increasingly doubted their ability to predict the dangerousness of criminals and their potential for rehabilitation. Thus, the scientific basis for rehabilitation collapsed.

The discrediting of rehabilitation as a dominant purpose of punishment led commentators to question the underlying basis for individualizing sentencing on account of real offense factors. Sentencing individuals that committed the same underlying crime to different sentences came to be viewed as a source of unwarranted disparity. Studies in the 1960s and 1970s described the rampant disparity in sentencing because of the use of real offense factors such as biographic information, which were part of the foundation of rehabilitative sentencing.

Judge Marvin Frankel in a critique that served as the death knell of indeterminate sentencing argued, “individualized justice is prima facie at war with such concepts at least as fundamental, as equality, objectivity, and consistency in the law.” Judge Frankel was not concerned about simply identifying a system that would reduce disparity, Frankel was concerned with the underlying source of disparity in the system that derived from “the sweeping power of a single judge to determine the sentence.” Without a system of checks and review, sentences were based on the biases and neurosis of a single judge.

Conservatives attacked the rehabilitation era indeterminate sentencing system from another angle. In an era of rising crime, conservatives complained that the system resulted in sentences that were too lenient. Consistent with the “get tough on crime” campaigns of the

90 Id. at 93.
91 STITH & CABRANES, supra note 51, at 30-31.
92 See, e.g., ARTHUR W. CAMPBELL, LAW OF SENTENCING §1.2 (2004) (discussing the various critiques of real offense sentencing).
93 STITH & CABRANES, supra note 51, at 31.
94 FRANKEL, supra note 89, at 10.
95 Id. at 69.
96 Id. See also Theresa Walker Karle & Thomas Sager, Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis, 40 EMORY L.J. 393, 396 (1991) (arguing that judges during the rehabilitation period “enjoyed wide discretion to sentence in accordance with their own theories regarding criminal sanctions and with any personal biases and prejudices”).
97 See STITH & CABRANES, supra note 51, at 31 (describing the criticism of conservatives of judicial and parole discretion in sentencing that focused on rehabilitation and “too often resulted in excessively lenient treatment of offenders who had significant criminal records or who had committed serious crimes”).
1970s, politicians sought not to rehabilitate offenders but to punish offenders on the basis of their "just desert." They wanted a system that required the imposition of more severe terms of punishment and one in which the sentence pronounced by the judge would be the sentence that the offender would receive. The drive to eliminate unwarranted disparity and excessive leniency ended with the enactment of the Sentencing Reform Act and the ushering in of the guideline era of sentencing.

C. The Guidelines Era

After years of extensive deliberation and debate, the rehabilitation era indeterminate sentencing system came to an end with the passage of the Sentencing Reform Act in 1984 (SRA). The primary goals behind the SRA were the establishment of a system of certain and proportionate sentences and the reduction of unwarranted disparity.

Congress pursued the first goal of certainty in sentencing by eliminating the system of parole, which had been the backbone of the indeterminate sentencing system. Congress replaced the indeterminate sentencing system with a determinate sentencing in which the sentence announced by the judge in court would be the sentence that the offender served minus good time credits. The judge's sentence would no longer be subject to revision and ultimately the back-end check provided by the parole board. This back-end check would be replaced by a system of guidelines that would bind the judge to a certain extent at the front end and an appeals process that would provide a minimal check on judicial discretion at the back end.


100 The Sentencing Reform Act eliminated the federal system of parole for all offenders sentenced under the Guidelines. Professor Freed argues that once the rehabilitation system in which "parole authorities would recognize the right moment to permit a reformed prisoner to reenter the community" lost support, "it became evident that a system of uncertain sentences that left prisoners in limbo and deceived the public served no useful purpose." Freed, supra note 77, at 1689, n. 34. This argument fails to take into account the secondary role of the parole board, which was checking judicial discretion to impose overly harsh sentences. This authority to check judicial discretion would need to be replaced in the Guidelines era, but no such system was created.

101 The Sentencing Reform Act limited appellate review to the following in cases of appeals by the defendant:
In pursuit of the second goal of fairness, Congress provided the Commission with little guidance. A fair system of punishment was described as one in which the sentences of all offenders were proportionate. The question that Congress needed to address was the criteria for proportionality, or in other words, what purpose of sentencing would guide the determination of proportionality. In the rehabilitation era, sentences were proportionate to the offender's need for treatment as determined by the crime, circumstances surrounding the crime and offender characteristics. Offenders that required greater treatment would receive the greater term of imprisonment. The SRA dramatically reduced the importance of rehabilitation as a purpose of sentencing by discouraging the use of offender related characteristics in imposing a term of imprisonment, and later declaring that rehabilitation shall not be used as a basis for imposing a term of imprisonment at all.

Congress only required the Commission to create a sentencing system that met the broad purposes of punishment, which included retribution, incapacitation, deterrence, and to a limited extent, rehabilitation. The specific criteria for determining fair and propor-

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(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.


102 See 28 U.S.C. § 994(e) (2003) (“The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”).


104 See 18 U.S.C. § 3553(a) (2006). A number of commentators have criticized the SRA for failing to address the question of what purpose of sentencing would guide punishment. See, e.g., Stith & Koh, supra note 51, at 239.
tionate sentences would be left unaddressed until the Sentencing Commission’s promulgation of the guidelines.\textsuperscript{105}

Finally, in order to pursue the goal of reducing unwarranted disparity, Congress had to identify a way to differentiate between warranted and unwarranted disparity.\textsuperscript{106} Congress could have established a system that eliminated all disparity based on real offense factors and returned to the early Republic era system by which a conviction led to the same pre-defined punishment for all offenders of the same crime regardless of the circumstances surrounding the crime or the characteristics of the offender.\textsuperscript{107} However, such a system would conflict with congressional instructions that the Sentencing Commission maintain a system of individualized sentences.\textsuperscript{108} Instead, the SRA modified the rehabilitation era system of individualized sentences by instructing the Commission to determine the relevance of several offender related characteristics to the purposes of punishment within the guideline system.\textsuperscript{109} Congress specifically prohibited the use of “race, sex, national origin, creed, and socioeconomic status of offenders” as relevant criteria for sentencing.\textsuperscript{110}

\textsuperscript{105} Regardless of the determination on the proportionality question, the Commission was instructed to establish more severe sentences in the Guidelines than those that existed at the end of the rehabilitation era. See 28 U.S.C. § 994(m) (2006). Professor Stith and Steve Koh describe increase in sentence severity as part of the “subtle transformation of sentencing reform legislation” from a liberal “anti-imprisonment and antidiscrimination measure,” to “a more conservative law and order crime control measure.” Stith & Koh, supra note 51, at 223.

\textsuperscript{106} Professor Stith and Judge Cabranes argue that the problem with ending unwarranted disparity begins when we “ask what factors should be considered in deciding whether particular crimes and particular criminals are ‘similar’ or ‘dissimilar’ for purposes of sentencing.” Stith & Cabranes, supra note 51, at 105.

\textsuperscript{107} Under the current sentencing ideology, such a system would not result in the death penalty for all persons convicted of a felony, but instead would likely encompass a wide range of severe mandatory minimum sentences, in which nearly everyone would serve the same mandatory minimum regardless of the circumstances surrounding the crime or offender characteristics. In the post-Booker era, proposed legislation that would transform the severe mandatory guidelines into mandatory minimums is before the House. See Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act, H.R. 1528, 109th Cong. (2005).


\textsuperscript{109} 28 U.S.C. § 994(d) (2006) requires the Commission to determine the relevance of age, education, vocational skills, mental and emotional conditions, physical condition, including drug dependence, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, degree of dependence upon criminal activity for a livelihood.

\textsuperscript{110} Id.
Congress also sought to reduce unwarranted disparity by binding judicial discretion. The SRA instructed the Commission to establish a guideline system in which the maximum discretionary sentencing range would be one in which the maximum sentence could not exceed the minimum sentence by “the greater of 25 percent or 6 months.”

Instead of judges sentencing within a broad statutory sentencing range, they would be confined to sentencing within a much narrower guideline range in order to reduce inter-judge disparity. While the Sentencing Reform Act instructed judges to take into account the purposes of sentencing when imposing punishment, this discretion would ultimately be bound in the very next provision that required the judge to impose a sentence within guideline sentencing range unless there were “circumstance[s] 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.” Thus, the guidelines would emerge as the most important feature of the Sentencing Reform Act.

1. The Guidelines and the Maintenance of a Real Offense Sentencing System

Congress placed the responsibility of establishing sentencing guidelines in a Sentencing Commission. The Commission promulgated the first set of guidelines in November of 1987. In the introductory letter to the guidelines, the Commission described its goals, its approach, and its reconciliation of major issues, in particular the issue of whether to establish a charge offense or real offense sentencing system. The goals of the guidelines described by the Commission mirrored those described in the SRA, honesty or certainty in punishment, uniformity or the reduction of unwarranted disparity and proportionality or fairness in sentencing. The Commission recognized the inherent tension between achieving uniformity and maintaining a system of proportionality. Instead of relying on judges to balance uniformity and proportionality, as had been the practice in the rehabilitation era, the

111 28 U.S.C. § 994(b)(2) (2006). The exception to this rule was established in cases in which the minimum term for the range was 30 years or more. In those cases, the maximum range may be life imprisonment. Id
Commission established a complex sentencing matrix that would provide a mechanical system of balancing the two goals through the creation of 258 overlapping levels of criminality.\footnote{Based on a hand calculation of the number of sentencing ranges in the United States Sentencing Guidelines, sentencing table. See USSG § 5A.}

The promulgation of the guidelines would not result in agreement on the purposes of sentencing,\footnote{Id. ("Adherents... have urged the Commission to choose between [the purposes of punishment] to accord one primacy over the other. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the Guidelines would find the widespread acceptance they need for effective implementation.")} but the purposes behind the guideline system could be found in the guidelines themselves. The guidelines were created such that the term of imprisonment would correspond primarily with the severity of the offense\footnote{The severity of the offense included other offense related characteristics such as how the offender committed the particular crime and whether the crime was a part of a larger scheme. These offense-related characteristics were primarily used to increase the sentence and can thus be seen as a component of offense severity.} and the criminal history of the offender. Such a feature seems unremarkable now, but it contrasted dramatically with the system that existed prior to the guidelines in which the judge and the parole board could calibrate the sentence on the basis of the level of treatment necessary for rehabilitation. While there was usually an indirect relationship between the severity of the offense, the criminal history and the ultimate sentence in the determination of the appropriate term for treatment purposes, there was no necessary correlation between the three variables such that all sentences would be ordered along the lines of offense severity and criminal history.

The Commission established a two-by-two matrix, which would greatly limit judicial discretion and require that the sentence, with few exceptions,\footnote{These exceptions would be provided in the form of departures, which over time were increasingly limited. See USSG § 5K (describing the several bases for departures from the Guidelines).} be calibrated on the basis of offense severity and criminal history. The complicated matrix was based on a point system by which each crime would be assigned a value or guideline points that would increase with the severity of the crime and the depth of the criminal history. The points from the offense and the criminal history would then be plugged into the matrix, which would produce a sentencing range that the judge could discretionarily sentence within.\footnote{See id. (on sentencing range being only the maximum of 25% or six months).}
While deterrence and incapacitation were important side products of the guideline system, the overriding sentencing purpose was one of retribution or "just deserts" in which the punishment corresponded with the level of culpability of the offender. An offender who commits a more serious crime and/or has a more extensive criminal history is determined to be deserving of a more severe punishment than someone who commits a less serious crime and has a less extensive criminal history. The concern is no longer about the time necessary for treatment, but instead about the term of imprisonment that corresponds with the level of moral culpability.\(^{121}\) Thus during the guideline era, proportionality of sentences would be based on retribution and "just deserts" rather than rehabilitation and the need for treatment.

While the Commission returned sentencing to the colonial era retribution-based system of punishment, it did not re-establish the charge conviction system that was a major feature of that era. The Commission also did not maintain the real offense system of the rehabilitation era in which judges were able to take into account all the relevant features of the crime, including various characteristics of the offender, in the determination of the sentence. Instead, the Commission established a "modified real offense" sentencing system\(^{122}\) that would incorporate conduct relevant to the culpability of the offender while discouraging the use of factors that were once deemed relevant to the prospects of rehabilitation during the rehabilitation era.\(^{123}\)

The modified real offense system adopted by the Commission represented a balance between concerns about judicial discretion and unwarranted disparity, on the one hand, and prosecutorial power and

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\(^{121}\) In its 15-year report, the Commission would determine that limited retribution and "just deserts" were the primary purposes behind the Guidelines. U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* (2004).

\(^{122}\) USSG § 1A1.A.

\(^{123}\) The Commission would follow the lead of the SRA and without explanation stipulate a number of offender-related factors that were determined to be not ordinarily relevant in the sentencing determination. See USSG § 5H (describing specific offender characteristics that judges were discouraged from considering). See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 *Harv. L. Rev.* 1938, 1953-56 (1988) (criticizing the Guidelines' failure to consider offender-related characteristics and proposing increased discretion for judges to consider these characteristics to "rectify the guidelines' principal shortcomings"); STITH & CABRANES, *supra* note 51, at 122-126 (describing the arbitrariness of uniformity that results in part from the failure to take into account offender characteristics and prospects for rehabilitation).
unwarranted uniformity on the other. The Commission incorporated several real offense factors into the guidelines. The base offenses included real offense factors that in most cases increased the sentence for offenders. The guidelines also specified offense adjustments to sentences in cases involving “hate crime motivation or vulnerable victim,” “official victim,” “restraint of victim,” and “terrorism.” There were also sentencing adjustments for the offender’s role in the offense, obstruction, and acceptance of responsibility.

The real offense provision that proved to be the most controversial was that pertaining to relevant conduct. The relevant conduct provision required the consideration of:

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 criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

The relevant conduct provision was both glorified as the “cornerstone of the Federal Sentencing Guidelines” and vilified as unconstitu-

124 See USSG § 1Al.A (describing the Commission’s decision to adopt a modified real offense sentencing system).
125 See generally STITH & CABRANES, supra note 51 (for an excellent description of the real offense factors incorporated into the Guidelines).
126 The real offense factors are usually described as specific offense characteristics and include additional factors related to the specific crime that could be found by the judge on the basis of the preponderance of the evidence. These are usually quantity based. For example, for larceny, the judge can make findings that can add guideline points for losses that exceed $5000. See USSG § 2B1.1.
127 USSG § 3A1.1.
128 USSG § 3A1.2.
129 USSG § 3A1.3.
130 USSG § 3A1.4.
131 USSG § 3B.
132 USSG § 3C.
133 USSG § 3E.
134 USSG § 1B1.3.
The breadth of the relevant conduct provision allowed for the inclusion of conduct that was only tangentially related to the underlying crime. For example, under this provision, the judge could aggravate sentences on the basis of uncharged or acquitted conduct committed prior to the crime. By design, any and all aspects that were considered relevant conduct would increase the sentence, which resulted in a real offense system that greatly relied on a "one-way ratchet up" of sentences.

At the same time, the breadth of the relevant conduct provision also allowed for the individualization of sentences on the basis of underlying conduct that was ignored by the other real offense factors that were incorporated into the guideline.

Real offense sentencing under the guidelines was controversial because the judge had discretion to make findings and aggravate sentences on the basis of real offense factors without any system of checks at the back end or procedural protections at the sentencing stage. The only built in limit on judicial sentencing severity was the statutory maximum of the crime of conviction.

According to the logic of *Williams v. New York*, decided during the heyday of rehabilitation, such a system would seem to present con-

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136 See, e.g., Tear, supra note 58, at 1185 (arguing that a particular application of the relevant conduct provision aggravating sentences on the basis of acquitted or non-conviction offenses "is at odds with the central role of the grand and petit jury in the constitutional plan for the administration of justice").

137 The ability to sentence on the basis of uncharged conduct has been greatly criticized. See, e.g., Kevin R. Reitz, *Sentencing Facts: Traverses of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993) ("Perhaps most startling of all, judges may base sentences on crimes for which the defendant has been acquitted. The assault offender, if found guilty of attempted murder, or not guilty on four of five counts, may still receive a sentence for the acquittal charges").

138 Tear, supra note 58, at 1204-06.

139 Another less controversial, but important real offense provision incorporated into the Guidelines is the one related to "Departures based on Inadequacy of Criminal History Category." Unlike the relevant conduct provision, the departure can be upward or downward depending on whether it is determined that the criminal history category based on the offender's criminal history report, understates or overstates the offender's true criminal history. See USSG § 4A1.3.

140 See Reitz, supra note 74, at 524 (describing the "spacious authority [of judges] to determine an offender's 'real' crimes").

141 Thus, one convicted of robbery and found by the judge to have committed murder in the course of that robbery, could only receive the statutory maximum sentence for the robbery conviction. Professor Tear strongly criticizes this constraint noting that "the maximum terms designated by the federal statutes are substantially higher than the average sentence prescribed by the Guidelines, providing many years within which the prosecution might maneuver at sentencing." Tear, supra note 58, at 1206-07.

stitutional problems under the Due Process Clause. The Court in *Williams* justified the real offense sentencing system in which few of the procedural protections at trial, including the right to jury determinations, were available at sentencing because the sentence served the purpose of treatment not punishment. As a result, the same liberty interests of the offender were not at stake in the determination of the term of imprisonment.

Rehabilitation during the guideline era was dead, and a system that relied primarily on retribution and punishment stood in its place. As a result, the real offense sentencing system that lacked the same procedural rights for offenders in the sentencing stage as were available in the guilt determination phase conflicted with the Due Process rights of the offender and the Sixth Amendment right to trial by jury. The need for distinct and separate guilt determination and sentencing phases, so that the judge could diagnose the moral disease for rehabilitation purposes, was no longer relevant in the guideline era punishment model of sentencing. Sentencing, under a punishment model, should more properly have been understood as an extension or component of the trial for which the Sixth Amendment required a functional role for the jury. However, the Supreme Court disagreed.


The Court addressed the Due Process issue while sidestepping the Sixth Amendment trial by jury issue in *McMillan v. Pennsylvania*. *McMillan*, decided a year prior to the promulgation of the federal sentencing guidelines, was a consolidation of three cases that challenged a Pennsylvania mandatory minimum sentencing law under the Due Pro-

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143 See infra text and notes.

144 While both the rehabilitation era system and the guideline system of retributive justice require a term of imprisonment, I am differentiating between the liberty interest taken away for the purpose of treating the individual and the liberty interest taken away for the purpose of punishing the individual. The deprivation of liberty under the rehabilitation model is necessary to provide the counteracting benefit of treatment, while punishment in the guideline system is designed specifically to deprive the individual of liberty. Punishment to achieve the purpose of deprivation of liberty is understood to be at the heart of the Fifth and Fourteenth Amendment Due Process concerns. See *Williams*, 339 U.S. 241.

145 See Tear, supra note 58, at 1202-1206 (criticizing the different procedural standards at the sentencing stage).

cess Clause and the Sixth Amendment right to trial by jury. According to the statute:

Anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense.

The judge was directed to determine at the sentencing stage, by a preponderance of the evidence, whether the offender violated the statute. If the judge makes these findings, the statute required the judge to sentence at or above the five-year minimum regardless of the statutory minimum for the underlying felony.

The petitioner argued that under the Due Process Clause, a finding of visible possession of a gun had to be proved by a jury beyond a reasonable doubt. The Court citing precedence agreed: "[The] 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." The Court then deferred to the Pennsylvania legislature's definition of the offense. Since the legislature did not redefine the offenses to include visible possession of a gun, then, the Court concluded, it is not an element of the crime that the Constitution requires to be proven beyond a reasonable doubt.

The Court established an amorphous limit on the discretion of legislatures to exclude sentencing factors from the definition of the crime. The Court held that the legislative exclusion of a sentencing factor from the crime itself does not necessarily shield it from judicial consideration. It is not enough that a factor is insufficiently "closely related to the crime of which the defendant is convicted." If it is otherwise closely related, the Due Process Clause requires that the factor be treated like an element of the crime.

The petitioner McMillan was convicted of aggravated assault, which resulted in a sentence of three to ten years and "possession of an instrument of a crime" which resulted in a concurrent sentence of two and a half to five years. The petitioner Peterson was convicted of manslaughter with a corresponding sentence of one to six years and "possession of an instrument of a crime," which resulted in a concurrent sentence of six to eighteen months. Dennison was convicted of aggravated assault and "possession of instruments of crime," which resulted in a concurrent sentence of 11.5 to 23 months. Finally, Smalls was convicted of robbery and criminal conspiracy, which had a concurrent sentence of 4 to 8 years for violating the Uniform Firearms Act and reckless endangerment, which resulted in a concurrent sentence of two and a half to five years and one to two years respectively. Id. at 82 n.2.

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147 Id. at 80.
148 Id. at 81 (quoting 42 Pa. Cons. Stat. § 9712 (1982)).
149 Id.
150 The petitioner McMillan was convicted of aggravated assault, which resulted in a sentence of three to ten years and "possession of an instrument of a crime" which resulted in a concurrent sentence of two and a half to five years. The petitioner Peterson was convicted of manslaughter with a corresponding sentence of one to six years and "possession of an instrument of a crime," which resulted in a concurrent sentence of six to eighteen months. Dennison was convicted of aggravated assault and "possession of instruments of crime," which resulted in a concurrent sentence of 11.5 to 23 months. Finally, Smalls was convicted of robbery and criminal conspiracy, which had a concurrent sentence of 4 to 8 years for violating the Uniform Firearms Act and reckless endangerment, which resulted in a concurrent sentence of two and a half to five years and one to two years respectively. Id. at 82 n.2.
151 Id. at 83.
152 Id. at 85 (citing In re Winship, 397 U.S. 358 (1970)).
factor from the definition of a crime would be unconstitutional under the Due Process Clause only if the sentencing factor is the "tail [that] wags the dog of the substantive offense." It is not clear what excluded factors would fail the McMillan standard and thus constitute a violation of the Due Process Clause. After all, in McMillan, the visible possession finding increased the statutory minimum for one of the offenders from one to five years.

Thus, as long as the ultimate sentence did not exceed the statutory maximum and the judge's findings on the additional real offense factors was not the tail that wagged the proverbial dog, then a legislative definition of an offense that excludes real offense factors does not violate the Due Process Clause. Since the Pennsylvania legislature was free to determine that visible possession of a gun was a "sentencing consideration and not an element of the offense," the Court held, without any further elaboration, that the petitioner had no Sixth Amendment right to a trial by jury on the finding of visible possession of a gun.

The movement from a treatment model of sentencing in which imprisonment served a primarily rehabilitative purpose to the punishment model of sentencing in which imprisonment served a retributive purpose did not change the Court's understanding of the necessary Due Process and Sixth Amendment constraints on sentencing. The Court failed to address the liberty interests of the defendant that were now at stake at sentencing or the importance of the procedural restraints of proof beyond a reasonable doubt in protecting these liberty interests. The Court did not once identify the importance of re-inserting the jury as a buffer between the government and the individual when punishment and retribution were the goals of sentencing.

As a result, the real offense factors incorporated into the Federal Sentencing Guidelines were subject to limited constitutional restraints. Judges, during the guidelines era, found all of the real offense factors by a preponderance of the evidence without being subject to check or constraint by a parole board or a jury. The guidelines did require the judge

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153 Id. at 88. It is assumed that the metaphor is related to the possibility in which the sentence on the basis of the factor would be substantially longer than the sentence that would result from the substantive offense.

154 The statutory minimum for Dennison increased from 11.5 months for the crime of conviction of aggravated assault to five years on the basis of findings by a judge under a preponderance of the evidence standard.

155 McMillan, 477 U.S. at 93.

156 Id.
to identify the factors taken into account in the sentence, and as a result, the real offense sentencing regime was much more transparent than the indeterminate rehabilitation era system. But transparency is a poor substitute for the necessary check on the judge’s power to aggravate sentences on the basis of real offense factors.

3. The Continuation of the Separation of Function Framework During the Guidelines Era

The continued emphasis on the separation of functions between the judge and jury provided further support for the system of unchecked power of judges to aggravate sentences on the basis of real offense factors during the guidelines era. The idea that guilt determination was the domain of the jury and sentencing the domain of the judge maintained its vitality long after the system that justified its existence had faded away.

During the rehabilitation era, a separation of functions could be justified on the basis of judicial expertise at sentencing to determine the necessary treatment of offenders through the use of expert information provided by the probation department and subject to review by the parole department. At the same time, the jury had a comparative disadvantage in sentencing on the basis of the treatment needs of the offender because of its lack of expertise and experience on the matter. A checking role for the jury was also unnecessary because the treatment determination combined with the power of the parole board to release rehabilitated prisoners did not constitute a threat to the liberty interest of individuals. Under this system, it was appropriate for the judge as a singular actor within a separate domain to provide a treatment diagnosis for the offender at sentencing based on expert information.

The guidelines replaced this treatment model of sentencing with a punishment model based not on the offender’s need for treatment but

157 18 U.S.C. § 3553 (c) (1984) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence."); see Reitz, note 74, at 525 (contrasting the rehabilitation era sentencing system in which trial courts were not required to explain their decisions with the guideline era sentencing system); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 MINN. L. REV. 403, 405 (1993) (arguing that invisible real offense sentencing brought into relief by the sentencing guidelines).

158 Separation of functions was also justified on the basis of concerns for prejudicing the jury. I would argue, however, that this is not an important justification because it could be dealt with rather easily, although with costs, through a bifurcated system of punishment.
instead on the offender’s moral culpability and just deserts. A determination of moral culpability and just deserts is not based on expertise but on community sentiment on the immorality of the crime and the appropriate punishment for the offender. Punishment involved the imposition of government power on an offender that the Framers of the Constitution intended to check through the Sixth Amendment right to trial by jury.

The separation of functions rationale prevailed despite the importance of a jury role in sentencing under a punishment model of sentencing. In a series of cases from the late 1980s to the early 1990s nearly every court struck down attempts by defendants to instruct juries of the sentencing consequences of their verdict. The courts were primarily concerned with the effect of sentencing information on prejudicing the jury’s verdict. The courts were also concerned with maintaining the formal separation of functions between the judge and jury.

Courts concluded on the basis of case precedent from the rehabilitation era that the jury’s role was limited to guilt determination and as a byproduct the separate and distinct sentencing phase was the domain of the judge. The courts failed to address the relevance of the change in purposes of sentencing to the formal separation of guilt determination and sentencing and the demarcation of the role of the judge and the jury. The courts also failed to address the Framers’ concern that a lack of jury input into the imposition of punishment may lead to arbitrary and abusive use of government power.

159 See, e.g., United States v. Goodface, 835 F.2d 1233 (8th Cir. 1987); United States v. Thomas, 895 F.2d 1998 (8th Cir. 1990); United States v. Broxton, 926 F.2d 1180 (D.C. Cir. 1991). But see United States v. Datcher, 830 F.Supp. 411, 415 (M.D. Tenn. 1993) (“[A] defendant’s right to inform the jury of that information essential ‘to prevent oppression by the Government’ is clearly of constitutional magnitude.”). See generally Sauer, supra note 45 (for an excellent discussion of Datcher and an argument in favor of instructing juries of the sentencing consequences of their verdict in cases involving mandatory minimums).

160 See, e.g., Thomas, 895 F.2d at 1200 (“To inform a federal jury about a defendant’s punishment would only introduce improper and confusing considerations before it.”).

161 See, e.g., Goodface, 835 F.2d at 1237 (“In the federal system, the penalty to be imposed upon a defendant is not a matter for the jury . . . .”); Thomas, 895 F.2d at 1200 (“Regardless of changes that the guidelines have made in sentencing procedure, the role of the jury remains the same and is limited to determining the defendant’s guilt or innocence.”); Broxton, 926 F.2d at 1183 (“[F]ixing punishment is not the function of the jury; rather, the jury’s sole function is to ascertain guilt or innocence.”). But see Datcher, 830 F.Supp. at 416 (“The Supreme Court, in placing its imprimatur on the segregation of factfinding and sentencing in a case and in giving the judge and prosecution great latitude in ‘enhancing’ a penalty, could not have meant to remove completely jury oversight of punishment.”).
The judicial discretion to sentence on the basis of real offense factors in the guideline system for the purpose of achieving proper retribution without jury input or check, guided by a separation of functions rationale, had the effect of removing the constitutionally designed buffer between the individual and the state. Accordingly, the Sixth Amendment guarantee of trial by jury remained unfulfilled until the Court awoke to the reality of the problem.

4. Adding Sixth Amendment Substance to the Separation of Functions Framework

In a surprise series of cases beginning with Jones v. United States in 1999 and culminating in the January, 2005 case of Booker v. United States, the Court attempted to insert Sixth Amendment substance into the guidelines system within the separation of functions framework.

In Jones v. United States, the Court confronted the constitutionality of a sentencing factor enhancement for serious bodily injury of a federal carjacking statute. The sentencing factor enhancement authorized a judge to sentence above the statutory maximum for the underlying crime of conviction. Under McMillan v. United States, the judge could find these sentencing factors on the basis of a preponderance of the evidence. However, the sentencing enhancement in McMillan, unlike the sentencing enhancement in Jones, only increased the

165 18 U.S.C. § 2119 states:
Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
(1) be fined under this title or imprisoned not more than 15 years, or both,
(2) if serious bodily injury (as defined in [18 USCS § 1365], including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate [18 USCS § 2241 or 2242]) results, be fined under this title or imprisoned not more than 25 years, or both, and
(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.
166 Jones, 526 U.S. at 243 (noting that §2119(1) increases “the authorized penalty by two thirds, to 25 years”).
minimum sentence that the judge was required to impose without affecting the maximum sentence authorized.

The federal carjacking statute defined serious bodily injury and death to the victim as sentencing factor enhancements that increased the maximum to twenty-five years and life respectively.\textsuperscript{168} Instead of focusing on the Due Process concerns that dominated the discussion in \textit{McMillan}, the court for the first time expressed concern about the diminution of the role of the jury. In particular, the Court noted:

[i]f a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping; in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a juridical finding sufficient for life imprisonment.\textsuperscript{169}

The Court doubted the constitutionality under the Sixth Amendment of unlimited legislative discretion to define sentencing factors. More fundamentally, the Court also expressed doubt about the historical basis for the separation of functions framework. The Court argued that the historical relationship between the judge and the jury at the time of the Framing was fluid. The jury maintained the power to indirectly check sentencing severity through acquittals or "verdicts of guilty to lesser included offenses."\textsuperscript{170} This power to check the judge derived from the understanding of the jury as "the grand bulwark" of liberties.\textsuperscript{171} Quoting Blackstone, the Court continued:

so long as this palladium remains sacred and inviolate, not only from all open attacks, but also from secret machinations, which may sap and undermine it, by introducing new and arbitrary methods of trial, by justice of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary power, well executed, are the most convenient), yet let it be again remembered, that delays, and little inconveniences

\textsuperscript{168} The statutory maximum for the underlying carjacking crime was 15 years. 18 U.S.C. § 2119(a) (2006).
\textsuperscript{169} \textit{Jones}, 526 U.S. at 243-44.
\textsuperscript{170} \textit{ld}. at 245.
\textsuperscript{171} \textit{ld}. at 246 (quoting W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 322-324).
in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters.\textsuperscript{172}

Trial by jury under the Sixth Amendment, according to the Court, is not a mere formality, but a bulwark protecting liberties from arbitrary governmental power. This concern about arbitrary power was not limited solely to the guilt determination, but also to the ultimate sentence or punishment imposed by the state through its judicial actors.

The Court in \textit{Jones} did not specifically resolve the issue of what Sixth Amendment role for the jury was appropriate in sentencing, but the Court introduced the Sixth Amendment controversy into the real offense sentencing debate.

The next year in \textit{Apprendi v. New Jersey},\textsuperscript{173} the court began to define the extent of the Sixth Amendment limits on legislative definitions of sentencing factors that could be found by a judge by a preponderance of the evidence. \textit{Apprendi} involved a challenge to New Jersey’s hate crime law that authorized a sentencing enhancement if the judge found that the offender committed the crime “with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”\textsuperscript{174} The enhancement varied on the basis of the underlying crime. In \textit{Apprendi}, the offender was convicted of “possession of a firearm for an unlawful purpose,” which under New Jersey law was a second-degree offense.\textsuperscript{175} The sentencing range for the offense was five to ten years.\textsuperscript{176} The hate crime enhancement allowed for an extended sentence of ten to twenty years.\textsuperscript{177}

\textit{Apprendi} pled guilty to “two counts of second-degree possession of a firearm for an unlawful purpose. . . and one count of the third-degree offense of unlawful possession of an antipersonnel bomb.”\textsuperscript{178} The prosecutor filed for a hate crime sentencing enhancement after the trial judge accepted the plea. The judge found by a preponderance of the evidence that \textit{Apprendi}'s action had the purpose of intimidating on the

\begin{itemize}
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} 530 U.S. 466 (2000).
\item \textsuperscript{174} \textit{Id.} at 468-69 (quoting N.J. \textit{Stat. Ann.} § 2C:44-3(e)(1999) (this section of the statute has since been deleted with the 2002 amendment).
\item \textsuperscript{175} \textit{Id.} at 468 (citing N.J. \textit{Stat. Ann.} § 2C:39-4(a)).
\item \textsuperscript{176} \textit{Id.} (citing N.J. \textit{Stat. Ann.} § 2C:43-6(a)(2)).
\item \textsuperscript{177} \textit{Id.} at 469 (citing N.J. \textit{Stat. Ann.} § 2C:43-7(a)(3)).
\item \textsuperscript{178} \textit{Id.}
\end{itemize}
basis of race in violation of the hate crime law. Apprendi challenged the enhancement under the Due Process Clause and the Sixth Amendment; asserting that the hate crime enhancement had to be proved to a jury beyond a reasonable doubt.

Justice Stevens, writing for the majority, determined that there was no basis for the New Jersey statutory distinction between sentencing factors and sentencing elements. Therefore, the lack of procedural safeguards for something labeled as a sentencing factor was suspect under the Due Process Clause. But the Due Process concern was not the focus of the Court. Instead, the Court followed the lead of Jones and attempted to insert substance into the Sixth Amendment right to trial by jury.

Analogous to the analysis in Jones, the Court quoted historical sources including Justice Story’s depiction of the Framers’ understanding of the role of the jury, “‘guard[ing] against a spirit of oppression and tyranny on the part of the rulers,’ and serving ‘as the great bulwark of [our] civil and political liberties.” The Court relied on an analysis of prominent legal historians in concluding that the judge’s role in sentencing was ministerial during the colonial period since the sentence derived completely from the jury’s conviction for violation of a specific law.

According to the court, a sentencing system in which the sentence was based solely on the jury conviction did not require the establishment of mandatory, fixed punishments. Sentencing ranges that provide judges with discretion to fix the sentence within a range were also compatible. As long as the judge sentences within the legislatively prescribed range for the crime of conviction, the role of the jury is not fundamentally altered. The sentence, broadly defined, continues to be completely derived from the conviction and the jury serves its function as a bulwark against oppression and tyranny.

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179 Id. at 471.
180 Id. at 477 (quoting Joseph Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)).
181 Id. at 479 (quoting John H. Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in the Trial Jury in England, France, Germany, 1700-1900 pp. 36-37 (A. Schioppa ed. 1987)) (“The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it”).
182 Id. at 481 (citing Williams v. New York, 339 U.S. 241 (1949)).
183 Id.
The problem with the New Jersey hate crime statute, according to the Court, was that it authorized the judge to sentence beyond the statutory maximum and to sever the link between the jury conviction and the ultimate sentence. As a result, the jury would have no way to control the ultimate sentence and provide a limit on the punishment power of the state. The Court, consistent with this line of reasoning, struck down the New Jersey hate crime law and held that “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.”

Justice Breyer, in dissent, expressed concerns that such a system of jury fact finding of all sentencing factors that increase the sentence above the statutory maximum could lead to a charge conviction system. In order to obtain a sentencing enhancement beyond the statutory maximum, each sentencing factor would have to be charged by the prosecutor and proved to a jury beyond a reasonable doubt. This would obviously be different from a real offense system in which the factors could be found by a judge by a preponderance of the evidence and would not be dependent on what the prosecutor charged. Such a system, the Justice argued, would result in unwarranted uniformity in sentencing in which “different offenders [would be treated] similarly despite major differences in the manner in which each committed the same crime.” In other words, judges would no longer be able to individualize sentences. The tension between jury fact finding and the individualization of sentences would be further developed in Blakely v.

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184 Id. at 482 – 83.

The historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

185 Id at 490. The Court distinguished sentencing factors based on prior conviction upholding its earlier decision in Almendarez-Torres v. United States, 530 U.S. 466 (2000), which upheld the constitutionality of sentencing enhancements on the basis of prior convictions. Since prior convictions do not usually present disputable issues of fact, I also agree that Almendarez-Torres is consistent with a substantive Sixth Amendment role for the jury.

186 Id. at 556 (Breyer, J. dissenting).

187 Id.
Washington,\textsuperscript{188} which involved an extension of the \textit{Apprendi} logic to the
Washington State sentencing guideline regime.

Ralph Howard Blakely, Jr. pled guilty to kidnapping. Under the
Washington State guideline system, the maximum guideline sentence
for kidnapping was fifty-three months.\textsuperscript{189} The guidelines provided for a
sentencing enhancement in cases involving “exceptional” circum-
stances.\textsuperscript{190} In the \textit{Blakely} case, the trial judge enhanced the sentence;
finding that the defendant had engaged in deliberate cruelty as part of
the kidnapping, increasing the sentence to ninety months.\textsuperscript{191}

Justice Scalia writing for the majority\textsuperscript{192} held that the \textit{Apprendi}
rule, which required any sentence beyond the statutory maximum to be
found by a jury beyond a reasonable doubt, was applicable to the Wash-
ington State guideline maximum.\textsuperscript{193} The Court concluded, “[o]ur
precedents make clear . . . that the ‘statutory maximum’ for \textit{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 defen-
dant.”\textsuperscript{194} Thus, for purposes of \textit{Apprendi}, the guideline maximum sen-
tence without the finding of any additional real offense factors is the
relevant “statutory maximum.”

The Court in \textit{Blakely}, similar to the Court in \textit{Apprendi}, was con-
cerned about “ensuring that the judge’s authority to sentence derives
wholly from the jury’s verdict.”\textsuperscript{195} The Court rejected the amorphous
Fifth Amendment “tail that wags the dog” standard; describing it as
inconsistent with the Framers’ intent regarding the role of the jury.\textsuperscript{196}
The Court again relied on historical sources cited in \textit{Apprendi} and \textit{Jones

\textsuperscript{188} 542 U.S. 296 (2004).
\textsuperscript{189} \textit{Id.} at 188.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} The majority in this case included Justices Stevens, Souter, Thomas, and notably Gins-
burg. Justice Ginsburg would also join the majority for the \textit{Booker} substantive opinion, but for
reasons that continue to be unclear would join the \textit{Booker} dissenters in the \textit{Booker} remedy opin-
ion, providing the dissenters with a majority in the \textit{Booker} remedy opinion. \textit{Id.} 297.
\textsuperscript{193} The state of Washington argued that the statutory maximum for ten years for Class B
felonies was the applicable maximum for \textit{Apprendi} purposes, not the guideline maximum of
fifty-three months.
\textsuperscript{194} \textit{Id.} at 303.
\textsuperscript{195} \textit{Id.} at 306.
\textsuperscript{196} \textit{Id.} at 307.
in defining the jury's role broadly and the Sixth Amendment right substantively.\footnote{197}

Justice Breyer, in dissent again, expressed his concern that an Apprendi compatible guideline system would have the same problems as a pure charge offense sentencing system. Prosecutors, not judges, would have the power to individualize sentences through their "control of the precise charge, control[ling] the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same real criminal conduct."\footnote{198} Therefore, the individualization of sentences would no longer be based solely on the additional circumstances that surrounded the crime, but on decisional factors such as the cost and benefits for the prosecutor of bringing additional charges for these real offense factors as well as the workload and the time constraints of the prosecutor.\footnote{199}

Justice Breyer did not see any way to reconcile the conflict between a real offense sentencing system, which required judicial discretion to individualize sentences with a substantive Sixth Amendment in which the jury would serve its constitutional role as a bulwark between the individual and the government.

The Blakely holding had implications beyond the Washington State guideline system, as it would eventually require the Court to declare the federal sentencing guideline system unconstitutional under the Sixth Amendment.\footnote{200} The Court in the Booker remedy opinion (Booker II)\footnote{201} would resolve the issue in favor of increased judicial discretion to individualize the sentence on the basis of real offense factors, virtually ignoring the concerns of the majority in the Booker substance opinion (Booker I) about establishing a substantive Sixth Amendment role for the jury.

\footnote{197} The Court expressed approval of an alternative scheme established by Kansas after the Kansas Supreme Court in State v. Gould, 23 P.3d 801, 809-14 (2001) determined that the Kansas Guidelines System ran afoul of Apprendi. The legislature responded by making the Washington State guideline system consistent with Apprendi through the establishment of a bifurcated sentencing system in which factors that enhance the sentence would have to be found by a jury beyond a reasonable doubt during the sentencing stage.

\footnote{198} Blakely, 542 U.S. at 334 (Breyer, J., dissenting).

\footnote{199} Justice Breyer also argued that the prosecutor would have enhanced power in the plea stage to engage in charge bargaining, which would potentially give the prosecutor greater control over the ultimate sentence than bargaining over sentencing factors. \textit{Id.} (Breyer, J., dissenting).


\footnote{201} See supra notes 32-44 and accompanying text.
The conflict will continue to be irreconcilable unless the Court moves outside of the separation of functions framework. While the Court in the \textit{Apprendi} line of cases did not expressly rely on the trial/jury, sentencing/judge dichotomy, it served as an underlying theme in all of the opinions. The Justices wanted to add substance to the Sixth Amendment through an expansion of the guilt determination phase. The majority in the \textit{Booker I} substance opinion sought to increase the number of facts that would have to be found by the jury at the guilt determination phase despite its impact on the judge's ability to individualize sentences at the sentencing stage. In contrast, the majority in the \textit{Booker II} remedy opinion maintained a circumscribed guilt determination phase and ultimately increased the power of judges to individualize sentences unconstrained in the sentencing phase. Sentencing remained separate from the determination of guilt and the demarcation of judge and jury role continued. The Court failed to imagine a jury function that would serve as a bulwark between the individual and the state that would also maintain a real offense sentencing system because of its failure to move beyond the separation of functions framework.

The next part of this article will first address the alternatives that other commentators to the post-\textit{Booker} sentencing regime have proposed and demonstrate that the proposals either do not resolve the \textit{Booker} conflict or only resolve the conflict in a fraction of criminal cases. Second, it will describe a proposal for reconciling the \textit{Booker} conflict between real offense sentencing and a substantive Sixth Amendment that requires thinking beyond the separation of functions framework.

\section*{III. Reconciling the \textit{Booker} Conflict}

Just as quickly as the concerns for a substantive Sixth Amendment emerged onto the judicial scene with the \textit{Jones} decision and the \textit{Apprendi} line of cases, they disappeared with the \textit{Booker} remedy and discussions of post-\textit{Booker} alternatives. The \textit{Booker} remedy made the guidelines advisory and thus increased judicial discretion in sentencing.\footnote{See supra notes 32-34 and accompanying text.} Judges, under a broad interpretation of \textit{Booker}, can now sentence anywhere from the minimum to the maximum of the statutory sentencing range for the underlying conviction. The judge can consider and apply the same real offense factors to aggravate and mitigate the sentence as it could before \textit{Booker} and also consider additional real offense factors not
specifically identified in the guidelines to achieve the broad purposes of sentencing.\textsuperscript{203} In the post-Booker regime the ability of the jury to check judicial discretion, in particular the discretion to aggravate the sentence on the basis of real offense factors, is virtually nonexistent. Rather than serving as a bulwark between the individual and the state, the jury is serving as a gatekeeper to the use of broad judicial sentencing power.\textsuperscript{204}

It is true that the judge's sentencing power cannot exceed the statutory limits for the crime of conviction, but it is important to recall that the original purpose of the broad statutory ranges was to provide judges with the discretion to individualize sentences broadly for rehabilitative purposes. The broad ranges should be viewed as unconstitutional under a punishment-based system because they virtually eliminate the power of the jury to impact and constrain judicial discretion in the imposition of a punishment.\textsuperscript{205} As a result, the jury is unable to fulfill its functional role of checking governmental power to punish. The post-Booker alternatives that have been proposed either do not address the need for a jury role in sentencing in order to check judicial discretion or place the jury in a role that it is unable to fulfill.

A. Post-Booker Alternatives

The two primary post-Booker alternatives have not been particularly concerned with maintaining a substantive Sixth Amendment role for the jury. Instead, the two alternatives have focused on constraining judicial discretion in a system in which the guidelines can no longer serve as that constraint. The two alternatives and the motivation behind them represent a replay of the pre-guidelines debate. The first alterna-

\textsuperscript{203} The broad purposes of sentencing are specified in 18 U.S.C. § 3553(a)(2) (2003) (the purposes include retribution, incapacitation, deterrence, and to a limited extent, rehabilitation).

\textsuperscript{204} The Booker remedy has led to the result that the Court in Jones intended to avoid in which the "jury's role [shrank] from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping." Jones v. United States, 526 U.S. 227, 243-44 (1999).

\textsuperscript{205} The argument is that sentencing within broad sentencing ranges requires some sort of jury check on judicial discretion. One could imagine a statute in which the sentence for conviction ranges from ten years to life. Such a broad sentencing range would not allow the jury to constrain the judge with its conviction, instead the individual would be placed at the mercy of the punitive power of the judge. But there are sentencing ranges that would not violate this substantive understanding of the Sixth Amendment such as those available under the federal sentencing guidelines, which limit the range between the minimum and maximum penalty to 25%. It is difficult to imagine ranges that go too far beyond the 25% that would maintain the ability of the jury to constrain the judge from sentencing on factors beyond the conviction.
tive focuses on constraining judicial discretion to ensure against unwarranted leniency. The second alternative focuses on guiding judicial discretion to ensure against unwarranted disparity.

In the immediate aftermath of Blakely, a prominent sentencing commentator, Professor Frank Bowman, introduced what came to be known as the "Bowman proposal."²⁰⁶ The proposal focused on making the guidelines constitutional. Bowman proposed to take the top off of the guidelines.²⁰⁷ Under this system, the guideline maximum would be removed and replaced by the statutory maximum such that the judge would have the discretion to sentence all the way up to the statutory maximum of the conviction offense on the basis of findings of real offense factors. At the same time, the guideline minimum would be transformed into a sort of mandatory minimum that could also be increased on the basis of real offense factors.²⁰⁸ The proposal would allow judges, without any checks or inputs from the jury, to impose even more severe sentences than under the guidelines. The Sixth Amendment, under the Bowman proposal, would continue to be more of an empty shell.

The second alternative, put forward most recently by Professor Marc Miller, seeks to establish a common law of sentencing.²⁰⁹ The proposal calls for the creation of a Sentencing Information System


²⁰⁸ After Apprendi, the Supreme Court upheld the McMillan decision, which held that factors that increase the statutory minimum do not have to be found by a jury beyond a reasonable doubt. Harris v. United States, 536 U.S. 545, 557 (2002). The Court in contrasting Apprendi and McMillan noted that "there was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the Apprendi rule did not extend to those facts." Id. at 563.

Judges, under this system, would input information about cases, including real offense factors related to the case, and their reasoning for sentencing on a particular matter. Subsequent judges would be able to look into the database and add and subtract factors as necessary to get an idea of what other judges are sentencing in similar cases to inform their judgment on the appropriate sentence in their case. An informal common law of sentencing develops in which judges follow the sentencing patterns of other judges dealing with similar cases. Judges, ideally, would also justify departures from the sentencing pattern to inform subsequent judgment on the aberrational cases. The SIS, in theory, would also provide appellate courts with the basis for affirming or overturning sentences. The theorized result would be a dramatic reduction of unwarranted disparity.

The problem with this alternative is that it imagines a system in which criminals are similarly situated. Such a system is very unrealistic if judges are provided with the discretion to sentence on the basis of any or all of the four diverse purposes of sentencing. There are an endless number of factors both related to the offense and the offender that can differentiate crimes from each other and ultimately require endless differentiation of sentences. The common law analogy falls apart because the sentencing options are not binary, as for example, in a tort case in which the judge determines whether the defendant was negligent or not negligent. Instead, it is more analogous to a tort award, which includes nearly infinite options. A common law of sentencing that relied on a sentencing information system would ultimately encompass all of the variations of offense, offenders and sentences providing judges with nearly unbounded discretion to assign a sentence consistent with the judge’s idiosyncrasies while eliminating any basis for an appellate court to overturn a sentence. Under this system, judicial power to aggravate sentences on the basis of real offense factors not taken into account in the jury verdict would remain unchecked.

Professor Miller credits Norvil Morris with first proposing the idea of an SIS. See Miller, supra note 209, at 1371 (citing Norval R. Morris, Sentencing Convicted Criminals, 27 AustL. L.J. 186 (1953)).

Id. at 1374-75.

Id. at 1374.

Professor Miller argues that “SIS might help to nurture the common law development of sentencing principles.” Id. at 1379.

Notably, in civil tort cases, these awards are not determined by a judge through an examination of the common law, but rather by a jury estimating the appropriate level of liability for the defendant.
RECONCILING THE BOOKER CONFLICT

Even if we were to conceive of a sentencing information system that provided appeals courts with a basis for affirming or overturning sentences, it is important to remember that judges at the appeals court level are also a part of the state. As a result, the substantive Sixth Amendment mandate of placing a non-state institution between the individual and the state and providing a check on governmental power would remain unfulfilled.

Both of the primary alternatives keep sentencing within the separation of functions framework in which the jury determines guilt and the judge sentences. While these two alternatives dominate the sentencing reform debate, a virtually ignored alternative being employed in a few states\(^1\) began to re-emerge during the post-\textit{Apprendi} period, jury sentencing. This approach ignores the separation of functions formality and establishes the jury as the central institution in both the guilt determination and sentencing phase.

It is important to differentiate jury sentencing as advocated by recent commentators\(^2\) from jury fact finding, which is supported in \textit{Booker I}. Jury fact finding requires juries to find all the facts that would impact the sentence.\(^3\) Thus, under a system of jury fact finding all real offense factors that enhance the sentence would have to be found by a jury beyond a reasonable doubt. In a jury fact finding system, the judge would continue to sentence within the sentencing range based on the jury's findings.

In contrast, under a system of a jury sentencing, the jury would not only be responsible for finding an offender guilty of a crime, but would also be responsible for setting the punishment, much like a civil jury does in a tort punitive damages case. Therefore, once the offender has been convicted of robbery, the jury instead of the judge decides the appropriate sentence within the statutory or guideline range.

Supporters of a jury system have put forward several arguments in favor of the system. The primary argument is that juries have a “unique


\(^{3}\) The jury can either find all the facts at the guilt stage of the process could be bifurcated in which the jury finds the charge related facts at the guilt stage and the real offense factors at the sentencing stage of the trial.
advantage” in sentencing since the jury reflects “the conscience of the community.”218 Under a retribution model of punishment where the sentence should be proportionate to the moral culpability of the offender, the jury would be able to reflect the community norms on moral culpability in meting out the punishment.219

The legislature and the judiciary, by contrast, are institutionally incompetent at assigning a sentence that accurately reflects community norms and therefore should not be involved in sentencing. A judge as an appointed official, at least in the federal system, is by institutional design detached and independent from community sentiment. The judge as a result is also unaccountable and one commentator argues “dangerous” in using their sentencing discretion.220 Legislative incompetence results from the fact that the legislature must establish statutory sentences that apply to the aggregate rather than to the individual. As a result statutory sentences are necessarily over-inclusive and result in sentences that do not reflect community sentiment on the appropriate sentence for each individual.

A second argument in favor of jury sentencing is that juries are able to engage in deliberation that leads to informed decisions and legitimate results.221 One author asserts that “[t]he value of jury sentencing lies in mediating, through a conversation across rival discourses, among different aims and models of punishment.”222 Juries would also be able to deliberate about the appropriate sentence for each case and distinct factual situation.223

Jury sentencing, by importantly ignoring the separation of function conception of the judge and jury role, would resolve the Booker conflict by establishing a substantive Sixth Amendment within the contours of a real offense sentencing system. The jury would be able to individualize sentences on the basis of real offense factors and would function as the constitutionally required bulwark between the individual

218 See Laani, supra note 216, at 1775 (“The one task that juries indisputably perform better than judges is to reflect the ‘conscience of the community’ and to express public outrage at the transgression of community norm”); see also Iontcheva, supra note 216, at 353.
219 See Hoffman, supra note 216, at 992 (“Jury sentencing . . . resonates with the reemergence of retribution as the primary justification for punishment”).
220 Id.
221 Iontcheva, supra note 216, at 341-342.
222 Id. at 344.
223 Id. at 350 (comparing the capacity of juries as compared to the capacity of the legislature to individualize sentences).
and the government. However, there are two major problems associated with a pure jury-sentencing model that result in it not being the most appropriate model to resolve the Booker conflict.

First, jury sentencing does not adequately address how a jury would match moral blameworthiness with an appropriate term of punishment. Each particular jury sentences only once, and as a result juries lack institutional knowledge of sentences applied in other cases. It is nearly impossible for a jury to know where the appropriate sentence lies within a statutory framework such that the sentence applied to one offender is proportionate to the sentence applied by another jury to another offender. In other words, the jury has no institutional map to be able to rank crimes on the basis of their severity and criminals on the basis of their moral culpability such that the convicted criminal that has greater moral culpability receives the greater punishment.

To ameliorate this problem, jury-sentencing proponents have favored providing juries with average sentencing statistics or the relevant guideline sentence for a particular crime and offender. The problem with this approach is that providing juries with this information may bias the sentences toward the average or relevant guideline sentence. The information, in other words, will have an anchoring effect and result in similar sentences regardless of differences in the level of moral culpability that would normally lead juries to aggravate or mitigate the sentence in the absence of this prejudicial information.

A second and deeper problem with jury sentencing is that it would only be applicable to a very small percentage of cases that are decided by the trial process. Currently, only 4% of guilty convictions are obtained at trial. The rest are obtained by plea agreement. Thus, in an overwhelming majority of the cases in the pure jury-sentencing model, judges can continue to aggravate sentences above the sentence appropriate for the plea agreement on the basis of real offense factors unchecked by juries.

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224 Id. at 358-39.
226 Judges have the option of accepting the plea and sentencing recommendation or accepting the plea while rejecting the sentencing recommendation and increase the sentence on the basis of findings of real offense factors. See USSG § 6B. The prosecutor can also enter a plea without a sentencing recommendation, in which case the judge has full authority to sentence on the basis of the conviction and any additional real offense factors that may aggravate or mitigate the sentence.
Any proposal for reform to reconcile the *Booker* conflict between a substantive Sixth Amendment and a real offense sentencing system would have to address both cases decided by the trial process and cases decided by pleas. A proposal would also have to recognize the limited institutional capacity of juries. The following proposal attempts to do just that.

B. *A Proposal to Reconcile the Booker Conflict*

A reconciliation of the *Booker* conflict requires the creation of a system that takes into account the fact that the overwhelming majority of convictions are obtained by plea agreements. It will also require a role for the jury that it is institutionally capable of fulfilling. While the focus is on checking governmental power and in particular judicial power at sentencing, the judge should continue to play an important role in sentencing. Judges have experience in sentencing such that they have created an institutional memory that allows them to rank crime and the culpability of criminals relevant to each other.\(^{227}\) The advocates of jury sentencing may be correct that the judge determined sentence may not exactly reflect the conscience of the community, but judges are able to match moral blameworthiness to a sentence that is proportionate to other offenders and crimes.

The proposed modified jury sentencing system will reconcile the *Booker* conflict by providing the jury with substantive power to check judicial discretion while taking advantage of judicial experience in the sentencing process. This modified jury sentencing system would be based on the interaction of advisory guidelines, judicial discretion to determine aggravating and mitigating sentences within the guidelines and to impose non-guideline sentences, and a sentencing jury modeled along the lines of a grand jury that checks judicial aggravation of sentences on the basis of a reasonableness standard.

The modified jury sentencing system is based on the determination that the separation of functions framework is a historical anomaly no longer relevant under a punishment model of sentencing. Sentencing, for the purposes of understanding the jury role, is an integral part of the

\(^{227}\) The institutional memory does not necessarily apply to new judges, but through training and collaboration with other judges, even new judges will have a greater understanding of proportionate ranking of crimes and other relevant characteristics.
trial process rather than a separate and distinct proceeding. The jury's role under the Sixth Amendment as a buffer between the individual and the state begins at the guilt determination stage and continues through sentencing. Thus, under the proposed modified jury sentencing model, the role of the jury would not be confined to determining guilt, but instead the jury would play an important checking role during the sentencing stage.

*Booker* made the guidelines advisory, but judges are still required to identify the factors that influence the sentence. This provision should be interpreted as requiring judges to identify each real offense factor and make the guideline calculation of how much each finding increases the sentence. This process maintains the transparency of the sentencing process and also offers an opportunity for the jury to fulfill its Sixth Amendment role of checking judicial discretion. The advisory guideline system also offers an opportunity for judges to impose a non-guideline sentence. However, such discretion does not eliminate the effect of the transparency requirement.

Therefore, each judge in imposing a non-guideline sentence should be required to identify the factors and the weight of each factor in the determination of the appropriate sentence. The appeals court under the modified jury sentencing system would play the important role, similar to that played in the administrative law context, of ensuring that judges provide adequate reasoning for their sentences in terms of how the sentence is calculated and the influence of each factor found by the judge on the ultimate sentence.

Judicial discretion is a necessary element of a real offense sentencing system. Consistent with the advisory guideline system currently in place, judges should not be constrained in the number of factors that they take into account in sentencing, but instead should use their experience to establish a sentence that is proportionate to the crime and to other offenders. The advisory nature of guidelines allows for sentences that fully reflect the individualized characteristics of the crime and offender. Any factor not determined to be relevant to sentencing should be found on the basis of studies and presented by the Sentencing Com-

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228 This view is consistent with the Framers' understanding in which the sentence would be an automatic byproduct of the conviction at trial, such that sentencing was a merely ministerial component of the trial. See *supra* notes 27-30 and accompanying text.

mission. Until that point, judges should be able to make unconstrained findings of real offense factors that go beyond the crime of conviction in order to ensure individualized and proportionate sentences.

While judicial discretion is necessary for a real offense sentencing system, it is also important to check this judicial discretion and re-insert the jury into its functional role of serving as a bulwark between the individual and the government in the imposition of a sentence. A real offense sentencing system necessitates that the connection between conviction and sentence will be weaker than it would be under a charge offense system. To ensure against abuse of the real offense sentencing power of the judge through the imposition of a sentence above that required by the charge conviction, the judicial findings of real offense factors should be subject to a reasonableness standard. Unlike the current system in which the appeals court determines the reasonableness of a sentence, the sentencing jury would determine the reasonableness of a finding on aggravated real offense factors.

The jury role is unnecessary in cases involving mitigating factors. The need for jury input on aggravated sentences, as opposed to jury input on the mitigation of sentences, is appropriate because the jury’s role is to ensure against oppressive sentences by unchecked governmental power. Any sentence that mitigates the sentence below that appropriate for a conviction does not have the effect of imposing the punishment power of the government on the offender.

The sentencing jury would be modeled more along the lines of a grand jury than a jury that determines the exact punishment under the pure jury-sentencing model. The jury would make a binary choice similar to that at the guilt determination stage of a trial. The difference would be that the jury would determine whether the judge’s decision to increase a sentence on the basis of a real offense factor is reasonable or unreasonable. The jury’s decision would be based on evidence relied on

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230 As noted above, the Sentencing Commission did not provide any basis for the determination that several offender related characteristics were not ordinarily relevant in sentencing. A judge should not be constrained from using constitutionally appropriate factors until the Sentencing Commission provides reasoning supported by empirical studies that demonstrate a particular factor is not relevant. The jury at the back end will be able to determine whether the use of a factor to increase a particular sentence is reasonable, which will provide all the necessary protection for the offender.

231 See supra notes 27-30 and accompanying text (demonstrating why it is more appropriate for a jury to serve this function under the Sixth Amendment).
by the judge in making the determination to aggravate the sentence and
the reasoning employed by the judge. The jury would then make its
determination in the form of a special sentencing verdict.

In a case involving a single real offense factor that increases the
sentence, the jury’s checking role would function as follows. If the jury
finds that the increase of the sentence on the basis of real offense factors
is reasonable, then the sentence is increased to include the real offense
factor. If the jury finds that the increase of the sentence is unreasonable,
then the judge can only sentence within the guideline range of the crime
of conviction and is required to eliminate any consideration of the dis-
credited real offense factor in the sentence.

In the case of multiple real offense factors, the jury would make a
reasonableness determination on each of the real offense factors found
by the judge that aggravate the sentence. Each real offense factor that is
determined to be unreasonable will have to be removed from the sen-
tencing determination such that the sentencing range is that of the
charge and all factors that survive the jury’s reasonableness determina-
tion that aggravate the sentence.

The sentencing jury under the proposed model would also check
the aggravation of sentences above the plea agreed conviction offense.
In cases in which the judge does not follow the sentencing recommenda-
tion in the plea agreement or the plea agreement lacks a sentencing rec-
ommendation, any aggravation of sentences above that appropriate on
the basis of the pled to crime would be subject to the reasonableness
determination.

The plea sentencing jury would be modeled after a grand jury.
Similar to a grand jury, the plea sentencing jury would sit for an ex-
tended period and make reasonableness determinations in several cases.
This would decrease the time, cost, and delay from empanelling a new
jury for every single case involving an aggravated plea sentence. The
judge, similar to the prosecutor seeking an indictment from a grand jury
on the basis of probable cause, would have to seek jury approval for the
aggravation of a plea-based sentence from a sentencing jury. The plea
sentencing jury, much like the sentencing jury in a trial case, would
examine the evidence relied on by the judge to aggravate the sentence
and determine the reasonableness of the aggravation. Unlike the trial
sentencing jury, the reasonableness determination would not require a
hearing since the offender has foregone his trial rights by agreeing to the
plea.
While many of the details of the model would have to be developed further through discussion and further deliberation, the modified jury-sentencing model reconciles the *Booker* conflict. First, it establishes a substantive Sixth Amendment role for the jury in the sentencing phase of the trial. The jury can fulfill its constitutional role of checking governmental power to punish by subjecting judicial findings on aggravating factors to a reasonableness determination. Second, the model maintains the real offense sentencing system. The judge will continue to have the discretion to find real offense factors that individualize the sentence and ensure that they are proportionate. Prosecutorial power is constrained under this system because the prosecutor’s charge will not necessarily determine the ultimate sentence.

This model admittedly does not alleviate the concerns for unwarranted disparity and unwarranted leniency, but instead it places the proper emphasis on constraining arbitrary punishment, which is at the foundation of the Sixth Amendment.

V. Conclusion

Sentencing stands at a crossroads. The transition from the rehabilitation sentencing system to the guideline sentencing system took nearly two decades. The direction of sentencing beyond *Booker* is still very unclear. While *Booker* presented a nearly irreconcilable conflict, it is important to learn from the Sixth Amendment concerns of the Justices in the majority of the *Booker* substance opinion and the real offense sentencing concerns of the Justices in the majority of the *Booker* remedy opinion. These are concerns that should not be overlooked in the search for the next sentencing system. Instead, they should be embraced and incorporated into a new sentencing model that would move us closer towards the goal of just and non-arbitrary sentences.

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232 Unwarranted disparity would be particularly problematic in the judicial determination of Guideline points associated with non-Guideline factors. For example, judges may assign different Guideline points for age that may result in inter-judge disparity on the basis of non-Guideline factors.

233 Unwarranted leniency would not be alleviated because under the modified jury sentencing model, judges will have discretion to sentence below the Guideline minimum on the basis of mitigating factors not found in the Guidelines.