Judicial Fact-Finding at Sentencing

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In the eighteenth century, most criminal convictions carried fixed, automatic penalties of death, fines, or corporal punishments such as whipping. From the nineteenth century through the most of the twentieth, however, imprisonment replaced most capital and corporal punishment. Once a jury convicted, the sentencing judge had broad, unreviewable discretion to sentence a defendant to any term of years from probation up to the statutory maximum sentence. Judges could decide on their own, based on hearsay or other incompetent evidence, that defendants's criminal past, bad character, or especially brutal or harmful crimes merited heavier sentences. These findings enjoyed none of the procedural protections of trial, such as jury findings beyond a reasonable doubt. The idea was that judges were like doctors or therapists, making forward-looking diagnoses of individual defendants's need for rehabilitation that were distinct from the jury's backward-looking assessments of historical fact and blame.

In the 1970s, the public and politicians concluded that rehabilitation was not working, and the dominant purpose of sentencing swung from forward-looking rehabilitation to backward-looking retribution or punishment, based on the seriousness of the crime and the criminal. Around the same time, legislatures and sentencing commissions began to structure judges's sentencing discretion by specifying that if a judge found certain facts, those facts would raise or lower a minimum or maximum sentence. These enhancements required no jury nor finding

beyond a reasonable doubt, though these new sentencing rules offered more structure and procedural protections than the old ones had.

The Impact of *Apprendi*

Throughout the twentieth century, the Supreme Court refused to require trial protections at sentencing. In *Williams v. New York*, 337 U.S. 241 (1949), it endorsed the medical model of judges as sentencing therapists unfettered by criminal procedures or the rules of evidence. But in 2000, the Court reversed direction. A judge raised Charles Apprendi's sentence for gun possession beyond the ten-year ordinary maximum to twelve years based on the judge's finding, by a preponderance of the evidence, that Apprendi had fired the gun with a racially biased purpose. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court struck down this enhancement in a five-to-four opinion, holding that the Sixth Amendment and the due process clause of the Fourteenth Amendment regulate sentence enhancements. Thus, the prosecution must prove any fact that raises a defendant's legal maximum sentence (except for recidivism) to a jury, beyond a reasonable doubt.

The Court's coalition was unusual: liberal Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg joined conservative Justices Antonin Scalia and Clarence Thomas to form the majority. Writing for the Court, Justice Stevens articulated three main reasons for the new rule: First, historically judges in the eighteenth century enjoyed no sentencing discretion to increase maximum penalties, as most eighteenth-century felony sentences were fixed. As judicial sentencing discretion grew in the nineteenth century with the rise of ranges of imprisonment, judges continued to exercise discretion only within limits fixed by the jury's verdict. The Court emphasized, however, that it did not question the persistence of broad judicial discretion, so long as it remained within the legislative sentencing ranges. Second, judicial sentence enhancements

risked being unfair to defendants, giving them inadequate notice of the penalties they faced. And third, the Court feared a slippery slope would continue to erode the right to a jury trial, as legislatures could take elements of crimes away from juries and recharacterize them as sentencing factors to be found by judges. Thus, the conservatives's desire for a historically grounded bright-line rule dovetailed with the liberals's concerns about unfairness and due process.

The dissenters, led by Justice Sandra Day O'Connor, pointed out that the majority's history was inconclusive and did not clearly constitutionalize this novel rule. After all, sentence enhancements simply did not exist until recently, and they provide more structure and protections than do broad sentencing ranges and unfettered judicial discretion. The dissenters noted that the majority's formalistic rule would be easy to evade. Legislatures could simply raise all sentencing maxima and then recast aggravating factors (such as burglary at night, which would ordinarily raise the maximum sentence) as mitigating ones (such as burglary during the day, which could lower the maximum). Finally, the dissenters feared that the majority would extend its rule to regulate not only statutory maximum sentences, but also sentencing guidelines. Justice Stephen Breyer's separate dissent emphasized the need for guidelines and sentencing commissions, in order to promote sentencing equality and expertise; he lamented the likelihood that sentences would become more arbitrary or even discriminatory if *Apprendi* were to invalidate them.

After *Apprendi*

Indeed, four years later the Court extended its *Apprendi* holding to regulate facts that raise maximum sentences under sentencing guidelines, in *Blakely v. Washington*, 542 U.S. 296 (2004). And in *United States v. Booker*, 543 U.S. 220 (2005), the Court held that binding federal

sentencing guidelines violated the *Apprendi* rule. One would have thought that the remedy would be to require juries, not judges, to find all facts that raise sentences under the guidelines—perhaps via long special-verdict forms, as the four *Booker* dissenters advocated. Surprisingly, however, the Court instead solved the constitutional defect by invalidating the guidelines's binding force and making them more or less advisory. Appellate courts may still review district courts's decisions to sentence within or outside the guidelines on procedural and substantive grounds, and they may presume that sentences within the guidelines range are reasonable: *Rita v. United States*, 551 U.S. ___ (2007). The Court is still working out, however, how much weight district and appellate courts must, or may, give to the guidelines, and how freely they may deviate from them without fear of appellate reversal.

Apprendi and its progeny are truly landmarks, meriting metaphors such as tsunami, tidal wave, and number-ten earthquake. Tens of thousands of defendants and prisoners have raised *Apprendi* and especially *Blakely* claims, snarling courts in years of litigation. Dozens of states have rewritten their sentencing laws as a result. Yet after all this litigation, it is hard to see profound changes in sentencing law and practice.

One paradox is that the oft-criticized federal sentencing guidelines have survived, like some horror-movie character who refuses to die. Though the federal guidelines are supposedly advisory, *Booker* leaves them with much gravitational force, and sentencing judges continue to crunch their numbers and follow them, with little input from juries and without proof beyond a reasonable doubt. Conversely, *Blakely* invalidated many state sentencing guidelines, though they are more flexible and more widely praised.

A second paradox is that while this line of cases began as a crusade to restore the role of the jury, it has turned into a campaign to restore judicial sentencing discretion. (This is much as

Justice O'Connor's *Apprendi* dissent predicted. Because *Apprendi* regulates only binding

structured sentencing, legislatures or courts can get around it simply by loosening the rules and

declaring them advisory rather than strict maxima.) Rather than creating a new, larger role for

juries at sentencing, the Court has used *Booker* and *Rita* as vehicles for returning traditional

sentencing discretion to judges.

A third, related paradox is that in only a few short years, these cases have moved far from

their constitutional roots. In Justice Scalia and Thomas's eyes, *Apprendi* was an effort to shore

up the Sixth Amendment's jury-trial guarantee with a bright-line rule and significantly more jury

fact-finding. On this view, binding sentencing guidelines are an unconstitutional innovation if

judges run them, so juries must play a much larger role. But Justices Stevens, Ginsburg, and

Souter seem less concerned with the historical role of juries than with fairness to defendants. The

result is that recent cases such as *Rita* focus primarily on the policy question of how much

judicial discretion is enough to ensure needed flexibility and very little on the important role that

juries should play at sentencing as well as at trial. The bright-line Sixth Amendment guarantee,

which threatened to turn all sentencing into a second heavily regulated trial, has morphed into a

fuzzy due process assessment: once a sentencing judge has a certain degree of flexibility, a

sentencing maximum is no longer a maximum and triggers no special procedures. *Apprendi*'s

legacy is to create a Sixth Amendment dichotomy, in which some sentencing facts require the

full-blown trial protections of a jury and proof beyond a reasonable doubt, while the rest require

no procedural safeguards. There is neither middle ground nor sliding scale.

Finally, these trial-focused rules miss the boat. More than 95 percent of criminal cases

end in guilty pleas, which bypass these procedural protections by admitting sentencing facts. The

Court's solicitude for the few jury trials ignores the overwhelming numbers of guilty pleas and

the greater need for due process at that stage.

The Court could instead have pursued a different, more fruitful path. The Court did not have to force sentencing factors into the same constitutional boxes as elements of crimes, nor try to divine some nonexistent clear rule in the sparse text and history of the Sixth Amendment. Instead, the Court could have explicitly weighed the due process need for regulating the under-regulated sentencing phase. This approach would have led to more flexible, sensible weighing of the need for confrontation, cross-examination, rules of evidence, double jeopardy, and proof by a preponderance or clear and convincing evidence at sentencing. The Court, however, shows no signs of turning around to explore this path not taken.

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