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Originalists, Politics, and Criminal Law on the Rehnquist Court

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INTRODUCTION

Unlike the Warren Court, the Rehnquist Court is unlikely to be remembered for having established sweeping criminal justice reforms that protect the interests of criminal defendants.1 On the contrary, the conventional wisdom about the Rehnquist Court is that its dominant mission in criminal law was to overrule or limit cases from the Warren Court era in order to cut back on criminal procedure protections.2


2 See, e.g., Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. Colo. L. Rev. 1337, 1358 (2002) (noting that “the Rehnquist Court has distinguished, created exceptions to, and reinterpreted” Warren Court precedents in a manner that has been “highly effective in producing the ‘law and order’ results Nixon and Reagan promised to deliver”) [hereinafter Smith, Criminal Procedure]; id. at 1344 n.25 (noting how *Miranda* has been limited by the Court); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 Tex. L. Rev. 1057, 1114 (2002) (arguing that Rehnquist Court “fundamentally reshaped[ed] Warren Court criminal procedure doctrines” by limiting their effect on legitimate law enforcement practices); Steiker, *supra* note 1, at 2469-70 (asserting that the Rehnquist Court largely affirmed the Warren Court’s standards for police conduct, while dramatically changing the “decision” rules that determine the consequences of unconstitutional conduct); Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 Nova L. Rev. 743, 745 (1998) (“Perhaps nowhere has the Court’s conservative trend been more apparent than in the area of criminal justice.”). For a sampling of Rehnquist Court cases cutting back on criminal procedural protections of the Warren Court, see Dickerson v. United States, 530 U.S. 428, 437-38 & n.2 (2000) (surveying Court’s delineation of exceptions to *Miranda* and statements that *Miranda* is prophylactic); Davis v. United States, 512 U.S. 452 (1994) (allowing continued custodial questioning after suspect receiving *Miranda* warnings makes ambiguous invocation of the right to counsel); New York v. Harris, 495 U.S. 14 (1990) (refusing to suppress defendant’s confession at police station following proper *Miranda* warnings even though police had arrested defendant in his home with out a warrant in violation of Payton v. New York, 445 U.S. 573 (1980)); Murray v. United States, 487 U.S. 533 (1988) (strengthening “independent source” doctrine to allow introduction of evidence acquired by a legal search preceded by an illegal search generating the same evidence).
While that might be the predictable story to tell about the Rehnquist Court’s approach to criminal law, it ignores a less frequently observed but much more interesting aspect of the Court’s criminal law jurisprudence. The same Rehnquist Court that narrowed the reach of Warren Court precedents interpreting the Fourth and Fifth Amendments simultaneously expanded criminal defendants’ jury trial rights under the Sixth Amendment. Indeed, the Rehnquist Court was one of most vigorous protectors of the jury guarantee in Supreme Court history.

The Rehnquist Court’s interpretation of the Constitution’s jury guarantee led it to overturn modern sentencing laws that required judges, not juries, to make key findings that increased a defendant’s sentence. To understand the significance of this development, it is important to keep in mind that for almost two hundred years, sentencing was an almost lawless enterprise and the Supreme Court paid little attention to sentencing practices that had allowed significant erosion of the jury’s power. The Rehnquist Court broke with this long tradition when it began overturning sentencing laws for violating the jury guarantee. Beginning in 2000 and continuing through recent Terms, the Court has made clear that legislators cannot pass laws mandating increases in punishment unless those laws are applied by juries, not judges. The Court has therefore rejected existing sentencing laws in numerous states and the federal system, causing a massive upheaval in sentencing practices that is as dramatic in its effects as the major Warren Court criminal cases.

The Court’s jury jurisprudence is thus an important part of the Rehnquist Court’s legacy because of the significant impact it has had on day-to-day plea bargaining and trial practice in the criminal justice system. Sentencing policy is under scrutiny as never before, as the Court’s cases have sparked legislative, executive, and judicial reforms. The importance of the jury to the criminal process has reemerged as a key consideration.

But the Court’s jury cases deserve attention for another reason as well. These cases provide a concrete and important example of the power of law and legal

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3 Marvin E. Frankel, Sentencing Guidelines: A Need for Creative Collaboration, 101 YALE L.J. 2043, 2044 (1992) (“[W]ith respect to sentencing, we gave free rein to our ignorance and neglected our expertise in the law. We gave lawless power to the judges.”).  
6 The jury guarantee was not the only aspect of the Sixth Amendment revitalized by the Rehnquist Court. Although less significant in terms of scope and the number of cases affected, the Rehnquist Court similarly reinvigorated the Sixth Amendment right to confrontation. In 2004, in Crawford v. Washington, 541 U.S. 36 (2004), the Court held that the Confrontation Clause does not allow the introduction into evidence of testimonial statements unless the defendant has an opportunity to cross-examine the declarant. This decision overturned the prior test for admitting this evidence established in Ohio v. Roberts, 448 U.S. 56 (1980), which allowed courts to admit testimonial hearsay, even if the defendant had no opportunity to confront the witness, as long as the trial judge found that the evidence was reliable.
methodology—and not simply politics—in Supreme Court decisionmaking. The Court’s Sixth Amendment decisions are out of step with what attitudinalist political scientists would have predicted from the right-leaning Court. A Court with more conservatives should, according to the attitudinal model, curtail the rights of criminal defendants, not expand them. Even more interesting is that the Sixth Amendment cases are not the result of the Court’s swing Justices joining forces with the Court’s liberal wing. These cases are instead the product of an alliance between Justices that the attitudinalists view as the extreme left and right of the Court.

It is therefore not politics—or, more specifically, not politics alone—that explains the Court’s Sixth Amendment cases. Rather, the Sixth Amendment’s resurgence under the Rehnquist Court is the product of a union between two interpretive methodologies that reach the same conclusion in this setting: it is a partnership between the Court’s self-proclaimed originalists (Justices Scalia and Thomas) and those members

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7 The definition of politics here is borrowed from Barry Friedman: it “refer[s] to any influence brought to bear by the legitimate institutions and actors of democratic government that reflects something other than the individual judge’s best judgment of the way the law determines a case’s merits.” Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257, 271 (2005).

8 The attitudinal model is dominant among political scientists. See Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 NW. U. L. REV. 251, 265 (1997) (“Among many political scientists, aspects of the attitudinal model have become a virtual truism.”); Stephen M. Feldman, The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making, 30 LAW AND SOC. INQUIRY 89, 90 (2005) (“Today, few political scientists would dispute that, within their discipline, the leading approach to adjudication is the ‘attitudinal model,’ which hypothesizes that Supreme Court justices vote their political preferences or ideologies.”). The leading advocates of the attitudinal approach, Jeffrey Segal and Harold Spaeth, have concluded that, “at the level of the U.S. Supreme Court, how the justices decide their cases depends upon the free play of their individual personal policy preferences.” JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 360 (1993). See also id. at 64-65 (arguing that the Supreme Court Justices base their decisions on their political ideologies and personal policy preferences); Howard Gillman, What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making, 26 LAW &SOC. INQUIRY 465, 466 (2001) (noting that behavioralist scholars are of the view that “law has almost no influence on the [J]ustices” of the Supreme Court).

9 Lee Epstein et al., The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective, 33 AM. J. POL. SCI. 825, 838 (1989) (predicting significantly less support for criminal defendants when Republicans control the Court). As Stephen Smith observes, “if there was a single issue that gave rise to the Rehnquist Court, it was criminal procedure” and the movement to be tougher on crime. Smith, Criminal Procedure, supra note 2, at 1338.

10 See Theodore W. Ruger et al., The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 COLUM. L. REV. 1150, 1158 n.29 (2004) (arraying Justices in spatial attitudinal order with “Stevens at one pole, followed in order by Ginsburg, Breyer, Souter, O’Connor, Kennedy, Rehnquist, Scalia, and Thomas”).

11 See Richard E. Myers II, Restoring the Peers in the “Bulwark”: Blakely v. Washington and the Court’s Jury Project, 83 N.C. L. REV. 1383, 1390 (2005) (observing that the lineup in Blakely “suggests that there is something more at play than the political scientists’ models can explain”).
of the Court who are most sensitive to the role of the judiciary in protecting criminal defendants’ rights from majority politics (Justices Stevens, Souter, and Ginsburg).

While it is often hard to pin down the independent function of law in any given case, and it is easy to conclude that all legal decisionmaking boils down to political preferences, this is an area that highlights the shortcomings in that simplistic account of legal decisionmaking. Judges—including those on the Rehnquist Court—are not simply political actors. Legal principles and theory matter. Justices Scalia and Thomas have shown no indication that they are particularly concerned with defendants’ interests in other contexts,12 but they are vigorous enforcers of the Sixth Amendment’s jury trial right because they appear to believe that their chosen legal methodology requires such a conclusion.13

This area of criminal law is therefore an important reminder of the significance of legal methodology to case outcomes. In particular, and perhaps most significantly, the Court’s jury cases illustrate that the interpretive methodology of originalism is not always the most conservative choice when it comes to criminal matters; sometimes, the Court’s conservative originalists are to the left of those conservative Justices who take a more flexible, pragmatic approach.14 Chief Justice Rehnquist, although an occasional adherent to originalism, is more fairly characterized as a pragmatist who took into account a variety of arguments in resolving a case.15 The same is true of Justices

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12 See, e.g., Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas) (arguing that the execution of an inmate convicted of a crime before the age of 18 is not prohibited by the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 337-54 (2002) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas) (concluding that the execution of a mentally retarded inmate is not prohibited by the Eighth Amendment); Dickerson v. United States, 530 U.S. 428, 444-46 (2000) (Scalia, J., dissenting, joined by Justice Thomas) (rejecting the majority’s upholding of Miranda in the face of a contrary federal statute); Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting, joined by Justice Scalia) (claiming that the wanton and unnecessary infliction of pain on a state inmate by a prison guard does not violate the Eighth Amendment in the absence of a significant injury).

13 For a view that originalism does not dictate the results reached in the Apprendi line of cases, see Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 GEO. L.J. 183 (2005).

14 The terms “originalist” and “pragmatist” can mean many things. Here the label “originalist” is attached to those Justices who proclaim to be such, and no attempt is made to evaluate their fidelity to the principle. “Pragmatist” is used as a catch-all label for those conservative Justices who do not espouse any particular ideology and who take into account a variety of factors in reaching their decisions, of which originalism or history may or may not be one.

15 Jeffrey Rosen, Rehnquist the Great?, THE ATLANTIC MONTHLY, Apr. 2005, at 79, 79, 88 (noting Rehnquist “was essentially a pragmatist who believed in certain core conservative values” and that “he invoked constitutional history when it was convenient and otherwise ignored it”); id. at 90 (quoting Jack Goldsmith’s description of Rehnquist as “in a different, older, more pragmatic conservative tradition” and nothing that he “often looks beyond text and history in discovering the relevant legal intentions”).
O’Connor and Kennedy. All three dissented in the Court’s jury cases, while the Court’s conservative originalists sided with the Court’s liberal wing.

This trend goes beyond jury cases. By reviewing all of the Rehnquist Court’s criminal opinions in argued cases during the ten-year period from Justice Breyer’s addition to the Court in the October 1994 Term through the 2003 Term, it is possible to determine whether the jury cases are outliers or are part of a larger pattern among the Court’s Justices that does not neatly correspond to their spatial array in an attitudinal model. While a review of those cases confirms the conventional view that the Court’s liberal bloc voted for criminal defendants more frequently than the Court’s conservatives in non-unanimous cases, the more interesting pattern is the variation among the Court’s conservatives in non-capital criminal cases in which the five conservatives disagreed among themselves. In the fifty-five non-capital criminal cases in which the Court’s conservatives did not vote as a bloc, Justices O’Connor, Scalia, and Kennedy each voted for the defendant twenty-four times, Justice Thomas voted for the defendant in eighteen cases, and Chief Justice Rehnquist in fourteen cases. In several of the most important constitutional decisions of that period, including but not limited to the jury cases, the conservative originalists voted for defendants while the pragmatist conservatives ruled for the government. The jury cases are therefore part of a larger pattern that reveals the relationship between originalism, politics, and criminal law to be far more complicated than is commonly believed.

This Article explores this relationship in two parts. Part I documents the revolutionary nature of the Rehnquist Court’s jury cases, both in terms of their historical significance and their transformation of modern sentencing practices. These cases deserve to be highlighted in a symposium on the Rehnquist Court’s legacy because they have had the largest effect on criminal justice practice and have revolutionized the field of sentencing law. In addition, these cases are the most consequential examples of the alliance between the Court’s liberal Justices and its conservative originalist Justices that produces outcomes favorable to criminal defendants. Part II then explores how these cases are part of a larger pattern in which the self-proclaimed originalists join forces with the Court’s liberal members in criminal cases, an alliance that challenges the attitudinal models.

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16 Id. at 90 (noting that Rehnquist, O’Connor, Kennedy, and Breyer are “the more pragmatically minded justices”).

17 The labels “conservative” and “liberal” are overly simplistic, of course. There are many varieties of “conservatives,” including cultural conservatives, libertarian conservatives, fiscal conservatives, etc. And there are similarly many types of “liberals,” including cultural liberals, libertarian liberals, welfare-state liberals, etc. The terms are used here to signify where Justices are arrayed on the attitudinal model. See supra note 10.

18 To be sure, those who proclaim adherence to originalism may vote for results in other contexts—including some criminal matters, like those involving the death penalty—that are not as protective of individual liberty as competing methodologies. See infra Part II. This Article takes no position on the overall value of originalism or those who follow it. Rather, it seeks only to highlight that there is a
I. **THE JURY AND THE RENNquist COURT**

The Rennquist Court’s concern with the criminal jury’s power in a series of cases dealing with mandatory sentencing laws was one of the most important developments in criminal law in modern Court practice. Subsection A briefly traces the Supreme Court’s approach to the criminal jury in the period before the Rennquist Court and reveals a consistent pattern of decisions that allowed erosion of the jury’s power. Subsection B then describes how the Rennquist Court’s revolutionary sentencing cases departed from this practice and explains how the decisions came about through an alliance between the Court’s conservative originalists and its more liberal members.

A. **The Supreme Court’s Jury Jurisprudence in the Period Before the Rennquist Court**

In the Nation’s early history, the criminal jury held a place of prominence in the constitutional order.19 Even before the adoption of the Bill of Rights and the Sixth Amendment, the Constitution provided that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”20 The placement of the jury guarantee in the main body of the Constitution reflected the reverence with which the Framers viewed the jury. “For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.”21 Alexander Hamilton similarly observed in the Federalist Papers that “[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.”22

These early juries had much responsibility. As is the case today, early juries were responsible for resolving factual disputes and issuing general verdicts in which they applied the law to their factual findings. But early juries had even greater responsibilities than juries do today, for they also decided questions of law.23 Lawyers

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20 U.S. CONST. art. III, § 2, cl. 3.


23 See NELSON, supra note 21, at 21-28 (“The frequent use of the general issue, which left to the jury the ultimate determination of the legal consequences of the facts of a case; the practice of counsel and judges giving the jury conflicting instructions on the law, which permitted the jury to select the rules for determining the legal consequences of facts; and the infrequency with which jury verdicts were set aside after trial tended to give the jury wide power to find the law.”); Mark DeWolfe Howe, *Juries as Judges of*
made competing legal arguments to the jury, and judges often deferred to the jury on questions of law.24 Many states passed laws designed to protect the jury’s ability to decide legal questions from judicial interference.25

The jury’s power to apply criminal laws made it a formidable check on government abuse. Without the jury’s agreement, the state could not convict an individual and impose criminal punishment. The jury thus protected individuals from legislative, executive, and judicial abuse of power.26

As law grew more complex and lawyers and judges became professionalized in the nineteenth century,27 the Supreme Court allowed legislators and judges to take some power away from the criminal jury. Four cases illustrate the Court’s acceptance of a diminution in the jury’s role and a shift of power from the jury to the government.28

The first crucial turning point occurred in 1895 with the Supreme Court’s decision in Sparf v. United States,29 in which the Court concluded that the jury did not have the right to decide questions of law. Although Justice Gray’s dissent documented the long history and tradition of criminal juries deciding legal questions,30 the majority rejected the argument that this established that the jury has a right to decide legal questions. Instead, the majority acknowledged only that the jury has the power to decide legal questions by virtue of its ability to issue a general verdict and to apply law to particular facts.31 Because the Court concluded that this power did not translate into


25 See id. at 391.

26 See Barkow, supra note 19 (elaborating on this argument in greater detail).


28 Although the Court in Duncan v. Louisiana, 391 U.S. 145 (1968), determined that the Sixth Amendment applies to the states through incorporation under the Fourteenth Amendment, the following decisions demonstrate the Court’s willingness to limit the substance of that right even though it extended its scope.

29 Sparf v. United States, 156 U.S. 51 (1895).

30 Id. at 114-183 (Gray, J., dissenting). See also Barkow, supra note 19, at 66; Howe, supra note 23, at 590-96; David C. Brody, Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right, 33 AM. CRIM. L. REV. 89, 98-101 (1995) (describing the historical role of the jury in deciding the law in criminal cases); R.J. Farley, Instructions to Juries, 42 YALE L.J. 194, 202 (1932) (“In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury. . . .”).

31 Sparf, 156 U.S. at 102. That is, because the jury’s decision to acquit a defendant is not reviewable, the jury has the raw power to decide legal questions in a given case. See Barkow, supra note 19, at 66-68 (describing the nullification power retained by juries).
a right, however, *Sparf* allows a judge to instruct the jury that it is bound by the judge’s interpretation of the law. In addition, lawyers are also no longer permitted to make legal arguments directly to the jury or to encourage the jury to nullify the law. *Sparf* therefore transferred considerable power from juries to judges because it made legal questions the exclusive domain of judges.

The Supreme Court’s decision in *Williams v. New York* in 1949 was a second pivotal decision, for it had the effect of allowing further erosion of the jury’s power by upholding broad sentencing authority for judges. In the Nation’s early history, most criminal laws dictated mandatory punishments. Thus, the jury’s decision whether or not to acquit a defendant under a particular law established the sentence a defendant would receive. By the end of the nineteenth century, the dominant model had shifted to a rehabilitative theory of punishment and indeterminate sentencing, under which judges had the discretion to make key factual findings that set the ceiling on a defendant’s sentence within a wide sentencing range, with the ultimate release date to be determined by a parole official. In *Williams*, the defendant challenged this scheme, arguing that the trial judge improperly sentenced him to death on the basis of information that appeared in a pre-sentence report, thereby depriving him of due process and his right to confront the witnesses against him. The Supreme Court rejected these arguments on the theory that judges pursuing a rehabilitative model needed this kind of information to make informed judgments. Although the Court in *Williams* did not directly face a challenge based on the defendant’s right to trial by jury, its decision had the effect of limiting the jury’s power, for the Court approved of a fact-

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32 Courts have recently taken *Sparf* one step further to conclude that judges can remove jurors who refuse to follow their instructions on the law. See United States v. Baker, 262 F.3d 124 (2d Cir. 2001) (approving removal of a juror who refused to participate in deliberation); United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) (holding that a judge may dismiss a juror who refuses to follow applicable law).


35 See Morris B. Hoffman, The Case for Jury Sentencing, 52 Duke L.J. 951, 964-65 (2003) (“Nineteenth-century sentencing schemes were tightly controlled by legislatures. As late as 1870, state legislatures commonly set a specific period of incarceration for each offense.”).

36 *Barkow*, supra note 19, at 70-71 (“At common law, ‘[t]he substantive criminal law tended to be sanction-specific,’” which “gave jurors a de facto sentencing function because their acquittal on a greater charge would dictate a lesser sentence or give judges the authority to impose a lesser sentence.” (quoting Apprendi v. New Jersey, 530 U.S. 466, 479 (2000))).


38 *Williams*, 337 U.S. at 245.

39 Id. at 249-51.
finding role for judges—finding facts regarding the defendant’s blameworthiness and increasing his or her sentence on that basis—that arguably belonged to the jury.40

A third moment in which the Supreme Court allowed significant erosion of the jury’s power came in 1971 when the Court, in Santobello v. New York,41 accepted plea bargaining as a legitimate government practice.42 Plea bargaining had existed in some form for most of the Nation’s history, in large part because it allowed prosecutors (and later, courts) to ease the burden of their caseloads.43 As the number of criminal cases increased, so, too, did plea bargaining.44 Although jury trials remain an option even under a system dominated by plea bargaining because a defendant can reject a plea and go to trial, the existence of plea bargaining undermines the jury’s power because it allows prosecutors to penalize defendants who exercise their jury trial right. Precisely because it undercuts the constitutional procedure for criminal cases, plea bargaining, although prevalent, was held in disrepute and operated as a shadow practice for most of the Nation’s history.45 It was not until Santobello that plea bargaining received the imprimatur of Supreme Court acceptance. The Court reasoned that bargaining had become “an essential component of the administration of justice” and remarked that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”46 The government’s reliance on plea bargaining has only grown since Santobello, with fewer than four percent of all federal criminal cases now ending in jury trials.47 Thus, largely on convenience grounds, the Court accepted a regime in which

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42 Id. at 260. See also Blackledge v. Allison, 431 U.S. 63, 76 (1977) (“For decades [plea bargaining] was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors and even judges . . . . [I]t was not until [the Court’s] decision in Santobello v. New York that lingering doubts about the legitimacy of the practice were finally dispelled” (citation omitted)). The Court set the stage for this conclusion when it decided in 1930 that the parties could waive jury trials. Patton v. United States, 281 U.S. 276 (1930).


44 See id.


46 Santobello, 404 U.S. at 260.

plea bargaining dominates and, consequently, in which power has shifted from juries to prosecutors.\textsuperscript{48}

The fourth area of erosion in the jury’s power involved the Court’s acceptance of a transfer of power from the jury to the legislature. The key Supreme Court decision occurred just before then-Justice Rehnquist was elevated to Chief Justice, with the Court’s 1986 decision in \textit{McMillan v. Pennsylvania},\textsuperscript{49} which posed the question of how much control legislatures have in defining offense elements that must be found by juries versus sentencing factors that must be found by judges. Specifically, the Court in \textit{McMillan} addressed the constitutionality of Pennsylvania’s Mandatory Minimum Sentencing Act, which provided that “anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years’ imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person ‘visibly possessed a firearm’ during the commission of the offense.”\textsuperscript{50} The Supreme Court rejected the defendants’ argument that “if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt.”\textsuperscript{51} Instead, the Court stated that “in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive.”\textsuperscript{52} The Court concluded that the Mandatory Minimum Sentencing Act did not fall within the exception to this rule because it did not presume the defendant guilty of a crime, nor did it alter the maximum penalty for the crime.\textsuperscript{53} Although \textit{McMillan} involved a Sixth Amendment claim as well as a due process claim, the Court’s due process analysis essentially stripped the Sixth Amendment claim of independent meaning.\textsuperscript{54} The Court concluded that the legislature could treat possession of a firearm as a sentencing factor, and reitered the Court’s view that there is no right to a jury at sentencing; thus the Court saw no reason to analyze the Sixth Amendment question any further.\textsuperscript{55} As a result, the Court gave the legislature great freedom to take power away from the jury by characterizing important facts as sentencing factors instead of offense elements and requiring judges to make those

\textsuperscript{48} For an argument that this shift in power raises constitutional concerns, see Barkow, \textit{supra} note 45, at 1047-50.


\textsuperscript{50} \textit{Id.} at 81 (quoting 42 Pa. C.S.A. § 9712).

\textsuperscript{51} \textit{Id.} at 84.

\textsuperscript{52} \textit{Id.} at 85 (citing Patterson v. New York, 432 U.S. 197, 210 (1977)).

\textsuperscript{53} \textit{Id.} at 87-88.

\textsuperscript{54} See \textit{id.} at 93.

\textsuperscript{55} \textit{Id.} Justice Stevens dissented and stated his view that “[o]nce a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.” \textit{Id.} at 96 (Stevens, J., dissenting).
determinations. After the Court’s opinion in *McMillan*, legislatures increasingly opted to place more fact-finding responsibility with judges instead of juries.56

The effect of these four decisions was to allow power to shift from juries to the government—whether to judges, prosecutors, or legislators. Together, the cases condoned a criminal justice system in which plea bargaining became the norm and trials the exception. For most defendants, sentencing became the most important part of their case. And the sentencing process either consisted of the indeterminate regime approved in *Williams* or some version of the mandatory regime accepted in *McMillan*. Thus, in neither case did the jury hold much power, nor was there much judicial oversight of trial court decisionmaking or prosecutorial and legislative judgments. It was against this backdrop that the Rehnquist Court decided its sentencing cases.

**B. The Rehnquist Court’s Jury Jurisprudence**

Initially, it looked as if the Rehnquist Court would similarly view the jury as having become a relatively weak part of the constitutional structure. For example, in *Almendarez-Torres v. United States*,57 the Supreme Court decided 5-4 that the legislature could make recidivism a sentencing factor to be decided by a judge, even if that factor increased the defendant’s sentence above the maximum permitted for the charged offense. A majority of the Court did not think there was a meaningful difference between a factor that alters a statutory *maximum* and the factor at issue in *McMillan*, which imposed a mandatory *minimum*, reasoning that the mandatory minimum could force the judge, as it did in *McMillan*, to impose a sentence more severe than the maximum one the trial judge would have otherwise imposed.58 Only four Justices—Justices Stevens, Scalia, Souter, and Ginsburg—thought there was an important distinction between facts triggering a mandatory minimum and facts that increase a

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56 See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1546 (2001) (table in Appendix A). For their part, judges interpreted ambiguous statutes as creating sentencing facts instead of offense elements. Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 477-80 (1993). In *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court even concluded that judges, not juries, could decide whether the necessary aggravating factors were present to justify imposing the death penalty. But see id. at 713-14 (Stevens, J., dissenting) (arguing that the Arizona statutory scheme violated the jury trial guarantee and noting that, despite *McMillan*, it was “not too late to change our course and follow the wise and inspiring voice that spoke for the Court in *Duncan v. Louisiana*”).


58 *Almendarez-Torres*, 523 U.S. at 243-45
statutory maximum so that the statute should be interpreted to avoid raising constitutional doubt.59

The Court shifted in the 1998 Term, when Justice Thomas changed his position and allied himself with the dissenters from Almendarez-Torres. In Jones v. United States,60 five Justices now had constitutional doubts about a sentencing law that required a judge to increase a defendant’s sentence above the maximum permitted for the charged offense.61 What concerned these Justices was their view that this kind of sentencing law was in tension with the Framers’ vision of the jury.62 Justice Souter’s opinion for the Court in Jones admitted that the question of sentencing enhancements was not presented at the framing, but stated that “on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers’ conception of the jury right”63 because “competition developed between judge and jury over the real significance of their respective roles.”64 Justice Souter noted that the jury had the power “to thwart Parliament and Crown” when it disagreed with the “potential or inevitable severity of sentences” by acquitting in the face of guilt to greater charges and issuing a verdict of guilty to a lesser charge—what Blackstone described as “pious perjury.”65 The opinion recounted England’s attempts to limit the availability of the jury to “control outcomes” during colonial times, including the Crown’s attempt to bar the right to jury trial in the Stamp Act and the effort made to limit the jury’s role in libel cases to findings of fact.66 And it quoted an antifederalist who warned, during one of the Constitution’s ratification debates, that the jury trial guarantee in Article III needed to be guarded “‘with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.’”67 Thus, a return to first principles of the jury’s place in the constitutional structure led the five justices in the majority to conclude that, “however peculiar” the

59 Id. at 250-54.
61 In Jones, the defendant faced a 15-year maximum penalty on a carjacking charge. Id. at 230-31. The statute further provided that “if serious bodily injury” resulted, the defendant could be “imprisoned not more than 25 years.” Id. at 230. And if death resulted from the carjacking, the prison term could extend to life. Id. At Jones’ arraignment, the magistrate judge told him that he faced a maximum of 15 years on the carjacking charge, and at trial the district court did not instruct the jury that it needed to find serious bodily injury. Id. at 230-31. At Jones’ sentencing, however, the district court concluded that serious bodily injury resulted from the carjacking and sentenced Jones to 25 years. Id. at 231.
62 See generally id. at 244-48 (discussing the jury’s role in sentencing at the time of the framing).
63 Id. at 244.
64 Id. at 245.
65 Id.
66 Id. at 245-47.
67 Id. at 248 (quoting THE COMPLETE BILL OF RIGHTS 477 (N. Cogan ed. 1997)).
sentencing factor/element distinction was “to our time and place, the relative diminution of the jury’s significance would merit Sixth Amendment concern.”

These concerns eventually caused the Jones majority to do more than doubt the constitutionality of allowing a factor that increased a defendant’s maximum penalty to go to a judge instead of a jury. The following Term, in Apprendi v. New Jersey, the same 5-4 majority held that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts,” other than recidivism, “that increase the prescribed range of penalties to which a criminal defendant is exposed.” The Court concluded that “when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” The Court explained that “[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant’s very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.” According to Apprendi, it is the jury’s function to ensure that such laws properly apply to a defendant. The Court therefore held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

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68 Id. After Jones, the Court interpreted 18 U.S.C. § 924(c), which increases the penalty for using or carrying a firearm in relation to a crime of violence when the weapon is a machinegun, to require a jury finding on whether the weapon was a machinegun. See Castillo v. United States, 530 U.S. 120 (2000).


70 The Court relied on the fact that “there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.” Id. at 496. For a defense of treating recidivism differently based on an estoppel theory, see Note, Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors, 112 HARV. L. REV. 1349, 1362-66 (1999).

71 Apprendi, 530 U.S. at 490. The Court in Apprendi considered a New Jersey statutory scheme that permitted a judge to enhance a defendant’s sentence for an underlying offense based on the judge’s finding that the defendant committed the crime with “a purpose to intimidate an individual . . . because of race.” Id. at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)). Under this “hate crime” statute, a judge could increase a sentence even above the statutory maximum for the underlying conviction because the enhancement was deemed a sentencing factor, not an offense element. Id. at 491.

72 Id. at 494 n.19.

73 Id. at 495.

74 Id. at 497.

75 Id. at 490.
Like Justice Souter’s opinion in *Jones*, Justice Stevens’ majority opinion was anchored in history. It noted that during the years surrounding our Nation’s founding, the trial judge had little discretion in imposing a felony sentence. It also noted that, at common law, “[w]here a statute annexe[d] a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must [have] expressly charge[d] it to have been committed under those circumstances, and must [have] state[d] the circumstances with certainty and precision.” From this “historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided,” the Court reasoned that a “judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.”

The concurrences of Justices Scalia and Thomas similarly relied on the jury’s historical importance. Justice Scalia’s concurrence was written in response to Justice Breyer’s dissent, which argued that the majority’s opinion did nothing more than promote the “procedural ideal” of juries, because “the real world of criminal justice cannot hope to meet any such ideal.” Justice Scalia admitted that Justice Breyer “sketched an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State.” But, he noted, “[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.” In other words, the Framers wanted the people to act as a check before the state—which, as Justice Scalia noted, includes judges—could bring its criminal laws down upon a defendant. For his part, Justice Thomas also canvassed history in reaching his conclusion that the law was unconstitutional. He concurred to note that, in his view, “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)” because he could find

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76 See *supra* notes 60-68 and accompanying text.
77 *Id.* at 479.
78 *Id.* at 480 (quoting M. Hale, 2 PLEAS OF THE CROWN *170). See also King & Klein, *supra* note 56, at 1472-74.
79 *Apprendi*, 530 U.S. at 482.
80 *Id.* at 483 n.10.
81 *Id.* at 555 (Breyer, J., dissenting).
82 *Id.* at 498 (Scalia, J., concurring).
83 *Id.* Justice Scalia thus echoed Justice Gray’s dissent in *Sparf*, in which Justice Gray noted that the jury’s power “is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature, but what, in light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument.” *Sparf* v. United States, 156 U.S. 51, 169 (1895) (Gray, J., dissenting).
84 *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).
“no historical basis for treating as a nonelement a fact that by law sets or increases punishment.”

Justice O’Connor noted in her Apprendi dissent that the Court’s decision was a break from the Court’s treatment of the jury. She characterized the decision as a “watershed change in constitutional law” because the Court had previously given great deference to legislative judgments about how to allocate sentencing and liability decisions between the judge and jury. Justice O’Connor also “suspect[ed] that the constitutional principle underlying the Court’s decision is more far reaching.” She worried in particular that “[t]he actual principle underlying the Court’s decision may be that any fact (other than a prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt.”

The Apprendi majority later confirmed Justice O’Connor’s view of Apprendi’s reach. Although Justice Scalia joined without explanation the Apprendi dissenters in Harris v. United States to provide a fifth vote for affirming McMillan’s holding that judges could find facts that trigger mandatory minimum sentences, the Apprendi majority stuck together in other several other significant sentencing cases. First, the Court in Ring v. Arizona overruled Walton v. Arizona and held that Apprendi’s logic requires that facts making a defendant eligible for the death penalty be proven to the jury beyond a reasonable doubt. Ring’s analysis effectively declared at least five

85 Id. at 521.
86 Id. at 524 (O’Connor, J., dissenting).
87 Id. at 543.
88 Id. at 543-44.
89 Harris v. United States, 536 U.S. 545 (2002). For an argument that “[t]here is little logic to support the coexistence of Harris and Blakely” and that the dissenters in Harris correctly interpreted the jury’s role by finding no distinction between facts that trigger mandatory minimum sentences and those that raise a maximum sentence, see Rachel E. Barkow, The Devil You Know: Federal Sentencing After Blakely, 16 FED. SENT’G REP. 312, 312 (2004); Barkow, supra note 19, at 102-05. As Kevin Reitz has observed, the Court’s decision in Harris means that “[t]he jury’s role as ‘circuitbreaker’ lacks constitutional significance in the context of mandatory minimum sentence enhancements.” Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 COLUM. L. REV. 1082, 1097 (2005). It is difficult to understand Justice Scalia’s switch in Harris, and it does not seem supported by any claim to originalism. This appears to be an instance where the attitudinalists would be correct to note the failure of legal methodology to explain the outcome and where political preference or ideology seems to be driving the decision.
91 Walton v. Arizona, 497 U.S. 639 (1990) (allowing a judge to make the necessary findings to trigger a capital sentence).
92 Ring, 536 U.S. at 609. The five Justices who comprised the majority in Apprendi reached this result based on their agreement with the analysis in Apprendi of the jury’s importance and their finding that capital cases were indistinguishable for purposes of the Apprendi analysis. Id. at 589 (“Capital defendants,
states’ death penalty schemes unconstitutional, and litigation continues about whether it extends more broadly to cover additional states.93

Following Apprendi, the Court issued the blockbuster decisions of Blakely v. Washington94 and United States v. Booker,95 which held that sentencing guidelines that require increases in a defendant’s sentence on the basis of judicial factfinding also violate the jury guarantee. In Blakely, the Court rejected the State of Washington’s argument that a sentencing guidelines enhancement was acceptable because it was within the 10 year maximum for the offense to which Blakely pleaded guilty.96 The Court clarified that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”97 The same five-Justice majority from Jones and Apprendi once again relied on the historical and structural importance of the jury. Writing for the Court, Justice Scalia noted that “[t]he jury could not function as a circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.”98 He noted that the decision in Blakely therefore “reflects not just respect for longstanding precedent, but

93 Barkow, supra note 19, at 41 n.28 (discussing Ring’s application to Arizona, Colorado, Idaho, Montana, and Nebraska); see also Kimberly J. Winbush, Annotation, Application of Apprendi v. New Jersey and Ring v. Arizona to State Death Penalty Proceedings, 110 A.L.R.5th 1 (collecting cases applying Apprendi and Ring to state capital murder proceedings).


96 Blakely, 542 U.S. at 303.

97 Id.

98 Id. at 306-07.
the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of powers in our constitutional structure.”99 Although the Court again cautioned that it was not passing judgment on the constitutionality of the Federal Sentencing Guidelines,100 the dissent warned that the Court’s opinion “casts constitutional doubt” over all sentencing guideline regimes, including the federal one.101

In Booker, the Court removed whatever doubt remained and concluded that the logic of Blakely applied to the Federal Sentencing Guidelines.102 The Court issued two opinions with two different majorities, one on the substantive question of whether Blakely applied to the Federal Sentencing Guidelines103 and another on the remedial question of what to do about it.104 Justice Stevens wrote the substantive opinion for the same five Justices in the Apprendi majority and reiterated the importance of the jury to the constitutional order. The opinion reaffirmed the viability of Williams and discretionary judicial sentencing.105 But it explained that the growth in mandatory sentencing laws like the Guidelines posed a greater threat to the jury’s role: “The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge’s power and diminish that of the jury. . . . As the enhancements became greater, the jury’s finding of the underlying crime became less significant.”106 Thus, the Court explained, “[t]he new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.”107 And the answer, according to the Court, required the holdings announced in Apprendi and Blakely and required application of the Blakely holding to the Federal Sentencing Guidelines, thereby preventing judges from increasing a defendant’s maximum sentence under the Guidelines based on facts that the jury did not find (or the defendant did not admit).108 When it came to deciding on a remedy, however, Justice Ginsburg broke ranks with the Apprendi majority and joined the Apprendi dissenters in concluding that the Guidelines

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99 Id. at 305-06.
100 Id. at 305 n.9.
101 Id. at 323 (O’Connor, J., dissenting).
103 Id. at 226-44 (opinion of Stevens, J., for the Court).
104 Id. at 244-68 (opinion of Breyer, J., for the Court).
105 Id. at 233 (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”).
106 Id. at 236.
107 Id. at 237.
108 Id. at 243-44.
were facially invalid and the proper course was to excise those portions of the Sentencing Reform Act that made the Guidelines mandatory.  

It is hard to overstate the significance of *Blakely* and *Booker* on state and federal sentencing practices. *Blakely* and *Booker* have changed dramatically the landscape of sentencing law because they affect all jurisdictions with structured sentencing, either in the form of statutes or guidelines. *Blakely* prompted multiple states to amend their sentencing guidelines, and many other state sentencing guidelines and statutes might be affected by the decision. The decision has also altered the plans of other states to adopt sentencing guidelines. Indeed, because *Blakely* potentially impacts the sentencing jurisprudence and policies of every state, Doug Berman believes it “may be

109 Id. at 245. The remedial majority explained that “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing” and that “courts of appeals review sentencing decisions for unreasonableness.” Id. at 264. Justices Stevens, Scalia, Souter, and Thomas disagreed that this remedy comport ed with the congressional intent in passing the Sentencing Reform Act. Id. at 274 (Stevens, J., dissenting in part) (“T]he Court’s creative remedy is an exercise of legislative, rather than judicial, power.”); id. at 313 (Thomas, J., dissenting in part) (agreeing with Justice Stevens’s proposed remedy but writing separately to state his view of severability). These Justices would not have found the Guidelines facially invalid but invalid only as applied to those cases without jury findings; thus, the Guidelines could still operate in a mandatory fashion, according to the remedial dissenters, as long as the requisite jury findings were made. Id. at 274-84. See also id. at 302 (“Neither *Apprendi*, nor *Blakely* . . . made determinate sentencing unconstitutional. Merely requiring all applications of the Guidelines to comply with the Sixth Amendment . . . would have required no more complicated procedures than the procedural regime the majority enacts today, and, ultimately, would have left most sentences intact.”).

110 While *Apprendi* was itself a significant decision that prompted a flood of litigation, it ultimately led to only small changes in doctrine because the courts interpreted the decision narrowly. Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 FED. SENTG REP. 307, 308 (2004) (noting that, “[t]hough the decision generated much litigation and many appellate decisions trying to interpret and give effect to the *Apprendi* ruling, its impact on established criminal law doctrines was relatively limited because lower federal and state courts typically interpreted *Apprendi* narrowly, and legislatures did not feel compelled to alter existing sentencing systems”). In those jurisdictions where courts read *Apprendi* more expansively and essentially predicted the outcome in *Blakely*, it did lead to significant changes. For example, after *Apprendi*, Kansas adopted a bifurcated system in which juries decide facts that increase a defendant’s sentence. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1109-13 (2005) (describing the Kansas system); see also *Blakely* v. Washington, 542 U.S. 296, 309-10 (2004) (same).


113 For example, Kevin Reitz notes that *Blakely* might be responsible for the decision of the Massachusetts legislature to curtail its plans to adopt sentencing guidelines. Reitz, *supra* note 110, at 1107. And, as he observes, “[i]n unknown numbers of other states, *Blakely* may similarly squelch or sidetrack movements toward sentencing reform.” Id. at 1108.
the most consequential and important criminal justice decision, not only of [the 2003] Term or [the last] decade or even of the Rehnquist Court, but perhaps in the history of the U.S. Supreme Court.”114 As Kevin Reitz observes,

Blakely has been likened to a legal earthquake, a forty-car pileup, a bombshell, and a bull in a china shop. It has been called the most significant constitutional decision in criminal justice since Miranda—and some have opined that its full force will be greater than any past ruling in the field.115

For its part, Booker altered the world of federal sentencing by transforming the most stringent guidelines in the country into an advisory system subject to judicial review, leaving a host of questions in its wake. There are already multiple circuit splits and unanswered questions about Booker’s scope and the shape of the new advisory Federal Sentencing Guidelines.116 The Department of Justice is contemplating solutions to address what it sees as the problem of too much judicial discretion, and Congress, too, is considering legislative proposals, including a House bill that would transform the Federal Sentencing Guidelines into mandatory minimum sentences.117

Contrast this new sentencing world—with almost daily judicial decisions about how federal or state sentencing systems must operate and multiple legislative proposals in the states and federal system designed to comply with the jury guarantee—with the sentencing system that operated for most of the Nation’s history, and it is easy to see why these decisions must be considered a vital part of the Rehnquist Court’s legacy. Whether or not the Court has struck the right balance,118 it has significantly transformed the conversation over sentencing. Just as it was in the nation’s early history, the jury is once again at the center of the conversation. And with hundreds, perhaps thousands, of court decisions reviewing sentences for compliance with Blakely and Booker, sentencing is anything but lawless. We are in the midst of a sentencing revolution, and it has been sparked by the Court’s reinvigoration of the jury’s place in the constitutional structure. These decisions therefore must rank alongside the Supreme Court’s other significant


115 Reitz, supra note 110, at 1086.


The post-Blakely and Booker legal developments are so voluminous that Doug Berman’s informative blog on sentencing law and policy developments posts a new significant decision or legislative proposal on an almost daily basis. See Berman, supra note 116.

118 Although most of the Court’s cases in this line are well-justified under the jury’s role in the constitutional structure, the Court’s decision in Harris cannot be defended as a matter of constitutional history or theory and creates perverse incentives that threaten to undermine the very jury protections the Court claims to be protecting. See Barkow, supra note 19, at 102-06; Barkow, supra note 89, at 312-15.
criminal procedure reforms, and they must be part of any discussion of the Rehnquist Court’s treatment of criminal law.

The day-to-day aftershocks of the Court’s Sixth Amendment cases would alone merit making them a critical part of the Rehnquist Court’s legacy, but they are significant for another reason: the coalition that produced them. The key jury decisions that sparked the changes in sentencing law were the product of a five-Justice majority, with the same four Justices objecting in dissent. That, of course, is not noteworthy, as the Rehnquist Court issued many 5-4 decisions. But the most common 5-4 patterns in the Court did not resemble the coalitions in the Sixth Amendment context. In the typical 5-4 case, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas were on one side, with Justices Stevens, Souter, Ginsburg, and Breyer on the other; Justices O’Connor and Kennedy were the swing votes that joined one of these two groups and determined the outcome. In the jury cases, however, the 5-4 lineup took on a new look. Justices Scalia and Thomas—commonly referred to as the Court’s most conservative Justices—joined with Justices Stevens, Souter, and Ginsburg—members of the Court’s liberal wing.

The votes in these cases that would most likely defy the predictions of the attitudinal models would therefore be those of Justices Scalia, Thomas, and perhaps Breyer. It is not clear that the model would not anticipate Justice Breyer’s votes in this line of cases because he tends to be more deferential to government decisionmaking than the Court’s other liberal jurists, and he is closer to the center in the spatial model. To the extent his vote does require more explanation, Justice Breyer’s more conservative position seems to have been driven in large part by the fact that he was one of the first members of the United States Sentencing Commission and a strong advocate for the kind of sentencing laws at issue in this line of cases. In addition, the jury’s lack of expertise and training and the unpredictability of their verdicts run counter to his preference for expert decisionmaking.

The pro-defendant stance of Justices Scalia and Thomas presents the greatest challenge for an attitudinal model. Their votes seem most readily explained by the

119 See, e.g., supra note 10.

120 This is not to say that the attitudinal model does not have merit in these cases or that the Justices have been consistently faithful to their stated legal principles in this line of cases. As noted above, the vote of Justice Scalia in Harris and the votes of Justices Kennedy and Breyer in Ring rest on thin legal justifications and are inconsistent with their other votes in this line of cases. Justice Ginsburg’s acceptance of the remedy in Booker is another example of something other than the principled application of legal methodology driving her vote. The argument is therefore not that the attitudinal model lacks force; rather it is that it is incomplete in at least a subset of cases.

121 See supra note 10.

122 Cf. Richard H. Pildes, Democracy and Disorder, 68 U. CHI. L. REV. 695, 715-16 (2001) (documenting Justice Breyer’s preference for “the authoritative role of expertise in policymaking” and pointing out that this preference might lead to his desire for order and stability in democracy cases).
interpretive methodology they endorse, which is originalism. As Justice Scalia has described it, originalism strives to adhere to the meaning of the Constitution at the time it was adopted. And the opinions in this line of cases—from Jones to Apprendi to Blakely and Booker—were based on the strong conception of the criminal jury that existed at the founding. The opinions are replete with historical references to the jury and its traditional importance, which signified a departure from the Supreme Court’s modern approach to the jury. Their stated commitment to originalism therefore prompted Justices Scalia and Thomas—the Justices frequently labeled the two most conservative members of the Court—to accept an outcome that is inconsistent with conservative politics on crime. They did so knowing that their decisions would benefit not only the defendants before them, but potentially thousands upon thousands of others; they also did so knowing that the decisions in these sentencing cases would have a profound impact on the operation of criminal laws throughout the country and would force state legislatures and Congress to rethink their approaches to sentencing, placing these cases among the most significant criminal procedure cases ever decided. Finally, Justices Scalia and Thomas voted for defendants in these cases because they believed their legal methodology required it even though their votes were in tension

123 As Stephanos Bibas points out, their votes in these cases are also consistent with a methodology that favors formalist rules over more flexible standards. Bibas, supra note 13, at 200-04. While Bibas is correct, formalism does little to explain the substantive content of Justice Scalia and Justice Thomas’s votes. That is, while formalism helps explain the form of the Court’s test for constitutionality, the fact that the Justices came out in favor of criminal defendants in those cases is based on the Justices’ perceptions of the original meaning of the Constitution.


126 There is already empirical evidence that Apprendi has resulted in shorter sentences for defendants. J.J. Prescott, Measuring the Consequences of Criminal Jury Trial Protections, http://econ-www.mit.edu/graduate/candidates/download_rip.php?id=114 (last visited June 11, 2006). Similarly, although the United States Sentencing Commission reports that most sentences have remained compliant with the Sentencing Guidelines after Booker and there has been a slight increase in the number of above-Guidelines sentences after Booker, there are now more below-the-Guidelines sentences than prior to Booker. United States Sentencing Commission, Final Report on the Impact of United States v. Booker On Federal Sentencing 57-58, 77 (March 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf (last visited June 11, 2006) (finding that 85.9 percent of cases are within the Guidelines, 1.6 percent are above the Guidelines (double the pre-Booker number), and 12.5 percent are below the Guidelines, up from 8.6 percent pre-Booker).
with or contradicted positions they had previously endorsed, the strongest evidence that they were not voting based on personal preference but on their view of what the law – and their stated legal methodology – required them to do.

The jury cases therefore showcase an important split among the Court’s conservative Justices. Chief Justice Rehnquist and Justices O’Connor and Kennedy, all of whom follow a more pragmatic approach that weighs many factors including the burden a particular decision would place on the efficient operation of government, sided with the government. Those conservative Justices who claim adherence an originalist methodology ruled in favor of the defendants.

While an enormous amount of scholarship has focused on the conservative/liberal divide on the Court, less attention has been paid to the fissure among the Court’s conservatives based on legal methodology. Yet it was precisely this division that produced the Rehnquist Court’s most significant criminal procedure cases, measured in terms of the impact those cases have had on protecting the interests of criminal defendants and in terms of how they changed the existing criminal justice system. The Court’s conservative originalists were to the left of the Court’s conservative pragmatists in these important cases. The results in these cases challenge a purely political accounting of the Court and highlight the need for paying closer attention to the complicated relationship between originalism, politics, and criminal law. While the conventional wisdom views the Court’s conservative pragmatists as less ideological than the originalists and would therefore predict that the conservative pragmatists would be more favorable to criminal defendants than the Court’s conservative originalists, the jury cases defy that logic. And, as Part II explains, these cases are part of a larger pattern.

127 See Ring v. Arizona, 536 U.S. 584, 610-12 (2002) (Scalia, J., concurring) (noting that the case forces him to confront “a difficult choice” because he was “reluctant to magnify the burdens” the Court’s death penalty jurisprudence places on the states but ultimately concluding that juries need to find aggravating facts in capital cases because “[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it”); Apprendi v. New Jersey, 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring) (noting that he was in error in his approach in Almendarez-Torres). Moreover, the position of Justices Scalia and Thomas in the death penalty cases shows that their votes are motivated by something other than a concern that the jury stand between the innocent and the state; in the capital context, the defendant is already convicted of murder and the only issue is whether the death penalty should apply. Justices Scalia and Thomas are consistently opposed to procedural protections in death penalty cases, see infra Part II, so their votes in Ring can be explained only their stated commitment to originalism and what it demands in all proceedings, including capital matters.

128 Thus, it is not merely that law and legal methodology are having an influence, but that they are acting as constraints on judicial behavior. See Friedman, supra note 7, at 330 (noting that “it is extremely important to emphasize that positive theory need not – and typically does not – deny the influence of law; it only raises questions about how much law serves to constrain judges in the strict sense demanded by some normative theory”).
II. ORIGINALISM, POLITICS, AND CRIMINAL LAW

The jury cases provide an important illustration of the significance of the methodological divide among the Court’s conservative jurists. In what were arguably the most important criminal procedure cases from the Rehnquist Court, the Court’s conservative originalists voted to the left of the Court’s conservative pragmatists.

By reviewing the Justices’ votes in all of the Rehnquist Court’s criminal cases during the ten-year period from the October Term 1994 to the October Term 2003, it is possible to determine whether these cases were notable outliers or part of a larger trend.\textsuperscript{129} Justice Breyer joined the Court for the 1994 Term, so there were no changes in the Court’s membership during this time, making it possible to compare the same nine Justices with one another across the entire time frame. Because the key issue under scrutiny is how the Court’s conservative originalists compare with the Court’s conservative pragmatists, the data set includes only those cases in which at least one of the Court’s conservatives voted for the defendant and at least one of the conservatives voted for the government.\textsuperscript{130}

During that time span, the conservatives split their votes fifty-five times in non-capital cases and fourteen times in capital cases. In the capital cases, the conventional wisdom that the conservative pragmatists would be friendlier to defendants than the conservative originalists proved correct. In those fourteen cases, Justice O’Connor voted for the defendant on eleven occasions, Justice Kennedy ruled for the defendant seven times, Chief Justice Rehnquist came out in favor of the defendant twice, and Justices Scalia and Thomas each sided with the defendant only once. Because the death penalty existed at the time of the Constitution’s framing and the Constitution makes explicit reference to it, the originalists reject arguments based on evolving standards of decency and are not persuaded by claims that capital proceedings merit extra procedural protections. Thus, for capital defendants, an originalist approach is certainly worse than a pragmatic one.

But while an originalist approach to the death penalty is relevant to any assessment of the theory’s relationship to criminal law, it is also important to consider separately the consequences of an originalist approach in non-capital cases. Death

\textsuperscript{129} The cases studied include all argued criminal cases, but not per curiam cases or cases dismissed as improvidently granted. Also omitted were civil forfeiture cases and civil cases under § 1983 and § 1988 that involved questions other than the scope of a constitutional right, such as jurisdictional questions or whether a right was clearly established enough to put an official on notice. Fourth Amendment cases outside the criminal context—such as mandatory drug testing for students or candidates running for office—were also omitted. Criminal cases involving questions of the government’s power to act—such as First Amendment or Commerce Clause challenges or jurisdictional questions—were also omitted from the pool of cases considered.

\textsuperscript{130} Unanimous cases and non-unanimous cases in which all five conservatives reached the same decision were therefore omitted from the data set. Concurring opinions were coded based on whether they came out in favor of the defendant or the government.
penalty cases remain a tiny minority of criminal cases, even though they occupy a disproportionate segment of the Court’s criminal docket. For the overwhelming majority of criminal defendants, the Court’s capital cases are irrelevant.\textsuperscript{131} Indeed, the Court itself has recognized that “death is different.”\textsuperscript{132}

When the non-capital cases are considered separately, the pattern is different. In those fifty-five cases, Justices O’Connor, Scalia, and Kennedy ruled for defendants most often, with twenty-four cases each. Justice Thomas followed with eighteen votes for defendants, and Chief Justice Rehnquist ruled for defendants fourteen times. In cases raising constitutional questions,\textsuperscript{133} as opposed to questions of statutory interpretation or the standard of review, Chief Justice Rehnquist was the outlier, with Justice O’Connor ruling for defendants fourteen times, Justice Kennedy ruling for them in thirteen cases, Justices Scalia and Thomas in eleven cases, and Chief Justice Rehnquist in only five cases.\textsuperscript{134} These numbers show that the jury cases are not outliers but part of a larger group of cases in which one or both of the originalists side with defendants even when one or more of the Court’s other conservatives do not.

But the absolute numbers cannot tell the entire story because cases involve issues of varying importance. If the Court’s conservative pragmatists came out in favor of defendants in the most important cases, the fact that originalists sided with defendants

\textsuperscript{131} Since the Supreme Court invalidated the death penalty in \textit{Furman v. Georgia}, 408 U.S. 238 (1972), the number of executions has remained minute compared to the overall number of criminal cases. For example, death sentences reached their peak in 1996, when 320 executions were carried out. James S. Liebman & Lawrence C. Marshall, \textit{Less is Better: Justice Stevens and the Narrowed Death Penalty}, 74 Fordham L. Rev. 1607, 1659 (2006). In that same year, there were 997,970 felony convictions in state court alone. Bureau of Justice Statistics, \textit{State Court Sentencing of Convicted Felons, 1996}, 2 tbl. 1.1 (1996), http://www.ojp.usdoj.gov/bjs/pub/pdf/scsc9601.pdf (last visited June 11, 2006). Indeed, even if one looks only at murder cases, there were 8,564 state murder convictions in 1996. \textit{Id.} And the number of capital sentences imposed has only decreased, reaching a post-\textit{Furman} low of 96 in 2005. Liebman & Marshall, \textit{supra}, at 1659. In contrast, the number of people incarcerated and serving sentences other than death has exploded, with more than 2 million people currently incarcerated.


\textsuperscript{133} If a Justice interpreted a statute a particular way to avoid constitutional doubt, it was included in this category. Sell v. United States, 539 U.S. 166 (2003), was omitted from the pool of cases because, although Justices Scalia, O’Connor, and Thomas dissented from the majority’s decision that upheld the government’s administration of psychotropic drugs to render a mentally ill defendant competent to stand trial, they did so on jurisdictional grounds, not on the merits. \textit{Id.} at 187 (Scalia, J., dissenting).

\textsuperscript{134} In statutory interpretation cases not raising questions of constitutional doubt, Justice Scalia ruled for defendants most often, in eleven cases, followed by Justice Kennedy in eight cases, Chief Justice Rehnquist in seven cases, and Justices O’Connor and Thomas in six cases each. The remaining cases in which the conservative Justices disagreed involved questions of the standard of review, either on direct appeal or on habeas. In those cases, Justice O’Connor ruled for the defendant four times, Justice Kennedy three times, Chief Justice Rehnquist twice, and Justices Scalia and Thomas once.
in smaller matters would lose significance, and vice versa. It is therefore important to look at the kinds of the cases in which the conservatives split their votes.

A. **Conservative Divisions in Criminal Cases**

As already noted, in the most important category of cases in which the conservatives disagreed, the jury sentencing cases, both originalists sided with the defendants while all of the pragmatists sided with the government. Another category of cases in which both originalists have taken a strong stance in favor of defendants involves state attempts to apply criminal law retroactively. In *Carmell v. Texas*, Justices Scalia and Thomas formed a majority with Justices Stevens, Souter, and Breyer and concluded that a law that reduces the quantum of evidence required for a conviction cannot be applied to offenses before the law’s enactment because it would violate the Ex Post Facto Clause. Similarly, in *Rogers v. Tennessee*, Justices Scalia and Thomas, along with Justice Stevens and Justice Breyer, dissented from a decision that upheld the retroactive application of a judicial decision to abrogate the year-and-a-day rule, under which a defendant could not be convicted of murder unless the victim died within a year and a day of the defendant’s act. They reasoned that due process concerns with ex post facto application of the law applied to judicial decisions no less than legislative ones.

The Court’s originalists were on the side of greater protection for individual liberty against the government in the Court’s 5-4 decision in *Kyllo v. United States*. *Kyllo* involved the question of whether the government’s use of a thermal imaging device aimed at a private home to detect relative amounts of heat counts as a search for purposes of the Fourth Amendment. Justice Scalia, in an opinion joined by Justices

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135 In *Richardson v. United States*, 526 U.S. 813 (1999), Justices Scalia and Thomas, along with Chief Justice Rehnquist and Justices Breyer, Stevens, and Souter, concluded that under 21 U.S.C. § 848, the jury must unanimously agree about the specific violations that make up the “continuing series of violations,” id. at 815, and reached this interpretation in part to avoid a constitutional question, id. at 820.


137 *Id.* at 532-34.


139 See *id.* at 462. In one other Ex Post Facto Clause case from the same period, Justice O’Connor was the only conservative to join Justices Breyer, Stevens, Souter, and Ginsburg in finding that a new law that resurrects an otherwise time-barred criminal prosecution and that was itself enacted after the pre-existing limitations period had expired violated the Ex Post Facto Clause. See *Stogner v. California*, 539 U.S. 607 (2003).

140 *Rogers*, 532 U.S. at 468 (Scalia, J., dissenting) (“Today’s opinion produces . . . a curious constitution that only a judge could love. One in which (by virtue of the Ex Post Facto Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that.”).


142 *Id.* at 29.
Souter, Thomas, Ginsburg, and Breyer, concluded “that obtaining by sense-enhancing technology any information regarding the interior of the home that could not have otherwise been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where (as here) the technology in question is not in general public use.”143 The majority reasoned that this rule was necessary to “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”144

In other areas, the originalists split their votes, with only one of them coming out in favor of defendants. For example, Justice Scalia has been a particularly strong adherent to the rule of lenity, the common law tradition that requires interpreting statutes in favor of defendants. He has repeatedly sided with defendants on this basis in cases involving a variety of crimes.145 In fact, according to a recent study by Ward Farnsworth, Justice Scalia is “[t]he only justice to use the rule of lenity often and distinctively,” “appl[y]ing it in ten of the last eleven cases where it was made an issue.”146 Justice Scalia has also been a particularly strong adherent to the jury’s constitutional role, even outside the sentencing cases. In *Neder v. United States*,147 Justice Scalia dissented, along with Justices Souter and Ginsburg, from a majority opinion that held that a jury instruction that omits an element of an offense should be held to

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143 *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

144 *Id.* Justice Thomas, along with the Court’s conservative pragmatists, also joined the majority opinion in *Bond v. United States*, 529 U.S. 334 (2000), which held that a law enforcement officer’s warrantless physical manipulation of the carry-on luggage of a bus passenger violated the Fourth Amendment. Justice Scalia, along with Justice Breyer, dissented. *Id.* at 339 (Breyer, J., dissenting). For an argument that the Rehnquist Court’s use of originalism in interpreting the Fourth Amendment “has little to recommend it,” see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000).


harmless error analysis. In contrast, all of Court’s pragmatists, along with Justice Thomas, found that the balancing approach of harmless error was preferable, thus allowing convictions to stand even in the face of flawed instructions on the law. As noted above, Justices Scalia and Thomas did not agree in all of the jury cases involving sentencing. Justice Scalia voted with the government in United States v. Harris, a case in which Justice Thomas joined the other members of the Apprendi majority and in which the dissenters would have overruled McMillan and required jurors to find the facts that trigger mandatory minimum sentences. Justice Thomas also joined with the Court’s liberal justices in United States v. Bajakajian in finding a forfeiture to be excessive under the Eighth Amendment.

In addition, there are two areas where the originalists have indicated that, in future cases, they might be more likely to rule for criminal defendants than their conservative peers. Justices Scalia and Thomas have indicated that they would interpret the Fifth Amendment privilege against self-incrimination expansively. In United States v. Hubbell, in which only Chief Justice Rehnquist dissented from a decision holding that the target of a grand jury investigation cannot be compelled to answer questions that are designed to elicit information about the existence of sources of incriminating evidence, Justices Scalia and Thomas concurred to note that they would go even further than the rest of the majority. They noted that “[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence” and stated that, “[i]n a future case,” they “would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.”

Justices Scalia and Thomas have also been protective of defendants under the Confrontation Clause. They were recently part of a coalition of seven justices in Crawford v. Washington that rejected the Ohio v. Roberts balancing test for admitting

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148 Id. at 30 (Scalia, J., dissenting in relevant part).
149 Id. at 4.
151 Justice Thomas voted with the government in Almendarez-Torres, though he later noted that he made a mistake in that case. Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring); see also Shepard v. United States, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in judgment) (noting that a majority of the Court believes Almendarez-Torres was wrongly decided and stating that “in an appropriate case, this Court should consider Almendarez-Torres continuing viability”).
154 Id. at 49 (Thomas, J., concurring, joined by Justice Scalia).
155 Id.
testimonial statements and replaced it with a categorical bar. Courts applying the Roberts test frequently admitted statements made by non-testifying witnesses during police interrogations, grand jury proceedings, and allocutions. In an opinion authored by Justice Scalia, the Court in Crawford traced the historical background of the Confrontation Clause and then concluded that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” Instead, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” This view of the Confrontation Clause is one that Justice Scalia had been proposing in the years leading up to Crawford because of his view that an originalist interpretation of the Constitution requires as much. Crawford represented the triumph of this view, and though its ultimate scope remains unclear and “testimonial” might be defined narrowly, many criminal defendants have already benefited from the decision. Though concurring in the result in Crawford, Chief Justice Rehnquist and Justice O’Connor made clear that they dissented from the decision to overrule the Roberts balancing test.

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158 Crawford, 541 U.S. at 62-65. The Court also cited Roger W. Kirst, Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia, 53 SYRACUSE L. REV. 87, 105 (2003), which found that accomplice statements to the government were admitted under the Roberts regime more than a third of the time. Crawford, 541 U.S. at 64. As Jeff Fisher, the lawyer who argued Crawford in the Supreme Court, has stated, “[u]nder Roberts’ totality of the circumstances test, courts were finding almost anything and everything to indicate trustworthiness sufficient to overlook the inability to cross-examine.” Jeffrey L. Fisher, A Blakely Primer: Drawing the Line in Crawford and Blakely, CHAMPION, Aug. 2004, at 18, available at http://www.nacdl.org/public.nsf/championarticles/a0408p18 (last visited June 11, 2006).

159 Crawford, 541 U.S. at 43-50.

160 Id. at 61.

161 Id. at 68.

162 In 1990, for example, Justice Scalia dissented, along with Justices Brennan, Marshall, and Stevens, in Maryland v. Craig, 497 U.S. 836 (1990), because the court allowed a child witness to testify via closed circuit television in a sex abuse case. Id. at 860 (Scalia, J., dissenting). Justice Scalia thought this failed to comply with the Confrontation Clause because in his view, the Court was “not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.” Id. at 870. For other cases in which Justice Scalia ruled in favor of a defendant’s Confrontation Clause claim, see Idaho v. Wright, 497 U.S. 805 (1990); Coy v. Iowa, 487 U.S. 1012 (1988); Cruz v. New York, 481 U.S. 186 (1987).


164 Crawford, 541 U.S. at 69 (Rehnquist, J., concurring in the judgment).
Of course, there are also many areas where the Court’s pragmatists sided with defendants when neither of the originalists did. The most noteworthy example is *Dickerson v. United States*, in which the Court, in an opinion by Chief Justice Rehnquist joined by Justices O’Connor, Kennedy and the liberal justices, declined to overrule *Miranda* and held that it could not be overruled by Congress, either. Justices Scalia and Thomas dissented. This was an important criminal procedure decision because it emphasized the enduring importance of *Miranda*. In addition, as noted above, the conservative pragmatists have been far more receptive than the originalists to the claims of capital defendants. They have also been more willing to rule for defendants in cases raising equal protection challenges to jury selection and cases involving defendants’ habeas rights. In addition, in *City of Chicago v. Morales*, Justices O’Connor and Kennedy both joined Justices Stevens, Souter, Ginsburg, and Breyer in finding a Chicago ordinance against gang loitering to be impermissibly vague.

Justices O’Connor and Kennedy also ruled for defendants in some Fourth Amendment cases where the originalists did not. In *City of Indianapolis v. Edmond*, they held that a vehicle checkpoint to interdict unlawful drugs violates the Fourth Amendment. In *Ferguson v. Charleston*, they concluded that a state hospital could not perform a drug test on patients to obtain evidence for law enforcement purposes if the patient did not consent. Justice O’Connor was the only conservative to join the Court’s liberals in siding with an officer’s claim of qualified immunity in a case in which a warrant application listed items to be seized but the warrant itself did

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166 *Id.* at 444 (Scalia, J., dissenting).
167 The practical effect of *Dickerson*, however, should not be overstated because of the many exceptions to *Miranda* that the Court’s conservatives have allowed. *See* Stephanos Bibas, *The Rehnquist Court’s Fifth Amendment Incrementalism*, 74 Geo. Wash. L. Rev. ___ (2006). In addition, Chief Justice Rehnquist’s vote in *Dickerson* might be seen less as an endorsement of *Miranda* than as an attempt to make sure the opinion affirmin the decision was written narrowly. *See* R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 Harv. L. Rev. 10, 14-15 (2005).
168 *See*, e.g., *Campbell v. Louisiana*, 523 U.S. 392 (1998) (concluding that a white defendant has standing to raise an equal protection claim that black jurors have been discriminated against in grand jury selection).
169 *See*, e.g., *Bousley v. United States*, 523 U.S. 614 (1998) (holding that a defendant who procedurally defaulted on a claim that a plea was not knowing and voluntary could establish constitutional error if he could show he was actually innocent of the charges). Justice Kennedy also dissented, along with Justices Stevens and Souter, in *Dretke v. Haley*, 541 U.S. 386 (2004), disagreeing with the majority that when a federal court faces allegations of actual innocence by a defendant, it must first address all the nondefaulted claims for comparable relief. *Id.* at 397-98 (Stevens, J., dissenting).
171 Chief Justice Rehnquist, however, sided with the government in these cases.
not.\textsuperscript{174} And in \textit{Atwater v. City of Lago Vista},\textsuperscript{175} she dissented along with Justices Stevens, Ginsburg, and Breyer, from the majority’s decision holding that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense that is punishable only by a fine. For his part, Justice Kennedy dissented, along with Justice Stevens, from the Court’s decision to allow a police officer making a traffic stop to order passengers to exit the car.\textsuperscript{176}

Justices O’Connor and Kennedy also disagreed with each other in other cases, reflecting their respective individual commitments to defense interests in particular circumstances. Justice O’Connor, for example, showed a stronger commitment to the right to counsel\textsuperscript{177} and the ability of the defendant to have a fair opportunity to put forth evidence in his or her defense than the Court’s other conservatives.\textsuperscript{178} Justice Kennedy has been quite protective of defendants’ interests under the Self-Incrimination Clause.\textsuperscript{179}

A closer look at the cases, then, shows that in many important areas, originalists side with defendants more than pragmatists, and in other areas, pragmatists are more favorable to the accused. Whether one methodology is viewed more favorably than the other to defendants depends in part on the importance one places on each of these areas. These cases also show that the conservative Justices cannot be neatly arrayed according to the attitudinal models when it comes to criminal matters. The Justices’ methodology, as well as their politics, must be considered.

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\begin{thebibliography}{9}
\bibitem{Atwater} \textit{Atwater v. City of Lago Vista}, 532 U.S. 318 (2001).
\bibitem{Maryland} Maryland v. Wilson, 519 U.S. 408 (1997).
\bibitem{Shelton} See, e.g., Alabama v. Shelton, 535 U.S. 654 (2002) (holding that a suspended sentence that may ultimately deprive someone of liberty may not be imposed unless the defendant was given access to counsel).
\bibitem{Gray} See, e.g., Gray v. Maryland, 523 U.S. 185 (1998) (disallowing the confession of a codefendant where the defendant’s name in the confession was substituted by the word “deleted” or a blank space but suggesting other formulations that would allow the confession to come in); Montana v. Egelhoff, 518 U.S. 37, 61 (1996) (O’Connor, J., dissenting) (concluding that a Montana law that disallowed the defendant to show that he was intoxicated as a defense to a mental state element of a criminal offense violated due process).
\bibitem{Mitchell} In Mitchell v. United States, 526 U.S. 314 (1999), he, along with Justices Stevens, Souter, Ginsburg, and Breyer, concluded that the right against self-incrimination applies to the sentencing phase such that a court cannot draw an adverse influence from a defendant’s silence. Justice Kennedy showed a similarly strong conception of the right against self-incrimination in \textit{Chavez v. Martinez}, 538 U.S. 760 (2003), in which he dissented because he believed that an actionable violation could arise under the Self-Incrimination Clause “when the police, after failing to warn, used severe compulsion or extraordinary pressure in an attempt to elicit a statement or confession.” \textit{Id.} at 789 (Kennedy, J., concurring in part and dissenting in part). And in \textit{Missouri v. Seibert}, 542 U.S. 600 (2004), he joined Justices Stevens, Souter, Ginsburg, and Breyer in holding that a confession following Miranda warnings that were themselves given after a defendant provided an unwarned confession is inadmissible.
\end{thebibliography}
**B. Beyond Politics**

The previous section explained that the Rehnquist Court’s originalists, in a number of cases, have found themselves joining forces with the Court’s more liberal Justices to rule for criminal defendants even when one or more of the Court’s pragmatic conservatives disagreed.

This pattern is revealing because it shows that the Justices’ votes in criminal cases – at least non-capital ones – are more complicated than commonly recognized. In particular, the conventional view that Justices Scalia and Thomas represented the most politically conservative viewpoint on the Rehnquist Court\(^\text{180}\) does not hold if non-capital criminal cases are studied separately. In many important areas, the Rehnquist Court’s originalists have favored the accused while its conservative pragmatists have not. Looking at the period from the October Term 1994 to the October Term 2003, Chief Justice Rehnquist was the Court’s most conservative voice in constitutional criminal matters.\(^\text{181}\) Justice Scalia, one of the Court’s originalists, ruled for defendants as often as Justices O’Connor and Kennedy, the swing votes on the Court.\(^\text{182}\) Even more importantly, the criminal cases in which the originalists ruled for defendants involved issues with substantial ramifications for the day-to-day practice of criminal law. Part I explored the most significant group of cases in this vein, and the previous subsection discussed many other cases with broad impact on the operation of criminal law.\(^\text{183}\)

Thus, while originalism is typically viewed as the most conservative jurisprudential philosophy, this has not held true in non-capital criminal matters. A

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\(^\text{180}\) See *supra* note 100; see also Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. *Times*, Mar. 29, 2002, at A24 (singling out Justices Scalia and Thomas as the Court’s two most conservative members); David D. Kirkpatrick, *Court in Transition: Conservatives; Conservatives Are Wary Over President’s Selection*, N.Y. *Times*, Oct. 4, 2005, at A24 (describing conservatives’ desire that President Bush select a nominee to the Supreme Court “in the mold of Justices Antonin Scalia and Clarence Thomas”).

\(^\text{181}\) Indeed, Chief Justice Rehnquist’s votes might understate how conservative he is on criminal matters if he voted for defendants in some cases for strategic reasons. As Chief Justice, he is entitled to assign opinions when he is in the majority, so he may have decided to vote with the majority in some cases in order to assign opinions to himself or to other Justices who shared his view in a case in order to avoid having a Court opinion that was written in a manner even more favorable to defendants. One notable example where this appears to be the case is his vote in *Dickerson*. See *Cruz, supra* note 167, at 14-15.

\(^\text{182}\) In many cases, of course, the conservatives voted as a bloc against the accused. The interesting comparison is how they voted when they diverged. That is, the key question is whether it was it more likely that the pragmatists voted in favor of the accused or the originalists did when the conservative vote was divided.

\(^\text{183}\) *Crawford*, for instance, affects a huge number of criminal cases. Each week, at least twenty opinions are issued citing *Crawford*. Robert William Best, *To Be or Not To Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, 2005 *Army Law*. 65, 87 (2005). To take another example, resolving the question of whether harmless error applies to flawed instructions on material elements is also significant to criminal practice because a rule making harmless error inapplicable would mean new trials in every case with the erroneous instructions.
A conservative Justice who adheres to a pragmatic method of interpretation is just as likely, on balance, to reach conservative outcomes in this category of cases than a conservative jurist who follows an originalist methodology. And an originalist is more likely to reach a liberal outcome that has sweeping consequences in many important areas, such as the meaning of the jury guarantee, the treatment of testimonial statements under the Confrontation Clause, and the scope of the Fifth Amendment privilege against incrimination.

To understand why this would happen, despite the predictions of attitudinal models, it is helpful to consider what might push a conservative Justice with a stated commitment to originalism toward a ruling in favor of a criminal defendant. Consider, then, the Constitution’s text, structure, and history related to the state’s criminal power. The Framers were aware of the danger the state poses to individual liberty in criminal matters, and that is reflected in the many constitutional provisions that apply to criminal proceedings. Indeed, the danger of state criminal power occupies much of the Constitution. Article I prohibits bills of attainder, ex post facto laws, and suspension of the writ of habeas corpus. Article III ensures that the trial of all crimes shall be by jury. Four of the first ten amendments govern the criminal process. The Fourth Amendment’s provisions regulate police and investigative powers. The Fifth Amendment covers the right to a grand jury and the prohibition on double jeopardy, not to mention the broad protections offered to criminal cases through the Due Process Clause. The Sixth Amendment buttresses Article III’s jury protections by guaranteeing that the jury will be a local one. In addition, it provides for the right to a speedy and public trial and notice of criminal charges, as well as the rights to confrontation and the assistance of counsel. The Eighth Amendment prohibits the state from imposing cruel and unusual punishments. In addition, the Constitution’s separation of powers requires that every branch of government – legislative, executive,

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184 See supra notes 8-10 and accompanying text.
185 For a longer discussion of these provisions, see Barkow, supra note 45, at 1012-17.
186 U.S. CONST. art. I, § 9, cl. 3; id. § 10, cl. 1.
187 Id.
188 (Id. art. I., § 9, cl. 2 (prohibition on suspension of the writ of habeas except “when in Cases of Rebellion or Invasion the public Safety may require it”).
189 Id. art. III, § 2, cl. 3.
190 Id. amend. IV.
191 Id. amend. V.
192 Id. amend. VI.
193 Id.
194 Id. amend. VIII.
and judicial — plus the jury must agree before a criminal conviction can be imposed.195 The Constitution is therefore replete with protections for criminal matters.

These provisions were deliberately designed to make it difficult for the government to act in criminal proceedings. The constitutional criminal protections — grounded in both rights and structure — are intentionally inefficient. Thus, someone who interprets the Constitution based on the original meaning of its provisions should enforce these provisions even if they are inconvenient for the government. The originalist is not, pursuant to the methodology, supposed to weigh the interests of the individual defendant against the changing needs of the state unless the Constitution contemplates such weighing. If the Constitution speaks in terms of categorical rights and that was the meaning of a constitutional provision at the time of the framing, the committed originalist should reject government requests for adaptation and instead uphold the right in categorical terms, even if that results in sweeping changes from the status quo.

It would be naïve, of course, to assume that originalists perform this task unaffected by their own biases.196 It is likely that a Justice chooses originalism as his or her preferred methodology because it will, in the vast majority of cases, produce a conservative outcome that accords with his or her preferences. Criminal law represents one of the few areas where originalism might create dissonance between the Justice’s ideological preferences and what the methodology requires. In many cases, that gap might be too large for the Justice to accept, and some self-proclaimed originalists will fail to find categorical rights even when there is historical evidence to support their existence because their view of the historical record will be colored by their preferences. That originalists often disagree with one another about what the Constitution requires shows the malleability of this methodology, and therefore its susceptibility to this kind of bias. But the Rehnquist Court cases discussed above demonstrate that this is not always the case and that originalists will often feel constrained by their methodology to vote a certain way, even if that means a vote in favor of criminal defendants with far-reaching consequences that they otherwise do not support.197

195 For an analysis of the Constitution’s separation of powers and the criminal law, see Barkow, supra note 4548.

196 See Robert M. Howard & Jeffrey A. Segal, An Original Look at Originalism, 36 LAW & SOC’Y REV. 113, 134 (2002) (analyzing arguments about text and intent made to the Court and finding that “ideological predispositions to vote a particular way overwhelm Supreme Court decisionmaking, regardless of whether or not one premises it on an originalist interpretive method or on some vague notion of justice”).

197 Cf. Michael. C. Dorf, Whose Ox is Being Gored? When Attitudinalism Meets Federalism 24 (2006) (Columbia Public Law Research Paper No. 06-102), http://ssrn.com/abstract=887744 (last visited June 11, 2006) (noting that a judge who adopts a particular approach to a category of cases, even she does so based on the belief that the approach will yield a pattern of results over time, should not be criticized as engaging in “result-oriented judging” if the judge “follows that approach even though it means casting votes in favor of results she dislikes”).
Moreover, the relevant inquiry here is not whether originalism will always restrain personal preferences—it will not—but whether originalism might be more likely than other methodologies to restrain personal preferences in criminal cases, assuming Justices with the same political preferences. Frank Cross analogizes this constraining function of law to “ropes binding a judicial Houdini”:

The ropes may be tight or loose, possibly knotted with skill and redundancy. These ropes will strive to bind thousands of judges, each of whom possess different levels of escape skills. If we try to constrain judges with law, it is imperative to understand which brand of rope and which type of knot are most effective and inescapable.\(^{198}\)

So, to phrase the inquiry more precisely, is a conservative Justice who takes an originalist approach to interpreting the Constitution more likely to rule against criminal defendants than a conservative Justice who takes a pragmatic approach?\(^{199}\)

When that comparison is made, there is reason to believe that a conservative-minded pragmatist might be more likely to rule according to his or her policy preferences and therefore vote against criminal defendants or to vote for criminal defendants on narrower grounds than the originalists in many important areas. One of the hallmarks of pragmatism is that it allows a weighing of the relevant interests. A conservative pragmatist is likely going to be more persuaded by government claims that courts should defer to political judgments and that some accommodation should be made to allow government to handle the massive number of criminal cases that are now prosecuted without being bogged down by the vision of the Framers.\(^{200}\) At the same time, the interests of defendants are likely to be systemically undervalued. Criminal defendants are a notoriously unsympathetic group, and it is often difficult to see why the many protections established in the Constitution need to apply with full force in every case. It is thus all too tempting to relax them in individual cases, especially in the face of a serious crime. A frequently cited vice of originalism, its rigidity, therefore might become a virtue in criminal cases where the values underlying a constitutional provision might be easily overlooked.

The Rehnquist Court’s Sixth Amendment cases illustrate this dynamic. The Court’s originalists, Justices Scalia and Thomas, came out in favor of strong jury rights

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\(^{198}\) Cross, *supra* note 8, at 326.

\(^{199}\) While one could ask whether a liberal Justice who takes an originalist approach to interpreting the Constitution is more likely to rule against criminal defendants than a liberal Justice who takes a pragmatic approach, that inquiry is less interesting because of the current composition of the Court. At present, there are no liberal Justices who claim to be originalists in any strong sense. If and when the composition of the Court changes, this too might become a fruitful inquiry. In a symposium on the Rehnquist Court, however, the more pertinent question is how the methodologies compare when employed by conservative jurists.

\(^{200}\) See Myers, *supra* note 11, at 1407 (describing “appeal to democratic values” and “concern over the social and political costs” of a decision as “centrist strategies”).
based on the historical role of the jury. This led them to a result with sweeping consequences. Thousands of criminal defendants across the country stood to benefit from their ruling. In contrast, the Court’s conservative pragmatists dissented. They rejected the categorical approach of the majority and highlighted the negative consequences of the Court’s decisions. They noted that the decisions would undermine democratic judgments. They worried that the decisions would eradicate years of sentencing reform. And they predicted that there would be a litigation explosion as defendants relied on the decisions to challenge their sentences.

To be sure, sometimes the Court’s conservative pragmatists take into account competing claims and decide in favor of defendants when originalists would not because the flexibility argues in favor of a more defendant-friendly position than a hard-line based on originalism. But a key question worth asking is which theory, as practiced by conservatives, is more likely to yield conservative results in criminal cases. The answer, as shown above, depends in large part on the type of criminal case. And it also depends on the Justice employing the theory. Among the pragmatists, Chief Justice Rehnquist rarely ruled for defendants in constitutional cases and, among the conservatives, voted least often for defendants in all the criminal cases from the period under study.

The claim here, then, is not that attitudinalists are wrong. Their work and the work of other political scientists studying how judges actually behave is invaluable and has much descriptive force. Nor is the argument that originalism is a better method of interpretation in criminal cases or any other context. Instead, the goal of this article is a more modest one, and that is both to challenge the idea that law does not act as a constraint on judges and to question the conventional wisdom that adherents to originalism are the most conservative members of the Court when it comes to criminal justice. The methodology and those who adhere to it are more complicated than the political models would suggest, and in many important areas, originalism produces favorable results for defendants when pragmatism does not.


202 See, e.g., Blakely, 543 U.S. at 323-26 (O’Connor, J., dissenting).

203 See id. at 326 (O’Connor, J., dissenting) (“[T]ens of thousands of criminal judgments are in jeopardy.”).

204 For an excellent overview of the political science scholarship and what it has to offer legal scholars, see Friedman, supra note 7, at 270-329.
CONCLUSION

The Rehnquist Court’s Sixth Amendment decisions were revolutionary in terms of their effect on sentencing law and policy and their reliance on the jury’s place in the constitutional structure. For that reason alone, they should be deemed an important part of the Rehnquist Court’s legacy in criminal justice.

But they are noteworthy as well because they were based on a union between the more liberal Justices and those conservative Justices who adhere to originalism. The cases therefore demonstrate that the interpretive methodology of originalism can produce results in criminal cases that contradict political models of the Court.205

Future scholarship should explore this question, not only because it is an interesting scholarly question, but also because it is an important political question. As new Justices are nominated to the Court, it is all too easy to rely on generalizations. One of the generalizations recently expressed in the confirmation hearings of Chief Justice Roberts by liberal politicians was that a Justice in the mold of Chief Justice Rehnquist is preferable to one who follows in the footsteps of Justice Scalia or Justice Thomas because the latter are too conservative and do not respect individual liberty.206

That may or may not be true, depending on what liberties one cares about. Those who care about the role of the judiciary in protecting the interests of criminal defendants should closely explore the accuracy of this view, because there is evidence that a Justice in the mold of Justice Scalia or Justice Thomas would be preferable to a Justice in the mold of Chief Justice Rehnquist in many important criminal matters. This view did not get much of an airing in the Roberts confirmation hearings because none of the powerful interest groups involved in the hearing cared about criminal defendants.207 This is unsurprising, of course, as criminal defendants fare poorly in all aspects of the political process.208 Political actors are unlikely to express concern with the liberties of criminal defendants. The politics of crime are such that neither

205 Cf. Barry Friedman, Taking Law Seriously, 4 Perspectives on Politics 261, 266-67 (June 2006) (noting that political scientists should focus on opinions in addition to outcomes)

206 See, e.g., Robin Toner & David D. Kirkpatrick, Court in Transition: Clash of Philosophies; Liberals and Conservatives Remain Worlds Apart on Roberts’ Suitability, N.Y. TIMES, Sept. 16, 2005, at A22 (quoting Sen. Joseph R. Biden) (“My question is, Is Justice Roberts going to be a Scalia, a Rehnquist or maybe a Kennedy? If I think he’s going to be a Justice Scalia, who I like personally very much, I vote no. If I think he’s going to be a Kennedy, I vote yes. If I think he’s going to be a Rehnquist, I probably vote yes because it won’t change anything.”); Press Release, Sen. Charles Schumer, Statement of Sen. Schumer in Opposition to Roberts Nomination to Supreme Court (Sept. 22, 2005) (explaining that Sen. Schumer chose to oppose Justice Roberts’s nomination because of “the risk that he might be a Thomas,” while noting that if Roberts were “a Rehnquist,” it “would not be cause for exultation; nor would it be cause for alarm”), http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005/PR41839.Oppose%20Roberts.09.22.05.pf.html (last visited June 11, 2006).

207 Indeed, criminal law matters were hardly mentioned.

208 For a discussion of the politics of crime, see Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 COLUM. L. REV. 1276 (2005); Barkow, supra note 37.
conservative nor liberal politicians express concern with criminal defendants’ interests. Instead, virtually all politicians are “tough on crime.”

But that is precisely why the role of the judiciary in criminal matters is so important, and why special attention should be paid to the kind of judge who is most likely to look after the interests of defendants. As one originalist has stated, the “most significant role[”] for judges is “to protect the individual criminal defendant against the occasional excesses of th[e] popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.”209 It is time to pay more attention to what kind of judge best performs that role. To be sure, it seems safe to assume on a general level that, everything else being equal, a liberal judge is more likely than a conservative judge to protect the interests of criminal defendants. But the more interesting question is how legal methodology factors in the mix when comparing judges with the same basic ideology. If the Rehnquist Court is any indication, the answer is a complicated one. In one of the most important jurisprudential developments in criminal law – sentencing – methodology mattered. Because methodology will continue to matter, it is time to give more thought to its relationship to criminal justice.