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Compromising Liberty: A Structural Critique of the Sentencing Guidelines

Jackie Gardina
Vermont Law School

COMPROMISING LIBERTY: A STRUCTURAL CRITIQUE OF THE SENTENCING GUIDELINES

Jackie Gardina*

This Article contends that the federal sentencing guidelines—whether mandatory or discretionary—violate the constitutional separation of powers by impermissibly interfering with a criminal jury's constitutional duty to act as a check against government overreaching. This Article posits that the inclusion of the criminal jury in Article III of the Constitution was intended as an inseparable element of the constitutional system of checks and balances. This Article also submits a proposal for restoring the constitutional balance through the creation of a "guideline jury system" within the current guideline structure. The implementation of a guideline jury system would fill the constitutional void created by the current sentencing regime without destroying its underlying benefits. By making the jury a larger part of the guideline structure, the sentencing guidelines would no longer violate the separation of powers and the criminal jury would be reinstated as a viable check against government overreaching.

In Part I, this Article examines the Supreme Court's recent decision in United States v. Booker, *specifically how the Court lost an opportunity to restore the jury to its rightful place in our tripartite system of government. By pronouncing the sentencing guidelines discretionary instead of mandatory, the Court simply transferred unchecked power from the hands of the prosecutor to the hands of the federal bench. In Part II, this Article illustrates how the sentencing guidelines interfere with the jury's constitutional role by systematically discouraging a criminal defendant from asserting her right to a jury trial. While most case law and guideline critiques focus on the sentencing factors that* increase *a criminal defendant's sentence, this Article focuses on the guideline mechanisms that* decrease *the sentence. Criminal defendants are routinely waiving their right to a jury trial based on these incentives. In Part III, this Article discusses the Supreme Court's decision in* Patton v. United States *where the Court made the unsupported declaration that Article III and the Sixth Amendment were to be read in* pari materia. *This Article contends that the Framers included the jury in Article III as a structural check against untrustworthy federal judges and overreaching by the Legislative and Executive Branches. Finally, in Part IV, this Article submits a proposal for restoring the constitutional balance. It contends that the equilibrium can be restored through the creation of a "guideline jury system" within the current guideline structure. By making the jury a larger part of the guideline structure the criminal jury, albeit in a different form, would be reinstated as a meaningful part of the constitutional sytem of checks and balances.*

* Assistant Professor of Law, Vermont Law School. I would like to thank Bruce Duthu, Cheryl Hanna, Peter Teachout, Pam Stephens, Laura Gillen, and Doug Berman for their insights and patience as well as Will Senning for his excellent research skills and comments. In addition, I want to extend a special thanks to Lauren Bassing without whom misplaced modifiers would abound.

INTRODUCTION

In *United States v. Booker*[1] the Supreme Court had the opportunity to re-establish the jury as a necessary component of the criminal justice process. Although a portion of the majority opinion paid lip service to the critical importance of the jury in our system of government,[2] in the end, the jury became a victim to the power struggle between the judicial and legislative branches of the government. It is ironic that in the same opinion where the Court extolled the jury as the guardian "against a spirit of oppression and tyranny on the part of rulers" and the protector of the "great bulwark of [our] civil and political liberties," it rendered powerless the jury's ability to fulfill that role.[3]

The *Booker* decision came in the wake of the Court's decision in *Blakely v. Washington.*[4] In *Blakely*, the Supreme Court extended the scope of the Sixth Amendment to certain aspects of the Washington State sentencing scheme, holding that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[5] Although it dealt with a state sentencing scheme, its applicability to the federal sentencing guidelines was immediately questioned.[6] To answer that question and calm the resulting chaos in the federal system, the Court expedited the appeals in *Booker.* The *Booker* Court concluded that its holding in *Blakely* was applicable to the federal sentencing guidelines.[7] To remedy the Sixth Amendment violation, a majority of the Court made the sentencing guidelines discretionary instead of mandatory, thereby removing the guidelines from the scope of the Sixth Amendment.[8]

Somewhat lost in the chaos following *Blakely* was the fact that the decision raised important questions regarding the role of the jury in our criminal justice system. The majority premised the outcome in *Blakely* on the importance of the criminal jury to the constitutional structure.[9] Yet what was conspicuously absent from

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1. 125 S. Ct. 738; 2005 U.S. LEXIS 628 (2005).
2. *Booker*, 125 S. Ct. at 753.
3. *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)).
4. 124 S.Ct. 2531 (2004).
5. *Id.* at 2543.
6. *See, e.g.*, United States v. Mueffleman, 327 F.Supp.2d 79 (D.Mass. 2004); United States v. Agett, 327 F.Supp.2d 899 (E.D.Tenn. 2004); United States v. King, 326 F.Supp.2d 1276 (M.D.Fla. 2004); United States v. Harris, 325 F.Supp.2d 562 (W.D.Pa. 2004); United States v. Croxford, 324 F.Supp.2d 1230 D. Utah 2004).
7. *Booker*, 125 S. Ct. at 746.
8. *Id.*
9. *Blakely*, 124 S.Ct. at 2538–39.

post-*Blakely* discussions about the continued viability of the federal sentencing guidelines and the future of sentencing reform was any substantive discussion of how the criminal jury can be restored to its prominent position in the Judicial Branch. *Booker* provided the Court with the opportunity to address this issue. Unfortunately, despite its rhetoric regarding the role of the jury,[10] the *Booker* decision neglects to provide any measure of protection for that role.

The Framers included the criminal jury in the constitutional design as part of an elaborate system of checks and balances.[11] It was not deemed a mere procedural formality, nor was it simply an individual right of the accused.[12] In the eyes of the Framers, the criminal jury provided the citizens an important role in the administration of the laws.[13] As Justice Scalia stated in *Blakely*, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[14] The criminal jury was intended to provide both an intra-branch check against the arbitrary actions of federal judges and an inter-branch check against the oppressive conduct of the other two branches.[15] The *Booker* majority appeared to recognize this constitutional role but failed to provide an avenue through which the jury could perform it.

Indeed the criminal jury's increasing marginalization is missing from most structural critiques of the federal sentencing guidelines. It is well documented that since the promulgation of the guidelines the use of criminal juries has steadily declined.[16] In 2002, less than three percent of criminal defendants chose to exercise their Sixth Amendment right to a jury trial.[17] A defendant's reluctance to exercise her right to a jury can be linked directly to institutional incentives imbedded in the federal sentencing guidelines encouraging waiver of constitutional rights.[18] Under the sentencing guidelines, criminal defendants who waive the right to trial by jury

10. *Booker*, 125 S. Ct. at 753.

11. *See* discussion *infra* Part III.A.

12. *See infra* note 218 and accompanying text.

13. *See id.*

14. *Blakely*, 124 S.Ct. at 2539 (citing Letter XV by the Federal Farmer (Jan. 18, 1788) *reprinted in* 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981)).

15. *See infra* note 228 and accompanying text.

16. *See* Judicial Conference of United States, Committee on Long Range Planning, *Long Range Plan for Federal Courts* (1995) (citing the Sentencing Guidelines as the major factor bringing about more guilty pleas and fewer trials).

17. *See* UNITED STATES SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 (2004) [hereinafter 2002 SOURCEBOOK].

18. *See infra* notes 131–32 and accompanying text.

often incur significantly lower sentences.[19] These defendants can be assured, on average, a sentence that is 300 percent lower than similarly situated defendants who exercise their Sixth Amendment right to trial by jury.[20]

Congress has created a sentencing regime that, in operation, interferes with the jury's ability to check against government overreaching.[21] The federal sentencing guidelines have eviscerated the jury's role in our constitutional design by systematically discouraging criminal defendants from asserting their right to a jury trial.[22] But because the majority of guideline critiques have focused on the impact of sentencing enhancements on an individual's Sixth Amendment right to a jury trial,[23] scant attention has been paid to the structural impact of the guideline factors that provide a reduction in a defendant's sentence. Indeed, even after *Booker*, Congress will be free to make factors that lead to sentence reductions mandatory because only mandatory sentence enhancements implicate Sixth Amendment concerns.[24] Courts and commentators have been lulled into accepting a sentencing regime that provides significant sentence discounts to criminal defendants, in part, because sentence reductions are viewed as harmless.[25] But a branch's

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19. *See* UNITED STATES DEPARTMENT OF JUSTICE, COMPENDIUM OF JUSTICE STATISTICS 64 (2000). The Bureau of Justice Statistics reports that "the average prison term imposed on defendants convicted at trial was longer than the term imposed on defendants convicted by plea." *Id. See also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 176–177 (1991). Judge Heaney reported that under the sentencing guidelines defendants who went to trial typically were sentenced to two-and-a-half more years than defendants who pleaded guilty while under pre-guideline law, the sentencing difference was one year and two months. *Id.*

20. *See* UNITED STATES DEPARTMENT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTIC 66 (2001) (reporting that drug offenders convicted at trial received an average of 203.8 months compared to the 68.7 months for drug offenders convicted by a guilty plea).

21. *See* discussion *infra* Part II.C.

22. *See* United States v. Speed Joyeros, S.A., 204 F.Supp.2d 412, 427 (E.D.N.Y. 2002).

23. *See generally* Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons From Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419 (1999); Andrew Neal Siegal, *The Sixth Amendment on Ice:* United States v. Jones*: Whether Sentencing Enhancements for Failure to Plead Guilty Chill the Exercise of the Right to Trial*, 43 AM. U. L. REV. 645 (1994); Brian P. Thill, *Prior "Convictions" Under* Apprendi*: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt*, 87 MARQ. L. REV. 573 (2004); Ethan Glass, *Whatever Happened to the Trial by Jury? The Unconstitutionality of Upward Departures Under the United States Sentencing Guidelines*, 37 GONZAGA L. REV. 343 (2002).

24. The *Booker* remedial majority acknowledged that the "ball now lies in Congress' court" to create a sentencing system compatible with the Constitution. *Booker*, 125 S. Ct. at 768.

25. Sentence reductions are deemed largely harmless as they relate to individual rights. However, as the Feeney Amendment reveals, Congress takes reduced sentences very seriously. *See infra* note 123.

interference with the carefully contrived system of checks and balances has never been deemed harmless.[26]

This Article contends that the federal sentencing guidelines—whether mandatory or discretionary—violate the separation of powers because they impermissibly interfere with the jury's constitutionally assigned role as a check against government overreaching. In making this argument, this Article challenges the long-standing constitutional principle that the reference to a trial by jury in Article III is solely an individual right that can be waived by the accused. In its stead, this Article posits that the inclusion of the criminal jury in Article III was intended as an inseparable element of the constitutional system of checks and balances. This challenge necessarily questions the Supreme Court's declaration in *Patton v. United States*[27] that the Sixth Amendment and Article III's trial provisions are coterminous.[28]

In Part I, this Article discusses the Court's recent decision in *Booker* and how the Court lost an opportunity to re-establish the jury to its rightful place in our tripartite system of government. By pronouncing the sentencing guidelines discretionary instead of mandatory, the Court simply transferred unchecked power from the hands of the prosecutor to the hands of the federal bench.

In Part II, this Article illustrates how the sentencing guidelines interfere with the jury's structural role by systematically discouraging a criminal defendant from asserting her right to a jury trial. While most case law and guideline critiques focus on the sentencing factors that *increase* a criminal defendant's sentence, this Article focuses on the guideline mechanisms that *decrease* the sentence. Criminal defendants are routinely waiving their right to a jury trial based on these incentives. As a result, the criminal jury has all but disappeared.

In Part III, this Article discusses the Supreme Court's decision in *Patton* in which the Court made the unsupported declaration that Article III and the Sixth Amendment were to be read in *pari materia*. This Article explains where the Court erred in both its legal and historical analysis. While discussing *Patton*, this Article describes the structural role of the jury in the constitutional design. Relying primarily on the historical research of Professor Akhil Amar, this Article contends that the Framers included the jury in

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26. *See* discussion *infra* Part III.D.

27. 281 U.S. 276 (1930), *abrogated on other grounds by* Williams v. Fla., 399 U.S. 78 (1970).

28. *Id.* at 298.

Article III as a structural check against untrustworthy federal judges as well as against overreaching by the Legislative and Executive Branches. In addition, this Article distinguishes the criminal jury in Article III from the Sixth Amendment right to a jury trial, and explains how the two can coexist.

Finally, in Part IV, this Article submits a proposal for restoring the constitutional balance. It contends that the equilibrium can be restored through the creation of a "guideline jury system" within the current guideline structure. The implementation of a guideline jury system would fill the constitutional void created by the current sentencing regime without destroying its basic premise. By making the jury a larger part of the guideline structure, the sentencing guidelines would no longer violate the separation of powers, and the criminal jury, albeit in a different form, would be reinstated as a viable check against government overreaching.

I. *BOOKER:* LOST OPPORTUNITY

In his column following the *Booker* decision, Edward Lazarus summed up the opinion in two contradictory, but nonetheless accurate, statements: "The Federal Sentencing Guidelines are dead. Long live the Federal Sentencing Guideline."[29] The Court in *Booker* faced two interrelated questions.[30] First, did the Sentencing Guidelines violate the Sixth Amendment by allowing the judge to enhance a defendant's sentence above the statutory maximum based on facts not found by a jury nor admitted by the defendant?[31] Second, if the answer to the first question was "yes," were the sentencing guidelines as a whole inapplicable, or could the offending portions be severed?[32] In a bizarre decision that contained two majority opinions, the Court answered yes to the first question, with one majority holding that "any fact . . . which is necessary to support a sentence exceeding the statutory maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable

29. Edward Lazarus, The Supreme Court's Sentencing Guidelines Decision: Its Logic and Its Surprisingly Limited Practical Effect, Writ: FindLaw's Legal Commentary, *at* http://writ.news.findlaw.com/lazarus/20050121.html (on file with the University of Michigan Journal of Law Reform).

30. *Booker*, 125 S. Ct. at 747.

31. *Id.*

32. *Id.*

doubt."[33] Another majority of the Court proceeded to sever the portions of the Sentencing Reform Act that offended the Sixth Amendment, making the guideline system advisory.[34] What the constitutional majority gave with one hand—a Sixth Amendment right to a jury trial—the remedial majority took away with the other, holding that the guidelines were no longer mandatory and thus outside the reach of the Sixth Amendment. Thus, the jury remains in a strong sense a dispensable part of the criminal justice system.

The *Booker* case required the Court to determine whether its holding in *Apprendi* (that the Sixth Amendment required any fact increasing the penalty for a crime above the statutory maximum to be submitted to a jury or admitted by the defendant) and whether its holding in *Blakely* (that the statutory maximum was the maximum sentence a judge may impose based on the facts found by a jury verdict or admitted by the defendant) were applicable to the federal sentencing guidelines.[35] In *Booker*, the jury convicted Freddie Booker of possession with intent to distribute a cocaine base after hearing evidence that he had 92.5 grams of cocaine in his duffel bag[36]. Based on Booker's criminal history and the amount of drugs found by the jury, the sentencing guidelines set a maximum sentence of 21 years, 10 months.[37] In a post–trial sentencing proceeding, the judge concluded that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Because of these additional judge-made factual findings, Booker was sentenced to 30 years imprisonment.[38] On appeal, the Seventh Circuit held that the sentence violated the Sixth Amendment and remanded with instructions to resentence Booker within the sentencing range supported by the jury's findings, or in the alternative to hold a separate sentencing hearing before a jury.[39]

The constitutional majority affirmed the Seventh Circuit's decision and reaffirmed it holding in *Apprendi*.[40] Its conclusion rested on the premise that the relevant sentencing rules were mandatory

33. *Id.* at 745 (constitutional majority consisted of Justice Stevens delivering the opinion of the Court joined by Justices Scalia, Souter, Thomas, and Ginsburg).

34. *Id.* (remedial majority consisted of Justice Breyer delivering the opinion of the Court joined by The Chief Justice, Justices O'Connor, Kennedy, and Ginsburg).

35. *Booker*, 125 S. Ct. at 746.

36. *Id.* at 746–47.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 755-56.

and imposed binding requirements on all sentencing judges.[41] According to the constitutional majority, "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."[42] The remedial majority used this reasoning to fashion a remedy that makes the guidelines effectively advisory. "We answer the question of remedy by finding that the provisions of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. 2004), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised . . . ."[43] Under the new advisory system, a sentencing court is required to "consider Guidelines ranges" but it also permits the court "to tailor the sentence in light of other statutory concerns as well."[44] In addition, the remedial majority altered the appellate standard of review, changing it from de novo to "reasonable."[45] In the end, the remedial majority recognized that theirs was not the last word. "The ball now lies in Congress' court. The National Legislature is equipped to devise an install, long-term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice"[46]

It is difficult to predict how the Booker decision will affect sentencing in the federal courts. Shortly after the opinion was released, two judges offered their sentencing approaches in the wake of Booker. The day after Booker was released, Judge Cassell issued an opinion in *United States v. Wilson*[47] in which he stated that he would continue to follow the Guidelines "in all but the most exceptional cases."[48] A week later Judge Adelman issued an opinion criticizing Judge Cassell's approach. "The directives of *Booker* and § 3553(a) make clear that the courts may no longer uncritically apply the guidelines and, as one court suggested , "only depart . . . in unusual cases for clearly identified and persuasive reasons."[49] According to Judge Adelman, sentencing in a post-*Booker* world "will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather they must consider all of the applicable factors, lis-

41. *Id.* at 750.
42. *Id.*
43. *Id.* at 756–57.
44. *Id.* at 757.
45. *Id.* at 765.
46. *Id.* at 768.
47. 2005 WL 78552 (D.Utah January 13, 2005).
48. *Id.*
49. United States v. Ranum, No. 04-CR-31, slip op. at 2 (E.D.Wisc. January 19, 2005).

ten carefully to defense and government counsel, and sentence the person before them as an individual."[50]

Although many questions remain unanswered, in the final analysis Booker does little to "reform" the sentencing system or secure the jury's role in our tripartite system of government. The Court had an opportunity to establish the jury as an important component of our constitutional system. Instead it created a sentencing regime that shifted unchecked power from one branch to another. While the Court acknowledged the essential and historical role of the jury as a check against governmental oppression and tyranny, it failed to allow the jury to act in that role. Indeed, the jury's role was even further diminished by the Court's decision. What *Booker* and the precedents on which it was built fail to acknowledge is that the vanishing criminal jury is leaving a dangerous void in our tripartite system of government.

II. THE VANISHING CRIMINAL JURY

As previously noted, over 97 percent of criminal defendants in 2002 waived their Sixth Amendment right to a jury trial to obtain significantly lower sentences.[51] Congress has created a sentencing system with enormous incentives to waive basic constitutional rights.[52] Under the pre-*Booker* sentencing system, a criminal defendant could cut his sentence in half by waiving his Sixth Amendment right to a jury trial and its attendant constitutional protections.[53] It is these systemic incentives that have largely caused the near extinction of the criminal jury trial.[54] While the Supreme Court recognized that sentence *enhancements* affect the Sixth

50. *Id.* at 5.

51. 2002 SOURCEBOOK, *supra* note 17, at 20.

52. *See* United States v. Green, No. 02-10054, 2004 WL 1381101, at *3–*8 (D.Mass. June 18, 2004).

53. *See* United States v. Speed Joyeras, S.A., 204 F.Supp.2d 412, 428 (E.D.N.Y.. 2002) ("The message to defendants is clear: 'Don't insist on your right to trial.'"); Berthoff v. United States, 140 F.Supp.2d 50, 68 (D.Mass. 2001)("[S]uch [sentencing] disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers.").

54. *See* Green, 2004 WL 1381101, at *4; Speed Joyeras, 204 F.Supp.2d at 428; Berthoff, 140 F.Supp.2d at 68–69 (noting that "[c]riminal trial rates in the United States . . . are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial").

Amendment right to a jury trial,[55] it has paid scant attention to how sentence *reductions* impact the structural role of the jury.[56] Indeed, under *Booker*, Congress is still free to incorporate mandatory sentence reductions into any new sentencing scheme without offending the Constitution.

A. The Birth of the Sentencing Guidelines

"Like the proverbial road to hell," as one commentator aptly noted, "the path to the Guidelines was paved with good intentions."[57] The sentencing guidelines were not created to undermine our constitutional design. To the contrary, they were intended to provide an important check on the unfettered sentencing discretion of federal judges that resulted in severe sentencing disparity among similarly situated defendants.[58] These disparities were often correlated with constitutionally suspect variables such as race.[59]

Under the pre-Guideline sentencing regime, federal judges were given significant discretion in determining the length of incarceration.[60] As long as the term was within the broad statutory boundaries, the sentence was not subject to review on appeal.[61] Consequently, there was no real mechanism for ensuring equity in punishment.[62] Not surprisingly, research revealed troubling dispari-

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55. Blakely v. Washington, 124 S.Ct 2531, 2538 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

56. At least one jurist has commented on the lack of attention paid to the dying American jury system. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW 30, 31–32 (July 2003). In an Open Letter to his colleagues, Judge Young beseeched the federal judiciary to recognize the crucial loss that the dying jury represents. "Our willingness, as a society, to drift from the use of juries reflects a failure in the understanding of the jury's essential function in our American democracy . . . . It is in fact, the most vital expression of direct democracy in America today." *Id.* at 32.

57. Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis No. 458 at 3 (Nov. 1, 2002) *at* www.cato.org/pubs/pas/pa-458es.html (on file with the University of Michigan Journal of Law Reform) [hereinafter *Misguided Guidelines*].

58. Stephen Breyer, *The Federal Sentencing Guidelines And The Key Compromises On Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988) [hereinafter Breyer I].

59. *Id.* at 5; *see also* Blakely v. Washington, 124 S.Ct. 2531, 2544 (2004) (O'Connor, J., dissenting).

60. *See generally* KATE STITH AND JOSE A. CABRANES, FEAR OF JUDGING 9–29 (The University of Chicago Press 1998) (describing pre-guideline judicial discretion in sentencing).

61. *See id.* at 9; *see also* MICHAEL TONRY, SENTENCING MATTERS 9 (Oxford University Press 1996) (noting that "proceduralist" sought to reform the pre-guideline sentencing system by making decision makers "more accountable" and subject to "review procedures").

62. *See* Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 29 (Spring 1999).

ties in sentencing decisions.[63] Not only were defendants who were committing the same crime subject to vastly different lengths of incarceration, minorities were seemingly sentenced more harshly than their white counterparts.[64] Unchecked judicial discretion was viewed as the cause for the differences.[65]

In response to these reports, Congress enacted sweeping sentencing reform that dramatically altered the way in which defendants convicted in federal court were sentenced.[66] The Sentencing Reform Act of 1984[67] sought to achieve certainty and fairness in the federal sentencing process by eliminating "unwarranted disparities among sentences for similar defendants committing similar offenses."[68] Congress determined that by "guiding" judicial discretion, it could decrease if not eliminate sentencing disparity.[69]

Congress created the United States Sentencing Commission, an independent agency housed in the Judicial Branch, and delegated to it the responsibility of promulgating the guidelines.[70] The transfer of formal sentencing authority from federal judges to the Sentencing Commission has been described as the "most significant development in judging in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure."[71] The new regime replaced the long-standing tradition that afforded judges broad discretion to determine criminal sentences within statutory limits.[72] Despite the Commission's use of the term

63. *Id.* (describing "experiments" and research that revealed disparities in sentencing); *but see* Stith & Cabranes, *supra* note 60, at 106–112 (questioning the validity of pre-guideline disparity research).

64. Breyer I, *supra* note 58, at 4–6; Melissa M. McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. L. J. 321, 324–325 (1990) (discussing pre-guideline disparities).

65. Breyer I, *supra* note 58, at 5.

66. *See* The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017–34 (codified at 28 U.S.C. §§ 991–998 (2003)).

67. Pub. L. No. 98-473, Title II, ch. 2, § 212(a)(2), 98 Stat. 1987, 1993–94, 1999–2000 (codified at 18 U.S.C. § 3563(b)).

68. STITH & CABRANES, *supra* note 60, at 2; *see also* S.Rep.No. 225, 98th Cong. 1st Sess. 52, 56 (1984) .

69. Breyer I, *supra* note 58, at 5.

70. *See* 28 U.S.C. § 991 (2001).

71. STITH & CABRANES, *supra* note 60, at 2.

72. *See* David M. Zlotnick, *The War Within The War On Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 216–17 (Winter 2004).

"guidelines," the sentencing rules it issued were binding on the federal judiciary.[73]

Criminal defendants challenged the institution of the guideline system, claiming that the creation of the Sentencing Commission violated the separation of powers.[74] In *Mistretta v. United States*,[75] the Supreme Court rejected this contention and, at least temporarily, put to rest any doubts about whether the delegation of sentencing authority to an independent agency housed in the Judicial Branch violated separation of powers.[76]

B. Application of the Sentencing Guidelines

The Court's decision in *Mistretta* did not silence the sentencing guidelines' critics, however.[77] Jurists applying the guidelines denounced that sentencing had been reduced to a mechanistic process.[78] One district court described the guidelines as a "wholly mechanical sentence computation which desensitizes those associated with it, and converts the sentencing proceeding . . . to a mathematical and logistical exercise."[79] The critics also complained that the promulgation of the guidelines resulted in a radical shift in the power structure of federal criminal justice.[80] The abatement of judicial discretion in sentencing served to expand the authority of prosecutors at almost every point of the process.[81] Judges denounced the loss of what they deemed to be judicial discretion in sentencing as a violation of separation of powers.[82] Although rarely

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73. *See* 18 U.S.C. § 3553(b)(2000); Mistretta v. United States, 488 U.S. 361, 427 (1989)(Scalia, J. dissenting)(referring to the Sentencing Commission as a "junior varsity" Congress), *abrogated by Booker*, 125 S. Ct. at 738.

74. *See, e.g.*, United States v. Frank, 864 F.2d 992, 1013 (3d Cir. 1988); Gubienso-Ortiz v. Kanahele, 857 F.2d 1245, 1251 (9th Cir. 1988); United States v. Dahlin, 701 F.Supp. 148, 148 n.2 (N.D.Ill. 1988)(finding the guidelines unconstitutional on multiple grounds); United States v. Richardson, 690 F.Supp. 1030, 1032 (N.D.Ga. 1988).

75. 488 U.S. 361 (1989).

76. *Id.* at 390.

77. *See* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236, note 91–97 (2004).

78. *See* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 366 (1992).

79. *Misguided Guidelines*, *supra* note 57, at 13.

80. STITH & CABRANES, *supra* note 60, at 145.

81. *Id*; *see also* Skye Phillips, *Protect Downward Departures: Congress and The Executive's Intrusion into Judicial Independence*, 12 J.L. & POL'Y 947, 974 (2004).

82. *See* Judge Louis F. Oberforder, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 16 (Winter 2003); Justice Kennedy also has been an outspoken critic of the transfer of sentencing discretion away from judges. *See* Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting 4 (Aug. 9, 2003) *at*

mentioned, the shift in the power structure also served to undermine one of the primary checks on government overreaching: the jury.

1. Mechanical Justice—As to the first complaint, the mechanical nature of the guidelines is hard to ignore. The sentencing guidelines provide a complex quantitative scheme for determining the sentence of a criminal defendant.[83] The mainstay of the sentencing guidelines is a 258-box grid called the Sentencing Table.[84] The horizontal axis of this grid, entitled "Criminal History Category," adjusts the severity of the sentence based on the offender's past conviction record.[85] The vertical axis, entitled "Offense Level," reflects a base severity score for the crime committed, adjusted for those characteristics of the defendant that the Sentencing Commission has deemed relevant to sentencing.[86] In the box at which the defendant's Criminal History Category and Offense Level intersect is the range within which the judge may sentence the defendant.[87]

Before *Booker*, a judge could depart from this range in only two circumstances.[88] The first circumstance was that in which the defendant provided substantial assistance to law enforcement authorities, with the important caveat that the prosecutor must file a motion requesting the departure.[89] The judge could not sentence the defendant to a lesser term on his own accord, nor on the defendant's motion.[90] The second situation that allowed a judge to depart from the guidelines (either up or down) was when the judge was able to demonstrate on the record that there were factors or circumstances in the case at hand that were not adequately addressed by the guidelines.[91] These were the cases deemed "outside the heartland."[92] Congress recognized that the Sentencing Commission could not anticipate every situation when formulating

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http//www.supremecourtus.gov/publicinfo/speeches/sp-08-09-03.html (on file with the University of Michigan Journal of Law Reform).

83. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2003) [hereinafter GUIDELINES MANUAL]. Section 1B1.1 describes the nine step process judges must perform to arrive at an appropriate guideline sentence. *Id.*

84. *Id.* ch. 5. pt. A; *see also* STITH & CABRANES, *supra* note 60, at 192–93 App. D (providing a flow chart depicting how federal sentences are calculated).

85. GUIDELINES MANUAL ch. 5, pt. A (2003); *see also id.* § 1B1.1(f).

86. *Id.* ch. 5, pt. A; *id.* § 1B1.1(a)–(b).

87. Ch. 5, pt. A, app. note 1.

88. *See* STITH & CABRANES, *supra* note 60, at 75–76.

89. *See* GUIDELINES MANUAL § 5K1.1; *see infra* note 142 and accompanying text.

90. *See* GUIDELINES MANUAL § 5K1.1; *id.* § 5K2.0.

91. *Id.* § 5K2.0.

92. *See* Koon v. United States, 518 U.S. 81, 98 (1996).

the Guidelines. Thus, judges were given the authority to depart from the guidelines' range where there existed an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.[93] In 2003, however, Congress severely curtailed a federal judge's ability to depart downward on this basis.[94]

2. Unchecked Prosecutorial Power—Closely tied to the mechanistic nature of the guidelines, was the way in which the sentencing scheme:

> inevitably shift[s] power toward prosecutors: Because the sentencing rules are known in advance, prosecutors may greatly influence the ultimate sentence through their decisions on charges, plea agreements, and motions to depart for substantial assistance to law enforcement authorities. Although prosecutors have always had significant discretion in charging and plea bargaining, the prosecutor's decisions on these matters have far greater significance . . . they determine not only the maximum term of a sentence . . . but in many cases, the precise range of the sentence.[95]

At each step in the criminal justice process, the prosecutors (through the sentencing guidelines) could exert an enormous amount of pressure on the defendant to waive his right to a jury trial. In the process, the prosecutor could strip the judiciary and defense counsel of any real role in sentencing and circumvent the sentencing mandates dictated by Congress.[96] More importantly,

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93. *Id.* at 92–96; *see also* 18 U.S.C. § 3553(b).

94. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21 § 401, 117 Stat. 650 (2003). The Feeney Amendment, named after its sponsor freshman Representative Tom Feeney, was attached to the popular Amber Alert bill. It made several important changes to departures under the sentencing guidelines. First, it overrules *Koon v. United States* and required *de novo* appellate review of all downward departures. *Id.* at 670. Second, it prohibited downward departures based on new grounds on remand. *Id.* at 671. Third, it required a government motion to allow the additional one level reduction for acceptance of responsibility. *Id.* Fourth, it reduced the number of federal judges on the Sentencing Commission from at least three to no more than three. Thus, federal judges will never constitute a voting majority. *Id.* at 676. In addition, passage of the PROTECT Act marked the first time that Congress bypassed the Sentencing Commission and actually wrote the guideline language. *See* Zlotnick, *supra* note 72, at 232. *See generally,* Jessica S. Intermill and William E. Martin, *Separation of Powers and the Fenney Amendment: The Constitutional Case for Judicial Discretion in Sentencing,* 27 HAMLINE L. REV. 392 (2004). Portions of the PROTECT Act were overruled by the Booker decision.

95. STITH & CABRANES, *supra* note 60, at 145.

96. *See* discussion, *infra* Part III; *see also* Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense*

however, the prosecutor's use of the guidelines could successfully block the jury as a primary structural check against government overreaching in the criminal context.

The sentencing guidelines contain both direct and indirect mechanisms to pressure the defendant to abandon his right to a jury trial. Direct mechanisms are explicit guideline provisions meant to discourage the assertion of this right, including the "acceptance of responsibility" provision, "fast track" disposition, motions for substantial assistance, and the "relevant conduct" provision.[97] Indirect mechanisms refer to the prosecutor's manipulation of the guidelines to encourage defendants to waive fundamental rights, including charge bargaining, factor bargaining, fact bargaining, and binding plea agreements.[98] Arguably, none of these mechanisms by themselves impermissibly interfere with the structural protections afforded by the jury. In combination, however, they are a powerful impediment to the check against tyranny.[99] When each of these mechanisms are taken into consideration, a defendant can often reduce her guideline calculation by six or more levels, in effect cutting her sentence by half or more.[100] For a criminal defendant, this is an offer hard to refuse.

It is unclear what effect, if any, the *Booker* decision will have on these mechanisms. For judges who adopt Judge Cassell's approach, the incentives to waive the right to a jury trial will remain largely intact. For judges who choose Judge Adelman's approach, however, the mechanisms may carry less sway in a criminal defendant's decision to forego a trial. Moreover, when Congress does address the sentencing system, it is free to maintain the mandatory nature of the guidelines that lead to sentence reductions because, according to the constitutional majority, the Sixth Amendment is only implicated by the mandatory nature of sentence enhancements.

a. Direct Mechanisms—One of the guidelines' most explicit invitations to defendants to waive their right to a jury trial is the "acceptance of responsibility" provision.[101] Pursuant to section

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Attorney Advocacy Under the Sentencing Guidelines, 92 CAL. L. REV. 425, 479 (2004) (discussing the declining utility of defense counsel).

97. *See* GUIDELINES MANUAL §§ 3E1.1, 5K3.1, 5K1.1, and 1B1.3

98. *See* discussion *infra* Part II.C.

99. As one district court judge observed: "The virtually untrammeled power over sentencing that Congress has ceded to the President's agents is today resulting—through a combination of grants for substantial assistance, lawful charge bargaining, and illegal fact bargaining—in a steady erosion of America's criminal jury system with profound and as yet unknown results." Berthoff v. United States, 140 F.Supp.2d 50, 71 (D.Mass. 2001).

100. United States v. Speed Joyeros, S.A., 204 F.Supp.2d 412, 428 (E.D.N.Y.. 2002)

101. GUIDELINE MANUAL § 3E1.1.

3E.1.1 an offender is eligible for a discount on his sentence if he "clearly demonstrates acceptance of responsibility for his offense" by "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable."[102] In practice, a defendant "clearly demonstrates" his contrition when he foregoes a trial by jury.[103] Indeed, the Application Notes state, "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."[104] If the defendant pleads guilty he is eligible for a two to three level reduction in his offense level—which can translate to a significant reduction in his ultimate sentence.[105]

Like acceptance of responsibility, the guidelines' Early Disposition Program provides defendants with a sentence discount for up to a four level reduction in their base offense level if they waive their rights to an indictment, trial, and appeal.[106] A fast track plea

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102. *Id.* app. note 1(a).

103. *See* United States v. Green, No. 02-10054, 2004 WL 1381101, at * 8 (D.Mass. June 18, 2004) ("What we mean by acceptance of responsibility is simply the discount offered for pleading guilty (earlier is better), thus saving the Department the trouble, expense, and uncertainty of a jury trial."). The provision's title is indeed a misnomer. If the reduction was related to remorse then defendants entering Alford pleas would be ineligible per se. By entering an Alford plea, a defendant pleads guilty but affirmatively protests her factual innocence to the charged offense. It is the exact opposite of "acceptance of responsibility." Yet the reduction remains available to those who enter such a plea. *See* United States v. Harlan, 35 F.3d 176, 181 (5th Cir. 1994); United States v. Burns, 925 F.2d 18, 21 (1st Cir. 1991); United States v. Rodriguez, 905 F.2d 372, 374 (11th Cir. 1990).

104. GUIDELINE MANUAL, § 3E1.1, app. note 2.

105. *Id.* § 3E1.1. As a side note, the reduction has not just effected the assertion of the right to a jury trial. It has also impacted the Fourth Amendment right to be free from unreasonable search and seizure. *See* United States v. Gonzalez, 70 F.3d 1236, 1239 (11th Cir. 1995). For example, the Eleventh Circuit determined that a defendant who raised a Fourth Amendment challenge to the admissibility of evidence pre-trial was not eligible for the acceptance of responsibility discount. *Id.* The Court concluded that, "by challenging the admissibility of the essential evidence against him, Gonzalez attempted to avoid the determination of factual guilt and thereby escape responsibility for his crime." *Id.*

106. *See* GUIDELINE MANUAL, § 5K3.1 (allowing for a four level departure); Brief for Government at App. D, United States v. Ruiz 536 U.S. 622 (2002). Included in the government's brief was a copy of Ruiz's fast-track *Brady* waiver agreement:

> The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant. The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a

agreement may also require a defendant to waive her right to receive impeachment information relating to any informants or other witnesses, as well as the right to receive information supporting any affirmative defense the defendant may raise if the case goes to trial.[107] A fast-track disposition allows the government to accelerate the conviction process,[108] and the programs are employed mainly in judicial districts with an unusually high volume of drug and immigration offenses.[109] Unlike the acceptance of responsibility factor, the early disposition program is completely in the hands of the prosecutor.[110] The program is available in a select number of districts, and the prosecutors, not the guidelines, dictate what is necessary to obtain a recommended departure.[111]

Substantial assistance motions provide criminal defendants with another incentive to plead guilty to obtain reduced sentences. Section 5K1.1 of the sentencing guidelines states: "Upon a motion by the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."[112] While federal judges have the ultimate say as to

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defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

Id.

107. *See* United States v. Ruiz, 536 U.S. 622, 624 (2002). According to the Supreme Court, "[t]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *Id.* at 623. The Court rejected the Ninth Circuit's contention that a defendant could not voluntarily and knowingly waive her right to a jury trial without receiving exculpatory impeachment information. *Id.* at 629.

108. See United States v. Banuelos-Rodriguez, 215 F.3d 969, 972 (9th Cir. 2000) (noting that the fast-track programs allows the government to secure a large number of convictions with relatively little use of resources); see also United States v. Estrada-Plata, 57 F.3d 757, 759 (9th Cir. 1995) (describing the fast-track program in the Southern District of California).

109. See United States Sentencing Commission, Report to Congress: Downward Departures From the Federal Sentencing Guidelines, Pub. L. No. 108-21, October 2003, at 63–64, available at http://www.ussc.gov/departrpt03/departrpt03.pdf (on file with the University of Michigan Journal of Law Reform) [hereinafter Report to Congress]. The Department of Justice indicated that the programs exist in some form in one half of the 94 judicial districts. *Id.*

110. *Id.* at 14 (describing the Attorney General's program).

111. *Id.* at 15. But see Michael M. O'Hear, Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure, 27 HAMLINE L. REV. 358, 359 (2004) (lauding the early disposition program because it allows federal sentencing guidelines to be adapted to local needs and values).

112. GUIDELINES MANUAL § 5K1.1

whether and to what degree a departure should be granted,[113] judicial discretion is not triggered until the government makes a motion.[114] By implication, the departure is only available to those who plead guilty. The 5K1.1 motion is an extremely powerful incentive for a defendant to waive his constitutional guarantees because it allows a court to sentence *below* the guideline range.[115] Utterly within the Department's control, substantial assistance motions are the major ground for downward departures from the guidelines.[116] It does not appear that Booker will alter the strength of this provision for prosecutors. While it seems that a judge may consider a defendant's cooperation as a factor in sentencing even in the absence of a government motion, it is unlikely that a judge will be able to go below a *statutory* mandatory minimum without a motion from the government.

Finally, the focus of the guidelines on "real offense" sentencing has had a significant impact on a criminal defendant's decision whether to seek a trial by jury. Under the guidelines, a defendant's sentence is not based solely on the criminal conduct for which she was arrested, but also on any other "relevant conduct" presented by

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113. Given the almost unanimous disregard for the sentencing guidelines among the federal judiciary, federal judges rarely miss an opportunity to depart downward. See Tonry, *supra* note 61, at 75 (describing judicial reaction to the guidelines).

114. See United States v. Romolo, 937 F.2d 20, 24 (1st Cir. 1991). A defendant can challenge the government's decision not to make a motion under § 5K1.1. See Wade v. United States, 504 U.S. 181, 185–86. However, a defendant is entitled to relief only if the prosecutor's motive is animated by an unconstitutional or other impermissible motive, or where there is government misconduct or bad faith. *See id.* Thus, any "discretion" available to judges is, in many respects, illusory.

115. See Melendez v. United States, 518 U.S. 120, 131 (1996). Substantial assistance motions have been called "a significant source of hidden sentencing." Honorable Patti B. Saris, Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 SUFFOLK L. REV. 1027, 1045 (1997). "Because of the fair concern about a cooperating defendant's safety, many plea agreements are impounded, and sentencing hearings based on cooperation are often closed to the press and the public." *Id.* at 1047. There is virtually no appellate review of most downward departure decisions pursuant to a 5K1.1 motion. See, e.g., United States v. Nesbitt, 90 F.3d 164, 166 (6th Cir. 1996) (stating that defendant may not appeal the extent of the district court's departure); United States v. Parker, 902 F.2d 221, 222 (3d Cir. 1990) ("The circumstances in which a defendant may appeal a sentence . . . do not include situations in which a defendant is seeking an enhanced downward departure."). As one judge noted:

> [d]ownward departures based on substantial assistance motions are an invitation to unwarranted, secret sentencing disparity. There is no judicial review of the government's decision whether to file a substantial assistance motion, and as a practical matter, a sentencing court has unfettered discretion in determining the extent of downward departures.

Saris, *supra* note 115, at 1049.

116. *See* Report to Congress, *supra* note 109, at 60, 67.

the prosecutor.[117] Relevant conduct includes any acts related to the crime of conviction, including all reasonably foreseeable behavior, and even those acts that were not part of the underlying crime but were connected to "the same course of conduct or common scheme or plan."[118] There are few limits placed on what information a prosecutor can present concerning the background, character, or conduct of a defendant for a sentencing court to consider in imposing a sentence.[119] Judicial findings concerning relevant conduct can have a significant effect on a defendant's sentence. Such conduct need only be proven by a preponderance of the evidence, may be based on hearsay, and can include acts for which the defendant was acquitted.[120]

The case of Vernon Watts is a chilling example of the pitfalls of the relevant conduct provision.[121] Watts was arrested after police detectives discovered cocaine in his kitchen cabinet and guns and ammunition hidden in his bedroom closet.[122]

> A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission Guidelines Manual § 2D1.1(b)(1) (Nov. 1995)(USSG).[123]

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117. GUIDELINE MANUAL § 1B1.3(a); 18 U.S.C. 3661 (2003). *See generally* Federal Criminal Procedure Committee of the American Trial Lawyers, *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463 (2001)[hereinafter *Proposed Modifications*]; Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (Summer 1997).

118. GUIDELINE MANUAL § 1B1.3(a)(1)(B).

119. *See* GUIDELINE MANUAL §§ 1B1.3 and 1B1.4. Section 1B1.4 states that a court "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." *See also* United States v. Baird, 109 F.3d 856, 863 (3rd Cir. 1997).

120. *See Proposed Modifications, supra* note 117, at 1464–65.

121. Watts v. United States, 519 U.S. 148 (1997).

122. *Id.* at 149.

123. *Id.* at 149–50.

The Supreme Court affirmed the enhancement, concluding that acquitted conduct can still be relevant conduct for purposes of sentencing.[124]

The lesson from this case is a sobering one: you can win at trial only if there is a complete acquittal; if you're convicted of anything, you can be punished for everything.[125] The "relevant conduct" provision of the guidelines allows prosecutors to greatly enhance the length of a sentence without being hampered by the high standard of proof present at trial.[126] If a defendant pleads guilty, he may be able to negotiate a more benign accounting of his relevant conduct, or, at the very least, counter his relevant conduct with the benefits granted those who waive their constitutional rights.[127]

After *Blakely*, it was unclear whether the relevant conduct provisions would survive a Sixth Amendment challenge. The Supreme Court made no mention of it in *Apprendi* or *Blakely*. *Watts* relied primarily upon 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[128] *Watts* did not address the Sixth Amendment, and in fact relied heavily upon a Fifth Amendment double jeopardy case, *Witte v. United States*, which held that the use of relevant conduct to enhance a sentence does not violate the Double Jeopardy Clause.[129] Justice Scalia, the author of the majority opinion in *Blakely*, wrote a concurring opinion in *Watts*.[130] In his concurrence, he observed that if the courts or Sentencing Commission were dissatisfied with

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124. *Watts*, 519 U.S. at 156. *Watts* does not represent an isolated incident. A similar scenario occurred in the First Circuit. *See* United States v. Lombard, 72 F.3d 170 (1st Cir. 1995). In Maine, two defendants were acquitted of murder under state law. *Id.* at 172. They were then indicted in federal court of various counts, including conspiracy to possess a firearm in violation of the felon in possession statute. *Id.* at 173 note 1. After one defendant plead, the other was convicted by a jury. Under the sentencing guidelines, without reference to the murder, the guideline range for one of the defendants would have been roughly between 262 and 327 months under the armed career criminal statute. *Id.* at 175 note 6. However, because the federal sentencing judge found by a preponderance of the evidence that the defendant committed the murder, the defendant received a life sentence—more than he would have under state law. *Id.* at 174.

125. *See* Gerald Shargel, *Run-on Sentencing*, Slate *at* http//slate.msn.com/id/2103754 (on file with the University of Michigan Journal of Law Reform).

126. *See Proposed Modifications*, *supra* note 117, at 1464–65.

127. *See infra* Part II.C.

128. *Watts*, 519 U.S. at 151.

129. *Id.* at 152–55.

130. *Id.* at 158.

the "rules of evidence and proof established by the Constitution and law," they may make recommended changes to Congress.[131]

However, the *Booker* constitutional majority indicated that the sentence enhancement in Watts did violate the Sixth Amendment. Unfortunately, the remedial majority's opinion essentially cancelled the potency of this conclusion. The remedial majority specifically instructed judges to maintain "a strong connection between the sentence imposed and the offender's real conduct . . . ."[132] Under the *Booker* sentencing regime, a judge will be free to enhance a defendant's sentence based on facts not found by a jury nor admitted by the defendant. Thus, there remains the threat that a defendant could be acquitted of conduct and then sentenced based on that conduct.

b. Indirect Mechanisms—Charge bargaining, factor bargaining, fact bargaining, and binding plea agreements are tools used by prosecutors to encourage defendants to waive their right to a jury trial. Each represents an enormous incentive to plead guilty because not only can they reduce the guideline sentence range, they can also circumvent the mandatory minimum created by Congress. It is unlikely that *Booker* will have a significant effect on these manipulations, and in fact may actually enhance their effectiveness. Prosecutors, intent on maintaining the power the mandatory guidelines provided them, are likely to turn to these remaining bargaining chips.

The most traditional of the Department's bargaining chips is so-called "charge bargaining": the ability to drop charges at will. This has always been the prosecutor's prerogative.[133] A prosecutor has broad discretion to decide what charges to bring and whom to charge.[134] The prosecutor exerts pressure on the defendant by bringing a multi-count indictment and then trading away charges or counts more difficult to prove, in return for a guilty plea to other counts or lesser charges.[135] Charge bargaining is often used to obtain sentencing outcomes below the otherwise applicable sentencing guideline range.[136]

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131. *Id.*

132. *Booker*, 125 S. Ct. at 757.

133. *See* Wayte v. United States, 470 U.S. 598, 607 (1985).

134. *Id.*

135. *See* United States v. Green, No. 02-10054, 2004 WL 1381101, at *6 (D.Mass. June 18, 2004).

136. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 62 (2000).

The recent case of Lea Fastow, wife of former Enron finance chief Andrew Fastow, shows the significant effect of charge bargaining on a criminal defendant's final sentence. Ms. Fastow was originally charged with six felony counts related to her role in the Enron debacle, which carried the potential for several years in prison.[137] However, she reached a plea agreement under which she would serve only five months in prison.[138] The sentencing judge rejected the plea because he considered the sentence too lenient.[139] The Department of Justice then simply dismissed the original indictment and replaced it with a single misdemeanor tax charge to which Ms. Fastow plead guilty, resulting in a maximum sentence of twelve months.[140] The sentencing judge rebuked the Department of Justice for its actions, noting that it was "a blatant manipulation of the federal justice system."[141]

The promulgation of the sentencing guidelines also spawned a new type of bargaining: "factor bargaining." In guideline factor bargaining, the government stipulates in the plea agreement that it will either not oppose an adjustment based on a particular guideline factor, or it will actively support such an adjustment.[142] This occurs most frequently in the context of the role-in-the-offense adjustment.[143] Typically, the presentence report and the offense description suggest that the defendant should be subject to an aggravating role adjustment as an organizer, leader, manager, or supervisor of the criminal activity.[144] In such cases, the plea bargain will contain an agreement that the prosecutor will not recommend an aggravating role adjustment.[145] In other cases in which the presentence report and the offense description provide no evidence that the defendant played a mitigating role, the plea bargain nonetheless contains an agreement to recommend a two to four level

137. Mary Flood & Clifford Pugh, *Lea Fastow Expresses 'Regret' at Sentencing*, HOUSTON CHRONICLE, May 7, 2004, at 19, *available at* 2004 WL 57827485.

138. John R. Emshwiller, *Executives On Trial*, WALL ST. J., May 7, 2004, at C3, *available at* 2004 WL-WSJ 56928436.

139. *Id.*

140. Carrie Johnson, *Lea Fastow Sentenced to 1-Year Term*, WASH. POST, May 7, 2004, E01 *available at* 2004 WL 74485894.

141. *Id.*

142. Stephen Schulhofer & Illene H. Nagel, *Plea Negotiations, Under The Federal Sentencing Guidelines: Guideline Circumvention And Its Dynamics In the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1293 (1997) [hereinafter *Guideline Circumvention*].

143. Illene H. Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 547 (1992) [hereinafter *A Tale of Three Cities*].

144. *Id.*

145. *Id.*

reduction on the grounds that the defendant was a minor participant in the criminal activity.[146]

Because factor bargaining generally reduces a defendant's ultimate sentence, *Blakely* did not interfere with its use. In fact, *Blakely* was more likely lead to an increase in factor bargaining.[147] Prosecutors intent on maneuvering around *Blakely* negotiated any sentencing factor that raised a defendant's sentence above the statutory maximum.[148] Current trends suggest that prosecutors will include a myriad of factors in the original indictment, negotiate a plea agreement, withdraw the original indictment, and then simply re-indict consistent with the plea agreement.[149]

It is uncertain whether *Booker* will result in a decrease in factor bargaining. While the remedial majority instructed judges to "consider guideline ranges" when imposing a sentence, it is unclear whether judges will continue to abide by the upward and downward adjustments warranted by the myriad of sentencing factors contained in the Guidelines. It appears that judges will still calculate a sentence using the Guidelines and then, depending on their interpretation of *Booker*, raise or lower that sentence using their discretion. Thus, the government and defense counsels' presentation of the relevant sentencing factors will still play a significant role in determining a defendant's ultimate sentence.

The guidelines have also sparked "fact bargaining." Fact bargaining is the process whereby the prosecutor fails to report to the probation officer and the court relevant evidence that may affect the guidelines calculation.[150] By failing to report certain facts, the prosecutor can reduce the guideline range to secure a sentence to which she and defense counsel have agreed.[151] One study suggests that fact bargaining occurs in up to one third of plea bargains,[152] occurring most often with respect to drug quantity or type, or to

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146. *Id.* at 547–48.

147. *See* Memorandum From James Comey, Dep. Atty. Gen. To All Federal Prosecutors, *Departmental Legal Positions and Policies in Light of* Blakely v. Washington (July 2, 2004) *available at* http//sentencing.typepad.com/sentencing_law_policy/files/dag_blakely_memo_7204.pdf (on file with the University of Micigan Journal of Law Reform).

148. *See* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 Fed. Sentencing Rep. 315, 320 (2004) *available at* http://ssm.wm/abstract=570161 (on file with the University of Michigan Journal of Law Reform).

149. *Id.*

150. *See* STITH & CABRANES, *supra* note 60, at 132.

151. United States v. Berthoff, 140 F.Supp.2d 50, 63 (D. Mass. 2001).

152. *See Guideline Circumvention, supra* note 142, at 1292; *see also* United States v. Lawson, 751 F.Supp. 1350, 1354 note 2 (N.D. Ind. 1990)(indentifying a study in which judges reported observing fact bargaining in 73% of guideline cases).

dollar amount in economic crimes.[153] The prosecutor and defendant stipulate to a factual scenario different from reality to control not only the sentencing range but the applicable mandatory minimum. Fact bargaining is explicitly prohibited by the sentencing guidelines,[154] and it is a fraud on the court.[155]

Like factor bargaining, fact bargaining will likely continue unabated after *Booker*. According to the remedial majority, judges are still to engage in real offense sentencing.[156] Thus, the relevant facts as presented by the prosecutor and defense counsel and described in the presentence report will still play a significant role in sentencing.

The binding plea agreement has taken on new importance under the sentencing guidelines. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(c), the Department of Justice may "agree [with the defendant] that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply."[157] Once the court accepts the plea agreement, the Department's recommendation is binding.[158]

Binding plea agreements are yet another incentive to plead guilty. The Department of Justice can use them to grant extraordinary benefits not accorded to other defendants tendering pleas, or perhaps to evade the established guideline sentencing range or the congressionally mandated minimum sentence.[159] Binding plea agreements have become a powerful tool in circumventing the sentencing guidelines. The Sentencing Commission recently reported to Congress that an "overwhelming majority (91.2%) of plea

153. *See A Tale of Three Cities*, *supra* note 143, at 547.

154. GUIDELINES MANUAL § 6B1.4(a)(2).

155. *See Berthoff*, 140 F.Supp.2d at 62–63; Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Hath Wrought*, 10 CRIM. PRAC. MAN. (BNA) 405, 405 (Oct. 9, 1996) ("[The] widespread use of fact bargaining, and the lying to the court that is inevitable with the frequent use of such bargaining, is the dirty little secret in the prosecution of federal criminal cases.").

156. *Booker*, 125 S. Ct. at 757 ("The other approach, which we now adopt, would (through severance and excision of the two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.").

157. Fed. R. Crim. P. 11(c)(1)(c)(2003).

158. *Id.*

159. *See* United States v. Aqua-Leisure Indus., Inc., 150 F.3d 95, 96 (1st Cir. 1998) (noting that the binding plea agreements provided for sentences well below what could have been imposed under the statutes and sentencing guidelines); *see also* Report to Congress, *supra* note 109, at 46.

agreements in the sample" were binding plea agreements[160] and that these account for nearly twenty percent of all downward departures from the appropriate guideline range.[161] Judges, except in rare circumstances, are likely to accept them, especially if the ultimate sentence accords with a particular judge's sense of justice.[162] Under *Booker*, binding plea agreements may take on even more significance. While prosecutors may no longer be able to dictate the sentencing range, they can still negotiate a sentence through the binding plea agreement.

C. Plea Bargaining

An overview of plea bargaining helps further the understanding of the sentencing guidelines' effect on the jury.[163] Plea bargaining is essentially an arrangement between a prosecutor and an accused offender where each party exchanges something of value with the other.[164] A criminal defendant provides something of value to the prosecutor (i.e., a guilty plea or inculpatory information on another's criminal activity) in exchange for receiving less punishment than if she went to trial and was convicted.[165]

Since the inception of the sentencing guidelines, the federal criminal justice system has become predominantly a plea bargaining institution.[166] One federal judge has observed that the key to

160. *Report to Congress*, *supra* note 109, at 46.

161. *Id.*

162. *See* United States v. Green, No. 02-10054, 2004 WL 1381101, at *8 (D.Mass. June 18, 2004).

163. Plea bargaining is a complex and oft-debated practice and it is beyond the scope of this Article to enter that debate. But for a helpful historical perspective of plea bargaining, see generally Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12–16 (1979); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247, 247–48 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 261–69 (1979).

164. *See* Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 755 (1998); Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93 note 1 (2003).

165. Christopher, *supra* note 164, at 755; Guidorizzi, *supra* note 164, at 755.

166. 2002 SOURCEBOOK, *supra* note 17, at 20. Figure C reveals a stead increase in guilty pleas between 1998 and 2002. In 2002, 97.1 percent of criminal defendants plead guilty compared to 93.6 percent in 1998. The rise in plea bargains is even more striking when the numbers are compared to pre-Guideline percentages. The Administrative Office reports that in 1986, 81 percent of criminal defendants plead guilty. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, CRIMINAL DEFENDANTS DISPOSED OF BY METHOD OF DISPOSITION 1971–2003, Table 3.5 *available at* http//www.uscourts.gov/judicialfactsfigures/table3.05 (on file with the University of Michigan Journal of Law Reform).

understanding current federal sentencing policy under the guidelines is to recognize that,

> [t]he Department [of Justice] is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.[167]

Despite, or perhaps because of, the extensive use of plea bargaining, scholars and policymakers debate its propriety. Scholars have argued for years that the system is inherently flawed and unfair for defendants.[168] Its effect on the jury system has not gone unnoticed.[169] Plea bargains have been described as "invading barbarians" that "bloodlessly and clandestinely swept across the penal landscape and dr[ove] our vanquished jury into small pockets of resistance."[170]

For better or worse, the Supreme Court has accepted plea bargains as a legitimate, essential, and desirable part of the criminal justice system.[171] Throughout its plea bargain jurisprudence, the Court has consistently rejected the argument that the Sixth Amendment forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of the right to a jury trial.[172] Under the Court's framework, it is appropriate for a defendant who chooses to forego his right to a jury trial to receive a lighter sentence than a defendant who is convicted by a jury.[173] While the Court recognizes that "the imposition of these difficult choices" has a "discouraging effect on the defen-

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167. United States v. Green, No. 02-10054, 2004 WL 1381101, at *2 (D.Mass. June 18, 2004). The Court's statement poses an interesting question regarding who is guarding the public's interest in criminal trials. Given the Department of Justice's enormous reliance on plea bargaining, it is unlikely that it is acting as a guardian of the public interest in criminal jury trials as the Supreme Court has assumed. *See, e.g.*, Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 384 (1979).

168. *See* Guidorizzi, *supra* note 164, at 768.

169. *See* Gertner, *supra* note 23, at 431; *see also* Berthoff v. United States, 140 F.Supp.2d 50, 67, note 31 (D.Mass. 2001).

170. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L. J. 857, 859 (March 2000).

171. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 32–33 (1973); Santobello v. New York, 404 U.S. 257, 260–61 (1971).

172. *See* Crampton v. Ohio, 402 U.S. 183, 213 (1971)("The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow .... Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not always forbid requiring him to choose.")

173. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977).

dant's assertion of his trial rights," it accepts them as an "inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[174]

Courts and commentators have questioned whether the sentencing guidelines have corrupted the plea bargaining system to such an extent that it is unconstitutional.[175] Admittedly, the sentencing guidelines have exacerbated the acknowledged flaws in the pre-existing plea bargaining system.[176] Under the previous indeterminate sentencing scheme, prosecutors and defendants could barter for a lighter sentence, but ultimately the sentencing authority rested with the judge.[177] Thus, while prosecutors could dangle the carrot of a lighter sentence or wield the stick of a significant length of incarceration, they could only recommend, they could not pronounce.[178] Under the pre-*Booker* sentencing system, the prosecutor could predict with some certainty a defendant's potential sentence, and more troubling, could influence that sentence greatly.[179] While adding certainty to the mix, the pre-*Booker* sentencing scheme placed an enormous amount of power in the prosecutor's hands.[180] As the statistics show, prosecutors wielded that power with incredible success. The prosecutor's power was enhanced by the court's crowded criminal dockets. Judges, anxious to clear their dockets, had little incentive to question a bargain to which both parties apparently agreed.[181]

The Supreme Court accepted the sentencing guideline's effect on plea bargains with relative ease.[182] It was unmoved by the "gross disparity" in the relative bargaining power of the parties to the plea agreements, stating that plea offers are "indistinguishable from any number of difficult choices that criminal defendants face

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174. *Chaffin*, 412 U.S. at 31

175. Rachel E. Barkow, *Recharging the Criminal Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 96–97 (2003); *see also* United States v. Joyeras, S.A., 204 F.Supp.2d 412, 429 (E.D.N.Y. 2002).

176. Stephen J. Schulhofer & Illene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 232 (1989).

177. *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver: *Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1116–1119 (2003)(discussing the judge's role in an indeterminate sentencing scheme).

178. *See id.*

179. *See infra* note 127 and accompanying text.

180. *See id.*

181. *See* United States v. Fiterman, 732 F.Supp. 878, 882 (NOTED. Ill. 1989) ("Congested trial calendars provide a natural disincentive for judges to scrutinize plea bargains and possibly upset guilty pleas.")

182. United States v. Mezzanatto, 513 U.S. 196, 209 (1995).

everyday."[183] It dismissed the potential for abuse of prosecutorial bargaining power under the sentencing guidelines as an insufficient basis for foreclosing negotiation altogether.[184] Instead, it suggested that the appropriate response is to permit case-by-case inquiries into whether waivers were the product of fraud or coercion.[185]

But the Supreme Court's waiver jurisprudence overlooked the sentencing disparity that occurred under the pre-*Booker* sentencing guidelines. In *United States v. Rodriguez*,[186] for example, the defendants' decisions to waive or not to waive their rights to a jury trial resulted in a 700 percent difference in sentence length. In *Rodriguez*, the government indicted six defendants, charging all of them with engaging in a conspiracy to distribute crack cocaine.[187] The district court found that this conspiracy was responsible for the distribution of approximately 5,000 grams of crack cocaine.[188] At sentencing, the district court held the two defendants who elected to go to trial accountable for all 5,000 grams of cocaine. In contrast, the three defendants who plead guilty were only held responsible for the amount of drugs each had personally handled (between 5 and 20 grams). The disparity in drug quantity led to a striking disparity in sentencing. The sentences for the three defendants who plead guilty ranged from time served to 60 months of imprisonment.[189] The sentences for the two defendants who asserted their right to a jury trial ranged from 235 months to 262 months of imprisonment.[190] Based on the Supreme Court's waiver jurisprudence, the appellate court concluded that the sentencing disparity was not an unconstitutional burden on an individual's right to a jury trial.[191]

As *Rodriguez* reveals, the mandatory sentencing guidelines created compelling incentives to plead guilty. In operation, the guidelines allowed for enormous sentencing disparities based entirely on an individual's decision to maintain his innocence until the government could prove his guilt to a jury beyond a reasonable doubt.[192] It is unlikely that *Booker* will alter this dynamic. Arguably,

183. *Id.* at 209–10.
184. *Id.* at 210.
185. *Id.*
186. 162 F.3d 135 (1st Cir. 1998).
187. *Id.* at 140.
188. *Id.* at 150.
189. *Id.*
190. *Id.*
191. *Id.* at 152.
192. *See Berthoff*, 140 F.Supp.2d 50, 70 (D.Mass. 2001) (identifying a 700 percent difference in the sentences of a defendant who plead guilty and a co-defendant who went to trial).

the federal judiciary is as addicted to plea bargaining as the Department of Justice. Federal judges have come to rely on the speedy disposition of their criminal dockets through negotiated plea bargains. Additionally, the Justices recognized that even under a discretionary system, "[p]rosecutors and defense attorneys would still resolve the lion's share of criminal matters through plea bargaining, and plea bargaining takes place without a jury."[193] Moreover, many federal judges have never sentenced without the guidelines as a marker. It is unlikely that these judges will alter their sentencing habits so dramatically that the disparities will disappear or even be significantly reduced.

The effect of the sentencing guidelines on the jury is obvious. Given the option between time served and over 20 years in prison, a defendant's choice is easy. Congress created a sentencing system that provides prosecutors tremendous leverage in the plea bargaining process,[194] forced criminal defense attorneys to adopt the role of transactional attorneys rather than zealous advocates,[195] and virtually eliminated the criminal jury as a viable check on government overreaching.[196]

Unfortunately, *Booker* did nothing to enhance the role of the jury. At most, it transferred unchecked power from the hands of the prosecutor to the hands of individual judges. Ironically, when a judge is bound by the Guidelines, the Constitution requires that the jury play a prominent role in the sentencing. However, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[197]

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193. *Booker*, 125 S. Ct. at 758 .

194. *See infra* note 127 and accompanying text; *see generally* William T. Powell and Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?* 97 W. VA. L. REV. 373, 394–95 (1995) (discussing how the sentencing guidelines have provided the prosecutor with almost complete control over the sentencing).

195. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 479 (2004) ("Unfortunately, in criminal courts today the hands of defense counsel are often tied. The Guidelines have fostered a regime under which a zealous lawyer can be as harmful to a defendant's case as an underzealous one.").

196. *See* 2002 SOURCEBOOK, *supra* note 17, at 20.

197. *Booker*, 125 S. Ct. at 750.

III. THE JURY'S ROLE IN OUR TRIPARTITE SYSTEM OF GOVERNMENT

As is evident from the preceding discussion, the sentencing guidelines have created a structural imbalance in our system of government. The original guidelines placed a significant amount of unchecked power in the hands of the prosecutor,[198] and the post-*Booker* guidelines simply transfer some of that power to federal judges. While the intent of the guidelines was not to undermine the role of the jury, this has been the outcome. Congress, without comment by the Supreme Court, enacted a sentencing regime that essentially eviscerated the jury's structural role in our tripartite system of government.[199]

Unfortunately, jurists and scholars alike tend to view the jury solely through a Sixth Amendment lens, acknowledging its Article III origins only in passing.[200] The universal failure to recognize the jury's structural role originated in the Supreme Court's decision in *Patton v. United States*.[201] In *Patton*, the Supreme Court made the thinly supported assertion that the jury provision in Article III and the right to a jury in the Sixth Amendment were identical—both relating to the accused's right to a jury trial.[202] Since then, the idea that the jury is solely an individual right that can be circumvented by a defendant's knowing and intelligent waiver has become ingrained in our collective constitutional conscience. Jurists accept its validity as readily as sailors once accepted the pronouncement that the earth was flat.

Our reluctance to let go of this vision of the jury is, in part, fueled by the erroneous belief that if we accept the structural role of the jury, then the individual right to a jury trial will become an imperative rather than a privilege.[203] Such a belief conjures up the specter of criminal defendants unable to avoid a trial even when they willingly admit their guilt. But the Sixth Amendment right to

198. *See* discussion *supra* Part II.B.

199. *See* discussion *supra* Part II.

200. While most opinions or articles note the reference to the jury contained in Article III, rarely is it discussed as distinct from the right to a jury trial described in the Sixth Amendment. *See, e.g.*, United States v. Mezzanato, 513 U.S. 196, 209–10 (1995); Corbitt v. New Jersey, 439 U.S. 212, 218–19 (1978); Patton v. United States, 281 U.S. 276, 297 (1930); *see generally*, Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 850–51 (2003) (discussing the jury trial as a structural check in the context of the Sixth Amendment); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363 (Fall 2000) (discussing § 3E1.1 on the Sixth Amendment right to a jury trial).

201. 281 U.S. 276 (1930).

202. *Id.* at 298.

203. *Id.*

a jury trial can coexist with the structural role of the jury in the same way that the right to an independent and impartial adjudicator can coexist with the structural role of the independent judiciary.[204] A criminal defendant's ability to waive his Sixth Amendment right to a jury trial is not affected by the recognition that the jury is part of our tripartite system of government, anymore than a civil litigant's ability to waive his right to an independent and impartial adjudicator is affected by the recognition that an independent judiciary is part of the constitutional design.[205] In the sentencing context, what *is* affected is Congress' ability to pass legislation that interferes with the jury's constitutionally assigned role to check government overreaching.

Before the structural balance can be restored, however, we must dramatically shift the way we think about the role of the jury in our system of government. It is important to distinguish the criminal jury trial referenced in Article III from an individual's right to a jury trial identified in the Sixth Amendment.[206] The former embodies the right of the people to participate in the administration of the laws and act as a check against tyranny through the institution of the jury. The latter represents an individual's right to access that institution. Because they serve two distinct purposes, the two jury provisions can and should be interpreted differently.

A. The Starting Point: Discrediting Patton v. United States

Reviewing the Supreme Court's decision in *Patton v. United States*[207] is the starting point for restoring the constitutional equilibrium. In *Patton*, the Court first addressed the jury provisions in Article III and the Sixth Amendment, discussing how they related to the ability of a criminal defendant to waive his right to a jury.[208] The Court framed the inquiry by asking: "Is the effect of the constitutional provisions in respect of trial by jury to establish a Tribunal as a part of the frame of government, or only to guarantee to the accused the right to such a trial?"[209] After a cursory review of

204. *See* discussion *infra* Part III.C and D.

205. *See infra* note 279 and accompanying text.

206. *See* discussion *infra* Part III.C.

207. 281 U.S. 276 (1930) *abrogated on other grounds by* Williams v. Florida, 399 U.S. 78 (1970).

208. *Id.* at 294–95.

209. *Id.* at 293.

English and colonial jurisprudence, the Court determined "it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused."[210] Consequently, the Court concluded that the right to trial by jury embodied in the Sixth Amendment and the criminal jury referenced in Article III were one and the same.[211]

The Court, however, made a critical error when it failed to distinguish these two jury provisions. This error is evident in the Court's comment that,

> [t]he first ten amendments and original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing .... Upon this view the constitutional provisions we conclude that article 3, s. 2 is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative.[212]

By essentially collapsing the two provisions, the Court dealt a serious blow to the jury's role in our tripartite system of government.

The Court's error can be traced to its inadequate analysis coupled with its cursory examination of the historical evidence. In rejecting the contention that the jury was part of the government structure, the Court relied on evidence that the early Americans deemed the right to a jury trial a fundamental right of the accused.[213] Based on this, the Court concluded that "the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused."[214] To bolster this conclusion, the Court pointed to the absence of support for the structural argument in historical documents, reasoning that if the Framers had intended the jury to have a place in the structure of the government, "it is strange nothing appears in contemporaneous literature or in any debates or innumerable discussions of the time."[215]

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210. *Id.* at 297.
211. *Id.* at 298.
212. *Id.*
213. *Id.* at 296.
214. *Id.* at 297.
215. *Id.*

The Court's conclusion, however, that the right to a jury trial was deemed a fundamental right of the accused does not inexorably lead to the conclusion that the Framers did not intend it to play a part in the structure of the government. The Court's reasoning rested upon the unsupported belief that if it deemed the Article III jury provision a structural check, then the right to a jury housed in the Sixth Amendment would no longer be a privilege but an imperative.[216] But the jury can serve both as a structural protection within the constitutional scheme and a safeguard to litigants' rights.[217] In fact, in another Article III context, the Court has acknowledged that an Article III structural protection can also be an independent right waivable by a litigant. Specifically, the Court has recognized that the independent judiciary housed in Article III § 1 serves a dual role—it "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . but also serves as 'an inseparable element of the constitutional system of checks and balances.' "[218] If the independence of federal judges can serve both functions, it follows that the jury can serve both functions as well.

The Court's reliance on the absence of historical evidence to support the structural argument is misplaced, if not disingenuous. There is significant historical evidence to support the idea that the jury is a structural protection included within the Judicial Branch. Many scholars, foremost among them Professor Akhil Amar, contend that the Framers gave the criminal jury a prominent role in protecting liberty.[219] According to these scholars, the Framers perceived an inseparable connection between liberty and the jury as an "institution."[220] As a result, the Framers included the jury in the

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216. *Id.* at 298.

217. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

218. *Id.* at 850.

219. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 84 (Yale University Press 1998); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 25 (Yale University Press 2003); Edward J. Erler, *The Constitution and Separation of Powers, in* THE FRAMING AND RATIFYING OF THE CONSTITUTION 153 (Leonard W. Levy et al. eds, 1987). Erler contends that the original view of the judiciary in Montesquieu's separation of powers theory was that the "power of judging was to be exercised by juries drawn periodically from the people, and in the exercise of the jury function the people themselves were to be judges." *Id. Barkow, supra* note 175, at 48 (discussing jury nullification); George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused,* 74 NEB. L. REV. 804, 814 (1995); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform,* 44 ALA. L. REV. 441, 470 (1997).

220. *See* Smith, *supra* note 219, at 475 ("An advantage of the jury that is closely related to its status as an institution expressing popular sovereignty is the functioning of the jury as a check on potential governmental abuse."); Harris, *supra* note 219, at 807 ("Fear of unchecked power, so typical of our State and Federal Governments in other respects, found

plan of the convention, stating that the "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[221]

The importance of juries in criminal cases was one of the few things on which the competing factions at the Constitutional Convention agreed. Both Federalist and Anti-Federalist believed that the trial by jury was one of the best ways to secure the rights of the people.[222] In Federalist No. 83, Alexander Hamilton described this unanimous support:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[223]

The inclusion of the jury as a structural component of Article III made good sense and fit neatly within the conceived structure of checks and balances.[224] In his book *The Bill of Rights: Creation and Reconstruction*, Professor Amar describes the jury as providing both an intra-branch check against the arbitrary actions of federal judges and an inter-branch check against the oppressive conduct of the other two branches.[225] Thus, in their role as guardians of liberties, criminal juries were deemed to be part of the Judicial Branch.[226]

The Framers saw the jury's role as an intra-branch check against judicial overreaching as similar to the bicameral requirements of the Legislative Branch.[227] Contemporaneous writings compared the

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expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.").

221. U.S. CONST. art. III, § 2 cl. 3.

222. THE FEDERALIST No. 83 (Alexander Hamilton) (J.E. Cooke ed., 1961); Amar, *supra* note 231, at 84.

223. THE FEDERALIST No. 83, at 562.

224. *See* Jonakait, *supra* note 219, at 26; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in the this insistence upon community participation in the determination of guilt or innocence.")

225. *See* Amar *supra* note 219, at 87.

226. *Id.* at 95; *see also* Barkow, *supra* note 175, at 57–58; Bruce Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution*, 13 WIDENER L. J. 11, 30 (2003).

227. *Id.* at 94–95; *see also* Jonakait *supra* note 219, at 24–25 ("Americans [gave] two rights preeminent importance. If the rights to representation and to trial by jury were left to

judicial structure to that of the legislature, with an upper house of greater stability and experience and a lower house to represent popular sentiment.[228] Analogies between the legislature and juries abounded. The Federal Farmer wrote:

> It is essential in every free country, that the common people should have a part and a share of influence, in the judicial as well as in the legislative department. . . . The trial by jury in the judicial department, and the collection of people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.[229]

Just as the bicameral nature of the Legislative Branch was created as an internal check against legislative overreaching, the jury was placed in the Judicial Branch to serve a similar check against federal judges.[230] If judges tried to subvert the laws and change the forms of government, jurors would check them by deciding against their opinions and determinations.[231] And because juries were the voice of the people, their pronouncements were presumptively more legitimate.[232]

The Framers assumed the intra-branch check was necessary because federal judges, although protected from political pressures by Article III's tenure and salary requirements, were, in the end, government employees.[233] In the words of one Anti-Federalist, "Judges, unincumbered by juries, have been ever found much better friends to the government than to the people."[234] The Framers identified the jury as playing a major role in protecting ordinary citizens against judicial participation in governmental oppression.[235] Jurors would be drawn from the community and were not permanent government officials on the government payroll.[236] The

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operate in full force, they would shelter nearly all the other rights and liberties of the people.").

228. Amar, *supra* note 219, at 95; Barkow, *supra* note 175, at 57 (observing that the Framers compared the jury's power to that of a voter).

229. Amar, *supra* note 219, at 94.

230. *See* Jonakait *supra* note 219, at 26, 27

231. *See* Amar *supra* note 219, at 100.

232. *See* Jonakait *supra* note 219, at 28.

233. *Id.* at 26. "[T]he Constitution did not change human nature; instead, it recognized it and tried to protect against its excesses." *Id.*

234. Amar, *supra* note 219, at 84.

235. Jonakait, *supra* note 219, at 27.

236. Amar, *supra* note 219, at 84.

inclusion of the jury within Article III was a natural outgrowth of the Framers' experience that judges, acting without juries, would participate in the oppression of the people.[237] Ironically, the *Booker* constitutional majority recognized that "[t]he Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."[238]

But the jury also served as an inter-branch check against Legislative and Executive overreaching. It could interpose itself on behalf of the people's rights by refusing to convict when the executive sought to abuse its position or when a defendant was charged under any federal law it deemed unconstitutional.[239] As Tocqueville observed, the overall jury system placed the real direction of society in the hands of the people,[240] or as a more contemporary observer recently stated,

> The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government. . . . Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed.[241]

The jury, then, provides an avenue through which the people can participate in the administration of the law and act as a check against tyranny.[242]

The perception of the jury as a structural check against tyranny was a natural outgrowth of the Framers' pre-revolutionary experi-

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237. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of a higher authority.")

238. *Booker*, 125 S. Ct. at 753.

239. Amar, *supra* note 219, at 84; Barkow, *supra* note 175, at 63–64 (discussing "jury nullification").

240. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 337–339 (Schocken 1st ed. 1961).

241. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31–32 (2003).

242. *See* Barkow, *supra* note 175, at 55–56. During the colonial period, criminal juries did provide an avenue through which the colonist expressed their disdain for British rule. Juries objected to the British parliament's Navigation and Revenue Acts by refusing to convict colonists for violation of these statutes. The juries' blatant disregard for imperial law was not a form of jury nullification but rather the People declaring a law unconstitutional. This form of local justice arose from the belief that "a jury unwilling to play a subservient role was the best shield the people had against tyranny." JOHN PHILLIP REID, IN A DEFIANT STANCE 71 (1977).

ence.[243] Before the revolution, the jury played an important role in preventing the encroachment of British law on individual rights.[244] "Colonial juries, then, acted as roadblocks to laws regarded as unjust and to judges controlled by the executive."[245] They made the enforcement of oppressive English trade and revenue laws nearly impossible by refusing to convict, and they checked the enforcement of seditious libel laws.[246] Thus, the jury was more than an individual right, it was a way for the people to express their disdain for laws they deemed unconstitutional.[247]

Creating a voice for the people in the Judicial Branch was also entirely consistent with the Framers' attempts to create a government for the people and by the people.[248] The Framers created a structure in which the Executive and Legislative Branches represented the people and were accountable to them.[249] Given the Framers' desire to create a system in which the people dominated the political landscape, it would be odd if they excluded the people from the Judicial Branch—the only unelected branch, and the branch that had the ultimate say in "what the law is."[250] Moreover, any contention that the people were not included in the Judicial Branch is contradicted by Thomas Jefferson's statement "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative."[251]

In the final analysis, *Patton* is easily discredited. Its reasoning is stunted and its historical analysis fails to account for the body of evidence supporting a contrary conclusion. And although *Patton*'s

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243. *See* JONAKAIT, *supra* note 219, at 24–25; Eben Moglen, *Consider* Zenger: *Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L REV. 1520 (1994) ("That juries provided a constitutional check on executive power was not a lesson any English-speaking person needed the Zenger case to teach—that was why English people loved juries so deeply, and why British North Americans were willing to respond with organized civil violence when jury trial was interfered with by an assertedly sovereign Parliament in the 1760s and 1770s.").

244. *See* JONAKAIT, *supra* note 219, at 24–25.

245. *See id.* at 24.

246. *Id.*

247. *See* Reid, *supra* note 242, at 71; Jonakait, *supra* note 219, at 24.

248. AMAR, *supra* note 219, at 94–95. This proposition is supported by Thomas Jefferson's pronouncement that "it is necessary to introduce the people into every department of government." *Id.*

249. *See* Erler, *supra* note 219, at 157.

250. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

251. AMAR, *supra* note 219, at 95 (quoting letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *in* THE PAPERS OF THOMAS JEFFERSON 282,283 (Julian P. Boyd ed., 1958)).

dubious value in contemporary cases appears to be entirely anchored to *stare decisis*, even this precedential value is questionable.

B. Overcoming Patton

In addition to its shaky analytical and historical foundation, *Patton*'s declaration that the two jury provisions should be interpreted identically was arguably dicta.[252] The question before the Court was a narrow one: whether a criminal defendant could waive his right to "a trial and verdict by a constitutional jury of twelve men."[253] The Court could have addressed the constitutional requirement of the *number* of jurors without commenting on the structural role of the jury. Thus, *Patton* is not an impediment to recognizing the jury as part of the structural checks and balances.

The Court's decision to delve into the structure of government appeared to be driven by the defense's argument that a constitutional jury of twelve men was a jurisdictional requirement under Article III, § 2.[254] If, as the defense contended, the numerical composition of the jury was a jurisdictional requirement, then a court was stripped of its jurisdiction if the jury was comprised of a lesser number.[255] The Court dismissed this argument and declared that the jury provision in Article III, § 2 was not jurisdictional.[256] It is at this point that the Court surmised that the Article III and the Sixth Amendment jury provisions were identical.[257] But even if the Court's declaration that Article III's jury provision was not jurisdictional is deemed essential to the ultimate holding, the Court's statement regarding jurisdiction does not undermine the concept that Article III's jury provision is a structural protection. It only stands for the proposition that a criminal defendant's decision to waive his right to a specific number of jurors does not impair the trial court's jurisdiction.[258]

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252. *Id.* at 108.
253. *Patton*, 281 U.S. at 287.
254. *Id.* at 293.
255. *Id.*
256. *Id.* at 298.
257. *Id.*
258. *Id.* at 289 ("It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he

Despite its protestations to the contrary, the *Patton* Court's decision to read Article III and the Sixth Amendment as confluent was inconsistent with the Court's previous decision in *Callan v. Wilson.*[259] In *Callan*, the Court stated that "the [Sixth] amendment was [not] intended to supplant that part of the third article which relates to trial by jury."[260] If anything, *Callan* supports the idea that Article III can be read separately from the Sixth Amendment. Although the *Patton* Court quoted this statement to support its decision to read the two provisions as coterminous, its position had the exact opposite effect, supplanting Article III's structural protections with the individual right protected by Sixth Amendment.[261] The jury's structural role in Article III was rendered ineffectual by the *Patton* Court's decision.

Patton's progeny does not create an insurmountable obstacle to re-establishing constitutional equilibrium. The case law that relies on the decision in *Patton* does so largely for *Patton*'s declaration that the Sixth Amendment right to a jury trial can be waived.[262] A large portion of these cases involve state laws.[263] While the Sixth Amendment has been held applicable to the states through the Fourteenth Amendment, the structural protections in Article III are *not* incorporated.[264] Therefore, these cases are inapposite to the underlying issue of whether the two provisions should be read in *pari materia.* At most, they provide insight into the requirements of the Sixth Amendment. The handful of cases on the federal level that have relied on *Patton* to address a sentencing issue have focused generally on the constitutional elements of a jury trial.[265] These cases do not rely on *Patton* for its discussion regarding the structural role of the jury.

In the end, *Patton* does not present a formidable obstacle to addressing the structural role of the jury. In fact, the Supreme Court

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should be tried by a jury composed of not less than twelve persons.") (quoting Thomson v. Utah, 170 U.S. 343, 350 (1898)).

259. *Callan*, 127 U.S. at 540.

260. *Id.* at 549.

261. *Patton*, 281 U.S. at 298.

262. *See, e.g.*, Singer v. United States, 380 U.S. 24, 33 (1965); Adams v. United States *ex rel*, McCann, 317 U.S. 269, 275 (1942); *In re* United States, 903 F.2d 88, 90 (2d Cir. 1990); United States v. Martin, 704 F.2d 267, 271–72 (6th Cir. 1983); Carrion v. Gonzalez, 125 F.Supp. 819, 822 (D.P.R. 1954).

263. *See, e.g.*, Kirk v. State, 22 So.2d 431, 432–33 (Ala. 1945); Blair v. State, 698 So.2d 1210, 1213 (Fla. 1997); State v. Dunne, 590 A.2d 1144, 1147 (N.J. 1991); State v. McGee, 447 S.W.2d 270, 272 (Mo. 1969).

264. *See* Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

265. *See, e.g., Singer*, 380 U.S. at 33; *Adams*, 317 U.S. at 275; United States v. Pachay, 711 F.2d 488, 494 (2d Cir. 1983) (Meskill, C.J., concurring); *Martin*, 704 F.2d at 271–72.

has, on several occasions, acknowledged the important role the jury plays in checking governmental overreaching.[266] Indeed, in *Powers v. Ohio*, the Supreme Court observed that "[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.[267] Thus, in theory, federal courts are free to treat the jury as a part of the system of checks and balances.

C. Distinguishing Article III from the Sixth Amendment

Even if one accepts that the jury provisions in Article III and the Sixth Amendment can be read differently, there still remains the question of how to distinguish them. Professor Akhil Amar has proffered one distinction, suggesting that the Article III jury clause was mandatory in nature and the Sixth Amendment was added to determine from where the jurors would be drawn.[268] According to this theory, "the clear words of Article III, mandating that 'the trial of *all* Crimes . . . *shall* be by Jury,' [are] a command no less mandatory and structural than its companion commands that the judicial power of the United States 'shall be vested in' federal courts . . . ."[269] In contrast, the Sixth Amendment refers to the accused's rights surrounding the trial by jury. For example, the accused has the right to an "impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[270] Professor Amar posits that given the difference in wording between the amendment and Article III, "perhaps the special Sixth Amendment right to a jury from the 'district' is solely the accused's, waivable at will—but the underlying mandate of the jury cannot be waived."[271]

While this Article agrees with Professor Amar's premise that the two jury provisions should be read differently, it advances a slightly

266. *See* Powers v. Ohio, 499 U.S. 400, 406–07 (1991); Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979); *Duncan*, 391 U.S. at 156.

267. *Powers*, 499 U.S. at 406.

268. AMAR, *supra* note 219, at 107 ("Thus the amendment can indeed be read as adding something new to Article III without taking anything away from the original mandate [in Article III]."); *see also id.* at 105–06 ("Note that, strictly speaking, Article III regulates venue—where the jurors will sit at trial—rather then vicinage—where the jurors will come from.").

269. *Id.* at 104–05.

270. U.S. CONST. Amend. VI; AMAR, *supra* note 219, at 105.

271. AMAR, *supra* note 219, at 106.

different distinction. This Article contends that the reference to the jury contained in Article III embodies the jury as an institution of the people. Using the bicameral analogy and the definition of jury as the democratic branch of the judiciary power, this Article asserts that the Article III use of "Jury" is a reference to the people's right to participate in the administration of the nation's criminal laws, thereby providing a structural check against government overreaching.[272] In contrast, the Sixth Amendment specifically explicates the criminal defendant's right to access a jury. While the individual right to access can be waived, the jury's structural role cannot.[273]

The distinction this Article proffers has two advantages over the current analytical framework. First, it allows the criminal defendant to waive his Sixth Amendment right to a jury trial. This allowance should allay any visions of criminal defendants being forced into trial by jury. Second, it recognizes the jury's role in our tripartite system of government. Contrary to conventional wisdom, recognizing the jury as part of the system of checks and balances will not require constitutional reordering. The jury's structural role can be incorporated into the Court's existing separation of powers analysis.

D. The Jury in the Separation of Powers Analysis

Admittedly, it is difficult to reconcile the apparent discrepancy between the ability of an accused to waive his Sixth Amendment right to a jury trial with an individual's inability to waive the structural guarantees contained in Article III.[274] The solution to this puzzle lies in the Supreme Court's separation of powers analysis. The separation of powers involves both the dispersion and blending of powers; it was designed to promote liberty by preventing the accumulation of excessive power in one branch.[275] In addressing separation of powers issues, the Court focuses on whether the challenged government conduct interferes with the carefully designed checks and balances intended to prevent the accumulation of

272. Barkow, *supra* note 175, at 56–57; *see also* Harris, *supra* note 219, at 810–11.

273. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986).

274. *Cf. id.*

275. *See* Martin Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L. J. 449, 457–465 (1991) (discussing the origins and rationale of the separation of powers theory).

power.[276] Any conduct that interferes with this design undermines the political values it was meant to foster and violates the separation of powers.[277]

The Supreme Court addressed the distinction between individual rights and structural protections when it distinguished between a litigant's interest in an impartial and independent adjudication of claims and the structural role of an independent judiciary.[278] In *Commodity Future Traders Commission v. Schor*, the Court explained that while a litigant can waive his right to an impartial adjudication, "to the extent that [the] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty."[279] Thus, when Article III structural limitations are at issue, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."[280]

In determining whether structural principles are implicated in a given case, the Court looks to whether the conduct at issue impermissibly threatens the institutional integrity of the Judicial Branch.[281] Structural principles can be undermined when Congress attempts to encroach on the power of the Judicial Branch.[282] For example, in *Northern Pipeline Construction Company v. Marathon Pipe Line Co.*, the Court addressed the question whether the judicial power of the United States could be vested in courts whose judges do not enjoy the protections and safeguards specified in Article III.[283] The Court determined that the Bankruptcy Act of 1978 violated the separation of powers because the Act withdrew certain matters from judicial cognizance.[284] As a result, the congressional

276. *See, e.g.*, Loving v. United States, 517 U.S. 748, 757 (1996) (stating "separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"); Morrison v. Olson, 487 U.S. 654, 693–94 (1988) (holding that the Ethics in Government Act did not impermissibly interfere with the Executive's ability to perform its constitutionally assigned function to make sure the laws are faithfully executed); INS v. Chadha, 462 U.S. 919, 956–57 (1983) (concluding that because the one-house veto utilized to override the Attorney General's discretionary decision that Chadha should not be deported circumvented the constitutional design and impaired the Executive's ability to act as a check on improvident legislative action, the separation of powers was violated).

277. *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA L. REV. 1127, 1147–49 (2000).

278. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

279. *Id.* at 850–51.

280. *Id.* at 851.

281. *Id.* at 851–52.

282. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982).

283. *Id.* at 62.

284. *Id.*

enactment was an unwarranted encroachment upon the judicial power reserved to Article III courts.[285]

Structural principles can also be implicated when Congress impermissibly undermines the role of the Judicial Branch.[286] The Court considered this issue in *Schor* when it examined whether a congressional enactment allowing a private litigant to adjudicate a state law claim in an administrative agency was an impermissible intrusion on the judiciary's role.[287] The Court concluded it was not, in part because there was a degree of judicial control saved for the Article III courts.[288] Thus, the structural checks envisioned by the Framers were untouched.[289]

The analytical framework adopted in *Schor* and *Marathon* can be referenced to address the role of the jury. Under this framework, a criminal defendant is free to waive his right to a jury trial, but to the extent that structural principles are implicated, the waiver is not dispositive of the lack of a constitutional defect.[290] Consistent with the underlying concerns of the separation of powers analysis discussed in *Schor* and *Marathon*, structural principles are implicated when the jury's role as an intra or inter-branch check on the accumulation or abuse of power is impaired by government conduct.[291] While obviously a congressional enactment eliminating a criminal defendant's access to a jury would violate this principle, as well as the Sixth Amendment, congressional enactments that systematically discourage an individual from asserting his right to a jury trial may also implicate structural concerns. Assuming that the jury plays an important role in the tripartite system of government, an act of Congress that undermines that role is a violation of the separation of powers.

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285. *Id.* at 83–84; *see also id.* at 87 ("We conclude that 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of the essential attributes of the judicial power from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.")

286. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

287. *Id.* at 851.

288. *Id.* at 855. See also Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?* 55 BAYLOR L. REV. 453, 484–490 (2003) for an excellent discussion on the analytical framework developed in *Schor*.

289. Schor, 478 U.S. at 857; *but see id.* at 865 (Brennan, J. *dissenting*) ("If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance. Thus, any sharing of jurisdiction is more illusory than real.").

290. *See Schor*, 478 U.S. at 850.

291. *See* Redish & Cisar, *supra* note 275, at 463–64.

Under this analysis, the federal sentencing guidelines violate the separation of powers because they interfere with the jury's ability to perform its constitutionally assigned role. Like the offending congressional enactment in *Marathon*, the federal sentencing guidelines threaten the institutional integrity of the Judicial Branch. Originally, Congress created a sentencing regime that systematically discouraged criminal defendants from seeking a trial by jury and placed a significant amount of unchecked power in the prosecutor's hands. Although the *Booker* decision may arguably reduce the prosecutor's power, it simply transferred that power to the federal judge. While this transfer of power is comforting to some, it does not correct the constitutional imbalance. Moreover, under the Booker analysis, Congress is still free to maintain the institutional incentives that encourage jury waivers. Under either system, the jury has effectively been removed as a check against government overreaching.

IV. RESTORING THE BALANCE

Because the operation of the guidelines—whether in its mandatory or discretionary form—implicates structural concerns, a criminal defendant's decision to waive his right to a jury trial cannot cure the constitutional defect. The question remains, however, what can be done to restore the balance? The problem does not invite an easy solution. The solution must balance the structural integrity of our system of government with the individual's ability to waive his Sixth Amendment right to a jury. Any viable solution must also recognize the political and administrative realities of our current criminal justice system.

As noted by the *Booker* decision, Congress will ultimately devise and install a sentencing system that meets constitutional requirements. Congress has the opportunity to succeed where the *Booker* Court failed: by creating a sentencing system that includes a role for the jury. Given the current political climate and the administrative realities of our criminal justice system, two options are likely to be rejected. It is unlikely that Congress will completely repeal the federal sentencing guidelines, or even significantly amend them to eliminate the incentives to plead guilty. In fact, the incentives to plead guilty, the guideline factors that lead to sentence reductions, remain constitutionally untouched by the *Booker* decision. Thus, Congress is free to reinstitute them as mandatory provisions of the guidelines. The sentencing guidelines as a whole, and especially

those provisions that encourage waiver, appear entrenched in our criminal justice system.[292] In any event, the sentencing guidelines were promulgated to achieve worthy goals.[293]

It is equally unlikely that serious consideration will be given to exploring the "dark side" of plea bargains.[294] Plea bargains, for better or worse, have become a necessary evil.[295] Because the new immigration and drug laws have swelled criminal dockets, the court system has come to rely heavily on plea bargains to keep the system moving.[296]

Whatever changes Congress ultimately decides to make, they must reinstate the constitutional equilibrium. To restore the constitutional balance, the jury must be injected into the existing process. Ironically, the solution that this Article recommends brings us, in part, back to *Blakely*. In *Blakely*, the majority relied on the jury's role in our constitutional structure to support its position that the jury should decide any facts essential to the lawful imposition of a penalty.[297] Justice Scalia described the jury's function as a "circuit breaker in the State's machinery of justice."[298] Unfortunately, *Blakely* did not do enough to actually allow the jury to perform its assigned function. Nonetheless, the majority's reasoning moves us towards restoring the constitutional balance.

I believe that equilibrium can be restored by working within the guideline system. I suggest that we create (for lack of a better phrase) a "guideline jury system." The imposition of a guideline jury system would fill the constitutional void created by the current sentencing regime without destroying its basic premise. With the jury a part of the guideline structure, the sentencing guidelines would no longer violate the separation of powers, and the criminal

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292. Incentives to plead guilty, including promises of a lighter sentence, were a part of the criminal justice system pre-guidelines as well. *See* Fisher, *supra* note 172, at 967. Thus, simply removing them from the guidelines will not solve the underlying problem.

293. *See* Breyer I *supra* note 58, at 5.

294. *See* Mazzone, *supra* note 200, at 872–73. Mazzone revisits plea bargains and suggests that procedures for entering a guilty plea should be altered to incorporate the public. To inject the public into the plea process, he suggests "Plea Panels" to review the voluntariness of pleas.

295. This is not to say that plea bargains should not be carefully scrutinized. *See* United States v. Speed Joyeras S.A., 204 F.Supp.2d 412, 433 (E.D.N.Y. 2002)(suggesting that the definition of "coercion" in the plea context needs to be reexamined). However, it is unlikely that any proposal to eliminate plea bargaining will be considered right now.

296. *See* Administrative Office of the United States, *Federal Judicial Caseload: Recent Trends 1997–2001* at 7 (2002) *available at* http//www.uscourts.gov/recenttrends2001/20015yr.pdf (reporting that drug, immigration, and firearm laws are largely responsible for the increase in criminal cases).

297. Blakey v. Washington, 124 S.Ct 2531, 2539 (2004).

298. *Id.*

jury, albeit in a different form, would be reinstated as a viable check against government overreaching.[299]

In this system, the guideline jury would decide any fact that raises *or lowers* the sentence applicable for the offense of conviction. Because the guideline jury is intended to act as a structural check, it could not be waived by the parties. Admittedly, this is a significant deviation from contemporary case law regarding the criminal jury's role in sentencing.[300] But up to this point, the vast majority of case law has only addressed the jury involvement required by the Sixth Amendment. Jurists and commentators have focused exclusively on the constitutional implications of sentence enhancements on a criminal defendant's Sixth Amendment right to a jury trial. I am suggesting that to maintain the checks and balances in our tripartite system of government, the criminal jury must play a role in the criminal justice system distinct from the Sixth Amendment requirements.

A guideline jury would, in form, be a hybrid of a grand jury and petite criminal jury. It would consist of a rotating panel of citizens convened for a specified period of time to hear sentencing issues only. Under this system, a criminal defendant would be free to plead guilty to the charged offense, or, in the alternative, seek a criminal jury trial on the alleged criminal conduct. Just as under the current guideline system, the offense of conviction would result in a base offense level. The base offense level would combine with the defendant's criminal history category to yield a sentencing range. If the defendant and the prosecutor agree with the offense level, the judge may sentence within that range. If, however, the prosecutor or the defendant wishes to raise or lower the offense level based on a fact or facts not part of the offense of conviction, the information must be submitted to the guideline jury. The two sides would then have the opportunity to present evidence to the guideline jury regarding specific circumstances that warrant an increase or a decrease in the base offense level. The burden would be on the party seeking the increase or reduction to prove the necessary facts beyond a reasonable doubt. The guideline jury would then make specific factual findings and, based on those find-

299. Justice Stevens recommended the use of bi-furcated proceedings in his Booker dissent. "Further in many cases, the Government could simply prove additional facts to a jury beyond a reasonable doubt—as it has been doing in some cases since Apprendi—or, the court could use bifurcated proceedings in which the relevant conduct is proved to a jury after it has convicted the defendant of the underlying crime." *Booker*, 125 S. Ct. at 780 (Stevens, J., dissenting).

300. As noted, the Supreme Court has been concerned primarily with facts that would enhance a defendant's sentence above the statutory maximum. *See Blakely*, 124 S.Ct. at 2539.

ings, the judge would raise or lower the offense level. The new offense level would result in a new sentencing range within which the judge would then be free to sentence. The judge would still have the opportunity to depart below the guideline range if she found there were circumstances deemed "outside the heartland."

Such a system is not without its critics. Justice Breyer, in his dissent in *Apprendi v. New Jersey*,[301] rejected a system that would require a jury to make sentencing decisions. According to Justice Breyer, "[t]here are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury."[302] I have attempted to address this concern in three ways. First, the defendant and prosecutors would choose which sentencing factors they wanted to "prove" or "oppose." The jury would not be faced with a myriad of factors that they would need to sift through, only those the parties chose to advance. Thus, the adversarial system would work much the same as it does during the determination of guilt phase.

Second, the guideline jury, like a grand jury, would serve for a specified period of time. During their service, the jurors would be exposed to the sentencing guidelines and educated regarding their complexities, in much the same way a trial jury is taught the complexities of the RICO statute or patent law.[303] To the extent that critics deem the complexities of the sentencing guidelines beyond the reach of ordinary jurors, their criticism is at best disingenuous and at worst insulting. Jurors are faced daily with complex and difficult questions under a variety of federal statutes. Moreover, the availability of a jury should not turn on the complexity of the underlying statute.

Finally, the judge would have the ability to determine the ultimate sentence and could take other facts into account when sentencing within the guideline range.

The guideline jury system would have several institutional advantages. First, it would not impair a defendant's Sixth Amendment right to a jury trial. A defendant would still be free to plead guilty and waive his right to a jury trial on the charged offense. The criminal defendant's continued ability to waive his right to a jury trial would alleviate any concerns that protecting the jury's

301. Apprendi v. New Jersey, 530 U.S. 446 (2000) (Breyer, J., dissenting).

302. *Id.* at 557.

303. "We have always trusted juries to sort through complex facts in various areas of the law." *Booker*, 125 S. Ct. at 781 (Stevens, J., dissenting).

structural role in our system of government would somehow turn the right into an imperative.

Second, this proposed system would reduce the institutional incentives to plead guilty and would level, to a certain extent, the plea bargain playing field. The guideline jury would act as an interbranch check by preventing prosecutors from using the guideline system to pressure defendants to waive their right to a jury trial. The parties would no longer be able to negotiate the terms of the sentence. Any fact that would increase or decrease a sentence would have to be proven to a guideline jury beyond a reasonable doubt, rather than by the less stringent preponderance of the evidence standard. This requirement would help lessen the use of "fact" and "factor" bargaining as well as diminish the potency of the "relevant conduct" provisions discussed earlier. In addition, because the structural protections cannot be waived, the parties could no longer use binding plea agreements to stipulate to a guideline range or to eliminate certain sentencing factors.

This is not to say that prosecutors would be without incentives to induce pleas. Charge bargaining, for better or worse, would still go unchecked. Because motions for substantial assistance are usually highly confidential, it is unlikely they could be included within the system. Thus, prosecutors and defendants could still use 5K1 motions to circumvent the system. In addition, prosecutors and defendants could agree not to pursue a higher or lower sentence before the guideline jury as part of the plea bargain process. The guideline jury system would not prevent such plea bargains. Thus, a guideline jury would not be a part of every sentencing decision. But the guideline jury would dramatically alter how the sentencing guidelines currently operate. While it will not cure all the flaws of the present system, it offers a significant structural improvement.[304]

Third, federal judges would retain sentencing discretion. A federal judge would still be able to exercise her discretion within the guideline range, and additionally would be able to consider factors

304. Unfortunately, the guideline jury system does not address, at least not directly, the race and gender disparities that permeate our criminal justice system. *See* Justice Anthony Kennedy, Speech at the American Bar Association Annual Meeting (August 9, 2003) (discussing the racial and ethnic disparities in the criminal justice system); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON 285, 308–12 (2001) (finding disparities in the likelihood and magnitude of downward departures based on race (particularly for African Americans and Hispanic Americans), gender (i.e., women are more likely to receive departures), citizenship, age, income level, and education level); Stephen J. Schulhofer, *Sentencing Issues Facing the New Department of Justice*, 5 Fed. Sent. Rep. 225, 229 (1993) ("My research with Commissioner Nagel brought to light the frequent use of substantial assistance motions to cloak leniency for 'sympathetic' (usually white) defendants.").

deemed "outside the heartland" when pronouncing a final sentence. When determining the final term of imprisonment, the judge would also be able to account for the "intangibles" in sentencing.[305] To be sure, federal judges would no longer be making the final decision regarding the applicability of "sentencing factors," but these decisions would still be made within the Judicial Branch.

Most importantly, the guideline jury system would allow the people to have a voice in the administration of criminal laws, and would provide a check against governmental overreaching. Because the community at large is affected by crime, the community at large should be a part of the criminal justice process.[306] The guideline jury would provide the people with an opportunity to be involved in the administration of laws at a critical phase: sentencing. The proposed system would act as both an inter-branch check against prosecutorial overreaching, as well as an intra-branch check against judges signing off on plea agreements with artificial sentences just to clear their dockets or sentencing arbitrarily using their new found discretion. Lastly, as the incentives to plead guilty diminish, more criminal defendants may exercise their Sixth Amendment right to a jury trial, thereby increasing the people's participation at the guilt or innocence phase. In addition, because the guilt or innocence phase would be separate from sentencing, criminal juries would not be prejudiced by the presentation of aggravating or mitigating sentencing factors during the criminal trial.[307]

To be sure, there are several disadvantages to this system. A guideline jury system would delay the imposition of the final sentence in those situations in which the prosecutor or the defendant decides to seek an enhancement or a reduction in the base offense level. In certain border districts, this addition of another procedural step could cause significant backlogs. While the delay may

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305. *See In re* Sentencing, 219 F.R.D. 262, 264 (E.D.N.Y. 2004). ("A judge applies mental impressions of many tangible and intangible factors when imposing a sentence.")

306. Even the Supreme Court has recognized that jury decisions are a reflection of community values. *See* Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, J., dissenting) ("Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, is a significant and reliable objective index of contemporary values, because of the jury's intimate involvement in the case and its function of maintain[ing] a link between contemporary community values and the penal system.") (citations and internal quotations omitted).

307. *See Apprendi*, 530 U.S. at 557 (Breyer, J, dissenting) (commenting on the awkward, and conceivably unfair, position for defendants if the guilt phase and the sentencing factor phase was combined).

not be of constitutional proportions because it relates only to the final term of imprisonment and not to the defendant's guilt or innocence, it would still be a significant problem. One of the benefits of the current sentencing regime is its certainty. With a guideline jury system, criminal defendants might have to wait some time to have their final sentence determined. While they would know the guideline range for the underlying offense at the time of their conviction, defendants would have to wait for the case to be heard by a guideline jury before knowing whether that range would be increased or decreased.

In addition, the viability of so-called sentencing juries has often been dismissed because of the administrative costs involved.[308] A guideline jury system would certainly add additional financial costs to an already overburdened court system. And if, as predicted, more criminal defendants do exercise their right to a criminal jury trial, these additional costs and time expenditures would certainly materialize.

But as William Blackstone argued over 200 years ago, the delays and inconveniences of the criminal jury are a fair price for free nations to "pay for their liberty."[309] Indeed, the Supreme Court has rejected efficiency arguments when it comes to maintaining the integrity of the system of checks and balances.[310] The Court has maintained that Congress is not free to undermine the constitutional design "whenever it finds that course expedient."[311] Or as Judge Stevens commented when discussing jury fact-finding in his dissent in *Booker*, "[t]his may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern."[312] Thus, even though the guideline jury system would likely result in additional administrative costs, it would more importantly provide a mechanism for the jury to perform its constitutionally assigned role in the system of checks and balances.

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308. *See id.* at 557.

309. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 350. Or as Justice Scalia stated in *Apprendi* "[The jury-trial guarantee] has never been efficient; but it has always been free." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

310. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982).

311. *Id.*

312. *Booker*, 125 S. Ct. at 781 (Stevens, J., dissenting).

V. CONCLUSION

The Supreme Court's decision in *Booker* was a significant loss for proponents of a strong jury system. The jury system has historically been viewed as a necessary check against government oppression. Yet, the *Booker* majority failed to account for the criminal jury's structural role in our tripartite system of government. Any discussion concerning a revision of the federal sentencing guidelines must recognize the current system's interference with the criminal jury's ability to perform its constitutionally assigned role. Congress created a sentencing regime that systematically discourages criminal defendants from accessing the jury. As a result, the criminal jury has all but disappeared as a viable check against arbitrary government conduct. The Supreme Court's decision in *Booker* does not abate Congress' ability to interfere with the criminal jury's role. When the sentencing guidelines are viewed in this manner, and not solely through the Sixth Amendment lens, it becomes evident that the sentencing guidelines violate the separation of powers.

To remedy this structural imbalance, the criminal jury must be injected into the sentencing process. To do so, this Article advocates the creation of a "guideline jury" system that would operate within the current sentencing regime. A guideline jury system would allow the people a voice in the administration of the criminal laws without undermining the worthy goals the guidelines were meant to promote. While we cannot summarily dismiss arguments concerning delay and costs associated with the guideline jury system, we also cannot continue to ignore the great costs that the current sentencing guidelines impose on constitutional liberty. Ensuring constitutional freedoms is often a costly endeavor, yet one that we cannot afford to forgo.