

**“The Question Is Which Is to Be Master – That’s All”:
Cunningham, Claiborne, Rita and the Sixth Amendment Muddle**

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“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When I use a word,” Humpty Dumpty said in a rather scornful tone,

“it means just what I choose it to mean – neither more nor less.”

*“The question is,” said Alice, “whether you can make words
mean so many different things.”*

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

-- Lewis Carroll, Through the Looking Glass

Three things are clear from the Supreme Court’s opinion in *Cunningham v. California*,¹ in which the Court struck down California’s sentencing law as violative of the Sixth Amendment, and from the briefs in the pending cases involving post-*Booker* federal sentencing, *Claiborne v. United States*² and *Rita v. United States*.³ First, the Supreme Court has plunged Sixth Amendment sentencing law deep down the rabbit hole. Second, both the government and petitioners in *Claiborne* and *Rita* have adopted indefensible positions. Third, neither the parties nor the *amici* in *Rita* and *Claiborne* have offered the Court any real help in crafting a sensible rule for the resolution of these and future similar cases. This essay presents a critical analysis of the *Cunningham* opinion and the *Claiborne-Rita* briefs, followed a few thoughts on how the Court might start to make some sense of the current muddle.

Cunningham v. California

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¹ 127 S.Ct. 856, 549 U.S. __ (2007)

² *Claiborne v. United States*, No. 06-5618.

³ *Rita v. United States*, No. 06-5754.

In *Cunningham*, the Supreme Court considered the constitutionality of the California state sentencing system in the wake of its Sixth Amendment decisions in *Blakely v. Washington*⁴ and *United States v. Booker*.⁵ Under California law, the statute defining an offense prescribed three precise terms of imprisonment – a lower, middle, and upper term. Penal Code §1170(b) provided that “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” The aggravating or mitigating circumstances were to be determined by the judge. The State Judicial Council promulgated rules defining “circumstances in aggravation [or mitigation]” as “facts which justify the imposition of the upper [or lower] prison term.”⁶ The rules went on provide a nonexhaustive list of aggravating and mitigating circumstances, and provided that the “judge is free to consider any ‘additional criteria reasonably related to the decision being made.’”⁷ Upon finding aggravating or mitigating facts, the judge was permitted, but not required, to impose either an upper or lower term sentence. The Supreme Court found this system in violation of the Sixth Amendment, as interpreted in *Blakely* and *Booker*, because a precondition for a sentence above the middle term was a post-conviction judicial finding of fact.

The problem with the opinion in *Cunningham* is that its stated rationale depends on a fundamental misconception of the relationship between the only three jobs the judiciary performs in any American sentencing system – fact-finding, discretionary choice among legally available sentences, and appellate review. Although sentencing

⁴ 540 U.S. 965 (2003).

⁵ 543 U.S. 220 (2005).

⁶ Rule 4.405(d).

⁷ *Cunningham*, 127 S.Ct. at 862

systems vary widely in their details, only four basic configurations in the relationship between fact-finding, discretionary choice, and appellate review are possible.

Category 1: *The facts found by the jury or admitted by the defendant generate a single, determinate sentence, from which the trial judge cannot vary, and from which there is no appeal except as to defects in the conviction itself.*

Category 2: *The jury finds all the facts (both those necessary to conviction and those related to sentencing) and possesses discretionary power to choose among the range of sentences rendered legally possible by its findings of fact. Such a system might, or might not, provide for appellate review of the jury's discretionary sentencing choice.⁸*

No system in either Category 1 or 2 presents a Sixth Amendment difficulty because the jury finds all the facts upon which determination of a sentence depends.

Category 3: *The facts found by the jury or admitted by the defendant generate a range of sentencing options among which the judge may choose in his or her discretion. The sentence is unreviewable on appeal (except for reliance on unconstitutional factors).*

Any system in Category 3 likewise avoids Sixth Amendment problems, but to understand why requires more careful analysis than might initially appear. The easy explanation is that some systems in this category, such as the federal sentencing regime as it existed immediately before the adoption of the Federal Sentencing Guidelines, simply require no post-conviction judicial findings of fact as part of the sentencing

⁸ Even a system that employs both jury fact-finding and jury discretion as to penalty in the sentencing phase must account for guilty pleas. It could empanel a sentencing jury for every case in which a guilty plea is entered and task that jury with finding sentencing facts and exercising sentencing discretion. Or it could delegate to the judge both fact-finding and penalty discretion in all cases resolved by plea. However, if it chooses the latter course, then as to all cases resolved by plea the system will fall into either Category 3 or 4.

process.⁹ However, the distinguishing feature of Category 3 systems is not that they do not require judges to find facts, but that they contain no enforceable rules which constrain judicial discretion by correlating judicial findings of fact to required or preferred outcomes. For example, even if the pre-Guidelines federal sentencing regime had required that the sentencing judge provide a statement of reasons including findings of the facts justifying the sentence chosen, the system would not have offended *Blakely*'s reading of the Sixth Amendment in the absence of rules connecting judicially found facts to outcomes and thereby placing some legal constraint on judicial discretion.

Category 4: *The facts found by the jury or admitted by the defendant generate a range or menu of sentencing options from which the judge chooses. There are rules, guidelines, or standards correlating facts found by the judge with sentencing outcomes. The sentence, and thus the judge's choice among legally available sentencing options, is subject to appellate review.*

All the sentencing systems that have presented the Supreme Court with Sixth Amendment questions fall into Category 4. However, the Supreme Court's opinions from *Apprendi* to *Cunningham* fail to provide a coherent rule for which do and which do not violate the Sixth Amendment because the Court, mesmerized by an obsession with fact-finding, articulates no theory about the constitutionally required relationship between judicial fact-finding, judicial sentencing discretion, and appellate review.

The linchpin of the *Apprendi-Blakely-Cunningham* line is a supposed "bright line rule" distinguishing sentencing systems that violate the Sixth Amendment from those that

⁹ See former Fed.R.Crim.P. 32 (repealed effective Nov. 1, 1987 by Pub.L. 98-473), which set out the duties of the sentencing judge in imposing sentence. The court was not required even to provide a statement of reasons for the sentence imposed.

do not.¹⁰ In *Apprendi*, the court said that, “[A]ny 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.”¹¹ In *Blakely*, the Court declared that, “[T]he ‘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...*”¹² In short, a judge may not impose a sentence higher than that which would be legally possible based purely on the jury’s verdict or the defendant’s admissions, if, in order to do so, he must find any additional fact whatever (other than facts relating to prior convictions¹³). There are two glaring problems with this supposed “bright line rule”:

First, if applied strictly, the “bright line rule” amounts to a declaration that where judicial sentencing discretion exists, the exercise of that discretion cannot be subject to the rule of law (or at least law may not govern discretion unless the law takes bizarre and twisted forms). While this may seem an extreme characterization of the Court’s holding, it flows ineluctably from the nature of the legal process. Second, the “bright line rule” cannot explain the result in *Booker* and thus provides no guidance in determining the permissible contours of the post-*Booker* federal system.

The *Blakely/Cunningham* “Bright Line Rule” and the Rule of Law at Sentencing

If conviction of Crime X generates a range of possible penalties from which a judge may choose, then a judge sentencing defendants convicted of Crime X can either declare that all persons convicted of Crime X in his courtroom will receive the same

¹⁰ Cunningham, 18-19, describing the *Apprendi-Blakely* rule as a “bright-line rule” and characterizing as “remarkable” the California Supreme Court’s view that the line drawn in these cases was not terribly bright.

¹¹ 530 U.S. at 490. See also, *Blakely*, 542 U. S. at 307, 308.

¹² 542 U.S. at 303 (emphasis in original).

¹³ *United States v. Almendarez-Torres*, 523 U.S. 224 (1998).

penalty, or he can try to distinguish among those who have committed Crime X. If he takes the latter course and does so on any basis other than a lottery, he must identify – at least in his own mind -- facts that distinguish the case before him from the universe of other cases involving convictions of Crime X. The facts deemed important by the judge might be facts about the offender (age, prior criminal record, prior good works, family ties, etc.) or facts about the offense that make this instance of Crime X more or less troublesome than other instances (violence, quantity of drugs, amount of loss, role in the offense, etc.).¹⁴ But a judge making rational distinctions among those who have committed Crime X must find facts and the facts on which the distinctions are based cannot be the elements of Crime X because by definition all members of the defendant class committed those elements.

Moreover, in every existing sentencing system in which conviction presents the judge a choice of more and less severe punishments for the same crime, a rational sentencing judge must find the existence of aggravating non-element factors in order to justify imposition of some subset of the legally available sentences. If, as was the case in California in *Cunningham*, the law provides for a lower, middle, and upper term upon conviction, a rational judge would be obliged find some non-element fact to justify imposition of the upper term even if the law did not affirmatively require it. Similarly, if the law provides a presumptive, aggravated, and mitigated *range* upon conviction, as was true in the Washington guideline scheme invalidated in *Blakely*,¹⁵ a rational judge is obliged to find some non-element aggravating fact to rationally justify imposition of a

¹⁴ See *Cunningham*, 127 S.Ct. at 856 (Kennedy, J., dissenting) (citing Stephanos Bibas and Douglas Berman, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L., 37, 55-57 (2006) (arguing for a constitutional distinction between offense and offender facts)).

¹⁵ See *Lopez v. People*, 113 P.3d 713, 716 (Colo. 2005) (en banc).

sentence in the aggravated range. Even in a system that specified no middle term or presumptive middle range but instead, upon conviction, presented the sentencing judge with an undifferentiated range within which to exercise sentencing discretion, a rational judge would nonetheless have to identify some non-element aggravating factor to justify a sentence at the upper end of the range.

Thus far, law has not entered into the analysis. We are merely defining the minimum requisites of rational decision-making by a judge possessing sentencing discretion. Law enters only when two additional conditions exist: (1) rules that correlate non-element facts with some required or preferred sentencing outcome, and (2) a mechanism for enforcing those rules. Rules of this correlating sort can emerge from a variety of sources, including statutes, administratively enacted guidelines, or common law judicial rulemaking. Likewise, they may take a wide variety of forms. They may, for example, say that if the judge finds Fact A, he *must* impose a particular sentence. Or that if he finds Fact B, he *may*, but need not, impose a higher (or lower) sentence than would otherwise have been possible in the absence of Fact B. Or that, if he finds Facts A, B, and C, he *should*, all else being equal, sentence within a particular elevated (or reduced) range. Or that, if he finds one or more facts of a general type, e.g., “aggravating” or “mitigating,” he may, or should, or must impose a different sentence than he would in the absence of such facts. What makes these correlations law is the presence of an enforcement mechanism that can overturn the sentencing judge’s decision if he fails to adhere to the rule correlating facts with outcomes. The only available enforcement mechanism is appellate review. Just as traffic law is a body of rules governing the conduct of drivers, sentencing law is a body of rules governing the conduct

of sentencing judges. If a judge is absolutely at liberty to impose sentences in contravention of sentencing rules without ever being reversed, those rules are no more law than traffic regulations would be if no tickets could be issued or fines collected.

Note that sentencing rules imposing quite different kinds and degrees of constraint on judicial sentencing discretion may properly be considered law. Compare, for example, a rule requiring the sentencing judge to impose a sentence of ten years imprisonment, no more and no less, upon the finding of Fact X, with another rule that declares that a judge may, but need not, impose a sentence of more than ten years only if Fact X is found. The first rule simultaneously empowers and requires the judge to impose ten years upon a finding of Fact X, while the second empowers him to do so without requiring it. Both rules are forms of “law” so long as a court of appeals is empowered to vacate a sentence violating the rule, either because the judge did not find the required fact, or because, having found it, the judge imposed a sentence different than required by the rule. Similarly, a rule correlating a set of judge-found facts to a *range* of permissible sentences is a law so long as an appellate court can vacate a sentence imposed within the range for failure to find the facts generating the range or a sentence imposed outside the permissible range for failure to abide by the rule requiring a sentence within it.

Likewise, in sentencing, as elsewhere, a rule creating a presumption may be a form of law. Consider a rule stating that a judicial finding of Fact X creates a presumption that a sentence of 10-12 years is proper, but that some other sentence may be imposed if there exist extraordinary aggravating or mitigating circumstances sufficient to overcome the presumption. Such a rule is a rule of law so long as an appellate court can

overturn a sentence outside the range, either on the ground that the sentencing judge found no aggravating or mitigating circumstance, or on the ground that the circumstances found were not sufficiently “extraordinary” to overcome the presumption. Finally, and critically to the present discussion, even a rule which grants the sentencing judge a range of choices upon conviction, subject only to the constraints that he explain his choice and that the choice be a reasonable one, allows for the operation of law within the range so long as an appellate court has the power to reverse a within-range sentence on the ground that the judge’s choice to impose it was unreasonable.

This last type of sentencing rule deserves particular attention because it is, in its essence, the post-*Booker* federal system at issue in *Claiborne* and *Rita*. *Booker* found the federal sentencing guidelines unconstitutional because they prohibited a judge from imposing a sentence above the range created by the Guidelines’ base offense level unless the judge found some additional aggravating fact that would either increase the sentencing range or permit an upward departure. The *Booker* remedial opinion sought to circumvent this difficulty by making the guidelines advisory. However, declaring the guidelines advisory does not alter the fundamental requirements of rational decision-making. After *Booker*, a sentencing judge is still presented with a statutorily created range of sentencing choices. For example, a defendant convicted of the crime of mail fraud is subject to a range of punishment from probation to twenty years imprisonment.¹⁶ A sentence at the upper end of such a range cannot be rationally justified unless the judge finds some fact in addition to the elements of the crime.

In the case of federal sentencing, the logical imperatives of rational decisionmaking are reinforced by specific statutory commands. Section 3553(a)(4)(A),

¹⁶ 18 U.S.C. § 1341.

which was left intact by *Booker*, requires that judges at least consider the range produced by application of the sentencing guidelines, and thus requires that judges find the facts necessary to determination of that guideline range. Moreover, 18 U.S.C. § 3553(c), also still in force after *Booker*, requires that the court provide a statement of the “specific reason for the imposition of a sentence” outside the guideline range, a requirement that obliges the court to find even more non-element facts to justify a sentence above the guideline range but within the statutory maximum. Additionally, while *Booker* has surely reduced the importance of the guidelines in the final sentencing calculus, all the non-guidelines factors and purposes listed in 18 U.S.C. § 3553(a)(1) and (2) also require, expressly or by necessary implication, findings of one or more facts not necessary to conviction of the underlying crime. Finally, the Sentencing Reform Act’s so-called “parsimony provision” provides that the sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)].”¹⁷ A great many claims have been made for this rule (some of them in my view unsustainable), but at a minimum it creates a requirement that a sentence greater than the minimum required by law be justified by reference to some case-specific consideration, or in *Blakely* terms, some non-element finding of fact.

In short, the judicially amended post-*Booker* remainder of the SRA expressly mandates what rationality would in any case require – fact based justifications at least for sentences at the high end of the legally available range, and if one gives a strong reading to the parsimony provision, for any sentence above the legal minimum. In this respect the present federal system is no different than the California law voided in *Cunningham*. And on this point, Justice Ginsburg’s rebuttal in *Cunningham* of Justice Alito’s

¹⁷ 18 U.S.C. § 3553(a).

suggestion that a sentencing consideration could be something other than a fact has equal force as applied to federal law.¹⁸

But Justice Alito is right and Justice Ginsburg wrong in *Cunningham* about a far more important point – the role of appellate reasonableness review. What transforms the provisions of the SRA requiring rational fact-based explanations of sentencing choices from a set of suggestions into a law subject to constitutional regulation is *precisely* the *Booker* Court’s imposition of reasonableness review. Without appellate authority to reject some sentences as unreasonable correlations between facts and outcomes, the sentencing power of judges is unconstrained within the wide boundaries set by statutory minimum and maximum penalties and, insofar as it is unconstrained, is not subject to the rule of law. If the Supreme Court had not included appellate reasonableness review as part of its remedy, the result would have been a reversion to the pre-SRA regime of unfettered judicial discretion, the sole difference being a ceremonial obligation to consult guidelines that, once consulted, could be entirely ignored. *Booker*’s imposition of reasonableness review means that it is a violation of the law, for which there is a cognizable remedy, for a judge to impose an unreasonable sentence.

It cannot be seriously maintained that a court of appeals applying the Sentencing Reform Act would find “reasonable” a sentence in which the judge imposed a term at or near the maximum sentence permitted by the fact of conviction without providing a justification based on a finding of one or more aggravating non-element facts particular to the defendant or the case. Therefore, as Justice Alito correctly points out in *Cunningham*,¹⁹ even in the post-*Booker* system of advisory guidelines, there exists a set

¹⁸ 127 S.Ct. at 862-863.

¹⁹ *Id.*

of federal sentences (those at the upper end of the statutorily available range) that cannot legally be imposed in the absence of a post-conviction judicial finding of fact.²⁰ In short, the post-*Booker* guidelines violate the “bright line rule” proclaimed in *Blakely* and embraced by the *Cunningham* majority.

The *Blakely/Cunningham* “Bright Line Rule” in *Claiborne* and *Rita*

That said, my purpose here is not to argue that the post-*Booker* federal guidelines are unconstitutional under *Blakely*. After all, the *Booker* remedial majority said that they are not. Nor is my purpose to join Justice Alito in contending that the California guidelines are constitutional under the *Booker* rule. My point is that the “bright-line rule” so fervently endorsed in *Cunningham* gives no clue as to *why* the post-*Booker* federal guidelines are constitutionally acceptable while the California statute is not. Nor does it answer the question of how much weight guidelines can be accorded in a constitutionally acceptable sentencing system. The answer, if there is one, must lie not in the requirement of judicial fact-finding, but in the manner and degree to which the facts found constrain the exercise of judicial discretion.

Stated in this way, the problem sounds relatively simple. However, an examination of the positions adopted by the parties in *Rita* and *Claiborne* illustrates the nearly impenetrable difficulties the Court has created for itself. In *United States v. Claiborne*, the Eighth Circuit held that the sentencing range produced by application of guidelines rules to certain post-conviction judicial findings of fact enjoyed a presumption

²⁰ Under current law, one kind of non-element fact that could rationally justify a high-end sentence – facts regarding a defendant’s criminal history -- may constitutionally be found by a judge rather than a jury. *United States v. Almendarez-Torres*, 523 U.S. 224 (1998). That anomaly of *Apprendi*-land does not alter the fact that most defendants either have no prior criminal history or an insufficiently serious history to rationally justify a sentence at the high end of the range available to the judge upon conviction. For this majority of defendants, a sentence at the high end of the range remains rationally unsupportable, and therefore legally unreasonable, in the absence of a non-element fact unrelated to criminal history.

of reasonableness and that a sentence substantially at variance from that range could only be upheld if the trial judge identified extraordinary circumstances justifying the variance.²¹ In *United States v. Rita*, the Fourth Circuit upheld a sentence imposed within the applicable guideline range in reliance on its general rule that “a sentence imposed ‘within the properly calculated guideline range ... is presumptively reasonable.’”²² The issue presented in both cases is the weight to be accorded by sentencing judges to the Guidelines and their ranges.

The Government’s Position

The problem for the government is that the construction of federal sentencing law it is defending in *Claiborne* and *Rita* – one in which judicially found facts create presumptively correct ranges higher than the minimum sentence legally authorized by the fact of conviction – is constitutionally indistinguishable from the guidelines regime invalidated in *Booker*, at least on any ground so far articulated by the Supreme Court.

Compare Mr. Claiborne’s posture under the pre-*Booker* system with what the Eighth Circuit holds to be current law in his case. First, both before and after *Booker*, Claiborne’s conviction would subject him to a statutory sentencing range of 0-20 years, 21 U.S.C. § 841(b)(1)(C). Both before and after *Booker*, the district judge is obliged by law to make post-conviction findings of guidelines facts. This obligation arises from the requirement of 18 U.S.C. §3553(a)(4)(A) that the court “shall consider ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission....” A judge cannot “consider” the

²¹ *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006).

²² *United States v. Rita*, 177 Fed.Appx. 357, 2006 WL 1144508 *1 (4th Cir. 2006) (*citing* *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (*citing* *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005), *cert denied* ___ U.S. ___, 126 S.Ct. 1455 (2006)).

sentencing range prescribed by the guidelines unless she first finds the facts necessary to calculate the range.

The district court found that Claiborne possessed a bit more than 5 grams of crack cocaine. This finding had two consequences. First, the amount was large enough to trigger a five-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B), but the judge also found facts making the defendant eligible for the so-called “safety valve” of 18 U.S.C. § 3553(f), thus rendering the mandatory minimum sentence inapplicable. The mandatory minimum sentence and the safety valve process would have been the same before *Booker*. Second, the judicial findings of drug quantity and safety valve eligibility generated a guideline range of 37-46 months – the same range that would have applied pre-*Booker*.²³ To this point, the pre- and post-*Booker* sentencing processes would have been identical in every particular. Therefore, if *Booker* effected any constitutionally significant change, it must relate to what a judge is to do once the guidelines sentencing range is calculated.

Before *Booker*, the judge was obliged to sentence within the range “unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed.” 18 U.S.C. § 3553(b). The key word, however, was “unless.” Even before *Booker*, a judge was not absolutely required to sentence a defendant within the range calculated after finding those facts specifically identified in the guidelines. To the contrary, the guidelines calculation did nothing more than create a range upon which Section 3553(b)

²³ Because the defendant pled guilty, it appears that he also received a three-level acceptance of responsibility adjustment under U.S.S.G. § 3E1.1.

conferred a presumption of correctness.²⁴ When *Booker* was decided in 2005, the presumption was a strong one to be sure, made so by the fairly restrictive mechanism for overcoming it specified by 3553(b), in combination with the strong *de novo* standard of review imposed on all departures before *United States v. Koon*²⁵ and reimposed on downward departures by the PROTECT Act of 2003.²⁶ Still, a pre-*Booker* guidelines sentencing range was presumptive and not mandatory, a point conclusively demonstrated by the battle between the Supreme Court and Congress over the standard of review for departures from the range.

In *Koon*, the Supreme Court changed the standard of review for departures from the guidelines from *de novo* review to abuse of discretion. The Court was plainly aware that in making this change it was loosening controls on district court adherence to the guidelines range and thus weakening the presumption of correctness enjoyed by a within-range sentence. Congress, for its part, understood the same point and, dismayed by statistical evidence suggesting that *Koon*'s relaxed standard of review was contributing to a growing percentage of departures,²⁷ passed the PROTECT Act which reinvigorated the presumption favoring a within-range sentence by legislatively reversing *Koon* and reinstalling *de novo* review. This interbranch back-and-forth is critical to understanding the real issues in *Rita* and *Claiborne*, not only because it graphically demonstrates the presumptive character of pre-*Booker* guidelines ranges, but because it reinforces the point made above regarding the centrality of appellate review to Sixth Amendment analysis. In

²⁴ See, e.g., *United States v. Granderson*, 511 U.S. 39, 49 n. 7 (1994) (referring to “[u]pward departures from the presumptive guidelines range to the statutory maximum”).

²⁵ 518 U.S. 81 (1996).

²⁶ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

²⁷ See Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 300 (2006).

a word, the strength of a presumption favoring a within-range sentence is dependent on the nature and rigor of the standard of appellate review.

How, then, does the Eighth Circuit treat Claiborne’s sentencing range after *Booker*? First, it held that because the guidelines were fashioned after years of study and took the factors listed in 3553(a) into account, the “guidelines sentencing range, though advisory, is presumed reasonable.”²⁸ Second, if a challenge is brought to a sentence imposed outside the range, the court of appeals will review the district court’s decision to vary from the range and the extent of such a variance sentence for reasonableness.²⁹ Third, due to the presumption of reasonableness afforded the guideline range, a judge who sentences outside of it must “offer appropriate justification under the factors specified in 18 U.S.C. § 3553(a).”³⁰ Fourth, the justification “must be proportional to the extent of the difference between the advisory range and the sentence imposed.”³¹ Finally, and critically, the court said, “A ‘range of reasonableness’ is *within the court’s discretion*,” but “[a]n *extraordinary reduction* [such as Claiborne’s sentence 60% below the guidelines range] *must be supported by extraordinary circumstances*.”³²

In short, the court found that the range determined by application of the guidelines to judicially determined facts remains presumptively correct, but the presumption of its correctness can be easily overcome so long as the judge stays close to the range. Thus the “range of reasonableness” that is “within the court’s discretion” extends somewhat beyond the bounds of the guidelines range. However, the presumption of correctness enjoyed by the guidelines range becomes harder to overcome the farther the judge strays

²⁸ Claiborne, 439 F.3d at 481.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (emphasis supplied).

from the range – until at some point the sentence requires “extraordinary justification.” In practical terms, this means that the diameter of the presumptively correct sentencing ranges within which a judge may sentence as an exercise of largely unfettered discretion, and outside of which appellate reversal becomes likely absent truly unusual facts, has broadened, extending some distance beyond the precise boundaries of the ranges specified by the Guidelines.

The size of the expanded ranges cannot be precisely ascertained, but *Claiborne* gives us a good outer benchmark applicable at least in the Eighth Circuit by holding that a sentence 60% lower than the guideline range requires extraordinary justification. Assuming that it would apply the same margin to sentences imposed above the range, we can reasonably infer that the strongly presumptive post-*Booker* sentencing range for a defendant like Mr. Claiborne is greater than 15 months and less than roughly 61 months, or approximately 16-60 months (in contrast to the narrower guideline range of 37-46 months that would have been strongly presumptive before *Booker*). Note that the location of this post-*Booker* presumptive range within the broader interval of statutorily possible sentences is still determined by the finding of a guidelines fact – the quantity of crack. If the court had found additional quantities of drugs, the guidelines range would increase as would the accompanying penumbra of presumptively acceptable discretionary variation from the range. For example, if Claiborne’s judge had found 20 grams of crack, the guideline range would have been 46-57 months.³³ Applying the Eighth Circuit’s sixty percent benchmark would generate a strongly presumptive post-*Booker* sentencing range of approximately 20-84 months.

³³ This range assumes eligibility for the safety valve and the three-level acceptance of responsibility adjustment, U.S.S.G. §3E1.1, both of which Claiborne actually received and which were accounted for in determining his actual 37-46 month guideline range.

The Eighth Circuit's reading of *Booker* is not unique in this regard. Any reading of *Booker* that assigns a presumption of correctness to the guidelines range will have the same effect. As the government correctly observes in its brief, the existence of a presumptively correct range derived from the interaction of findings of fact with the policy judgments of the Commission embodied in the Guidelines necessarily implies a principle of proportionality whereby the strength of the justification for a sentence outside the range must increase in proportion to the degree the sentence varies from the range.³⁴ The *Claiborne* opinion stands out only because the Eighth Circuit makes this point explicit and crystallizes its consequences by employing a number (60% variance) instead of some vaguer verbal formula to delimit a point at which variance from the guideline range requires particularly strong justification.

The upshot is that a post-*Booker* federal sentencing system based on guidelines with presumptive force is constitutionally indistinguishable from the pre-*Booker* guidelines regime, at least if the standard of reference is the "bright line rule" endorsed in *Cunningham*. In both systems, post-conviction judicial findings of fact create a strongly presumptive sentencing range the top end of which is higher than the sentence that could be imposed based on the fact of conviction alone. The only change wrought by *Booker* is that the range is now wider and its boundaries less precise than formerly. Hence, *Claiborne* and *Rita* should win unless the difference between a constitutional and an unconstitutional system rests on strength of the presumption created by fact-finding, rather than on the employment of fact-finding to create one.³⁵

³⁴ Brief of the United States, at 19-31.

³⁵ *Claiborne* may win regardless of the constitutional niceties. The Eighth Circuit's frankly bizarre *sua sponte* assumption that *Claiborne* probably committed crimes other than those reflected in the record

The Petitioners' Position in *Rita* and *Claiborne*

On the other hand, the positions adopted by petitioners and their *amicus* supporters in *Claiborne* and *Rita* are no more tenable than that of the government. Unsurprisingly, petitioners begin with the premise that a system with presumptive guideline ranges determined by judicial factfinding is inconsistent with the *Apprendi-Blakely-Booker* line.³⁶ The problem for petitioners arises because the *Booker* Court did not strike down the Sentencing Reform Act *in toto*, but instead left the entire edifice intact, save two sections, and declared that the remainder constitutes a constitutionally acceptable system. Accordingly, petitioners cannot argue that the Sentencing Reform Act as judicially amended in *Booker* is unconstitutional, but instead must argue *as a matter of statutory construction* that the Act, as redacted, does not confer presumptive effect on guideline ranges.

Indeed, petitioners contend that the excision of Section 3553(b) not only eliminates the strongly presumptive character of the guidelines ranges, but makes the guidelines no more than one factor co-equal with the other sentencing considerations listed in 3553(a). This contention is both more complex and more extreme than it appears. Section 3553(a) is written as a list of factors that the court is to consider in arriving at its judgment about the proper sentence in a given case. Subsection 3553(a)(4)(A) seems to make the guidelines one factor on the list by requiring that the court consider the sentencing range established by the Sentencing Commission in the guidelines. Strictly speaking, however, a guidelines range is not a sentencing factor, but a

below, 438 F.3d at 481, in combination with the fairly compelling facts of *Claiborne*'s case, may be enough to secure relief for *Claiborne* personally.

³⁶ See, e.g., Brief of Petitioner *Claiborne*, at 22 (“A sentencing scheme in which the Guidelines are termed advisory but presumed reasonable is essentially identical to the sentencing system that existed before *Booker*.”)

judgment by the Sentencing Commission about the range within which a sentence should customarily fall given the presence of certain sentencing factors. Although there is disagreement over whether, in formulating the guidelines, the Commission took account of *all* the factors listed in 3553, there can be no dispute that the Commission considered *most* of them. Accordingly, it is hard to make sense of the contention that a sentencing judge may give any single factor listed in 3553 the same weight as a guideline range which is the embodiment of an exercise of judgment by the Commission in which the factor singled out by the judge was already considered in combination with other factors listed in 3553(a). For example, what does it mean to say that the judge may give “the nature and circumstances of the offense” the same weight as a guideline range which is, by design, based largely on the nature and circumstances of the offense? Petitioners’ argument makes sense only when understood as a claim that the *sentencing court’s judgment* about how each factor listed in Section 3553(a) should affect the sentence is *entitled to exactly the same weight as the Sentencing Commission’s judgment* on the same point. And if that is the case, then the guidelines are purely hortatory and not even a meaningful benchmark against which the reasonableness of the district court’s sentence can be measured on review. Indeed, this is precisely the petitioners’ contention.³⁷

As an exercise in statutory construction, this just won’t fly. First, the text of the judicially redacted Sentencing Reform Act does not support petitioners’ position. Petitioners focus exclusively on 3553(a), as if that single statutory subsection were the whole statute. At most, Section 3553(a) is one of several SRA provisions now assigned to Title 18 that, read together, lay out the general contours of a new sentencing regime built

³⁷ See Brief of Petitioner Claiborne at 8 (“Nothing in Booker or Section 3553(a) supports a preeminent position for the Guidelines.”); Brief of Petitioner Rita at 42 (asserting that the “touchstone of reasonableness review ... [must be] something other than the Guidelines themselves”).

around the sentencing guidelines the newly created Sentencing Commission was to write. The bulk of the Act, now codified in Title 28, United States Code, §§ 991-998, is devoted to creating the Commission, defining its powers and responsibilities, and setting parameters for the guidelines that were and are the Commission's reason for existence. The centrality of the guidelines to the Sentencing Reform Act is evident in a hundred ways, and would have been so even if Section 3553(b) had never been enacted. Consider, as but one obvious example, Section 3553(c), which remains in effect after *Booker*, and requires judges to provide a statement of reasons for the sentence imposed and, if the sentence is outside the guideline range, to state "the specific reason for the imposition of a sentence different from" the range. This requirement alone creates a *de facto* presumption of the correctness of the guidelines range inasmuch as it requires a special explanation of the decision to deviate from that range. Likewise, 28 U.S.C. § 994(b)(2), the so-called "25% rule" which limits the width of guideline ranges, only makes sense if the ranges have legal consequence. Limiting the size of ranges judges are at perfect liberty to ignore would be pointless.

A great deal of space is expended in various of the briefs in *Claiborne* and *Rita* arguing about congressional intent.³⁸ In truth, the effort to determine congressional intent here is a comically solemn exercise in counterfactual absurdity -- an attempt to divine what Congress would have intended if it had intended to enact a statute it did not enact. But even if the peculiarities of the *Booker* remedy force consideration what Congress *would have intended* had it known in 1984 that *Booker* would be decided in 2005, that speculation does not help the petitioners. If anything is clear about congressional intent, it is that the purpose of the Sentencing Reform Act was not to grant judges effectively

³⁸ See, e.g., Opening Brief of Rita, at 13-15.

unlimited sentencing discretion, subject only to the requirement that they explain their choices using the categories on the list in 3553(a). The purpose of the Act when passed in 1984 was exactly the reverse – to create a sentencing commission which would in turn create guidelines for the precise purpose of constraining the exercise of judicial discretion within fairly narrow ranges. The only reasonable conclusion about what Congress would have intended had it known about *Booker* is that Congress would have wanted a system as close as possible to the one it actually enacted. Since Congress enacted a system with strongly presumptive guidelines, and made them even more presumptive over the ensuing twenty years with legislation like the PROTECT Act, the only rational inference is that it would want a system in which the guidelines are as strongly presumptive as the Court’s reading of the constitution will now permit.

Amicus briefs

Amici in support of petitioners, though often thoughtful and erudite, are no more convincing on the basic questions of constitutional law and statutory interpretation than petitioners themselves. For example, a brief authored primarily by Professors Marc Miller and Ronald Wright offers, in characteristically lucid style, the proposition that the key to distinguishing between acceptable and unacceptable guideline ranges is examination of the procedural rigor of the administrative process employed by the Sentencing Commission in enacting them.³⁹ While intriguing, this suggestion finds no warrant in the Sentencing Reform Act or the Administrative Procedures Act, from which the Commission’s deliberations are legally exempt. Moreover, assuming that at least some guidelines were enacted with the necessary procedural rigor, Miller and Wright do

³⁹ Brief of Amicus Curiae Marc Miller, et al.

not address the question – central to *Rita* and *Claiborne* -- of how much weight to give to a guideline range that survives their procedural test.

The separate amicus brief from “Law Professors Who Study Sentencing Reform” eloquently expounds on “the critical importance of judicial sentencing discretion and suggest[s that] the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.”⁴⁰ This hymn to the reasoned exercise of judicial discretion is, in essence, a claim that there neither can nor should be any meaningful legal constraint on a sentencing judge’s power to assign a sentence within the range created by jury-found facts. No *a priori* legislative or administrative limitations should be imposed. The federal guidelines or similar state enactments should not even be a standard against which trial discretion is measured on appeal. All that should be required of sentencing judges is that they exercise reasoned judgment. The defect of this approach is that it either strips the appellate reasonableness review required by *Booker* of all content, or alternatively, amounts to a startling declaration that the constitution permits the judiciary to make precisely the kinds of sentencing law legislatures and sentencing commissions are forbidden by *Blakey*, *Booker*, and *Cunningham* to enact.

Reasonableness review is contentless if, as the professors’ brief maintains, it means nothing more than that “Courts of Appeals [are] to police the exercise of reasoned judgment at sentencing by declaring suspect any and all sentencing decisions that fail to address thoughtfully the congressional directives of § 3553(a).”⁴¹ This “thoughtfulness” standard of review requires nothing more than that the judge explain a sentence in a

⁴⁰ Brief of Law Professors Who Study Sentencing Reform As Amicus Curiae In Support of None of the Parties, at 2.

⁴¹ Id. at 10.

minimally rational way using approved categories and buzzwords. But rational, reasonable people can come to diametrically different conclusions about the same facts. Some quite reasonable people think that those who sell small quantities of drugs should receive substantial prison sentences. Other quite reasonable people think such persons should receive probation or no criminal sanction at all. People with both views occupy seats on the federal bench. If both conclusions are sustainable on appeal so long as “thoughtfully” expressed, then law is banished from the sentencing arena.

For reasonableness review to have any content there must be some point of reference from which a sentencing judge can begin and some standards against which an appellate court can measure his conclusion. If, as petitioners and the professors’ brief contend, those standards cannot be established by the Guidelines or any similar legislative or administrative product, then the only possible source of standards is the common law power of appellate courts to create rules through the process of case-by-case adjudication. But if only appellate judges can create standards of reasonableness, the effect is to declare that the constitution permits only judges to constrain the sentencing discretion of other judges and thus confers on the judiciary a power it denies to the other branches -- a conclusion hard to find in the Sixth Amendment or indeed anywhere else in the constitution.

A Way Forward?

If the law is a muddle, the position of the government and the majority of the circuits that afford the guidelines presumptive weight offends the *Blakely/Cunningham* “bright line rule,” and the petitioners’ position cannot be squared with either the surviving components of the Sentencing Reform Act or common sense, what should the

Court do? It is no secret that I have always thought *Blakely* a huge mistake⁴² which the Court should repudiate in favor of a more constitutionally coherent approach.⁴³ But *Cunningham* makes clear that, to paraphrase Doug Berman, at least six justices have now bought tickets to *Blakely*-land, so the most the rest of us can do is offer constructive suggestions about how to best to order the affairs of that peculiar region. So, for what they may be worth, here are my suggestions:

First, the Court should reject the extremist view that no rule, guideline, or standard that correlates judicial findings of fact to preferred outcomes may constrain the discretion of a sentencing judge within the range created by jury findings or defendant admissions. To do otherwise is to say that law cannot operate within the range created by jury verdict or plea and that, within it, the *constitution* requires that the power of the individual sentencing judge be absolute.

Second, the Court should recognize that if the discretion of the sentencing judge within the jury or plea-generated range may constitutionally be subject to some legally enforceable constraints, then the *Blakely-Cunningham* “bright line rule” needs a codicil that defines the degree to which a standard or guideline based on judicial fact-finding may constrain the sentencing judge’s discretion without offending the Sixth Amendment.

Third, such a rule might be very simple, amounting to nothing more than a description of the weight that may constitutionally be accorded on appeal to a rule or standard that correlates a judicially found fact to a preferred sentencing outcome. If the Court takes this path, it will have to speak in the language of presumptions because the

⁴² See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AMER. CRIM. L. REV. 217 (2004).

⁴³ See Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT. REP. 1 (October 2004).

law has no other language to speak of such things. Plainly, the Court will not permit a sentencing rule to create a mandatory, conclusive, or irrebuttable presumption, because such a “presumption” is really just a rule of positive law. At the other end of the spectrum, the Court might permit guidelines to create something like a permissive inference of the correctness of a sentence within them, meaning that the judge is entitled to conclude that the guideline range represents a proper balance of all the relevant factors and need offer no explanation beyond the guidelines calculation in order to provide a legally sufficient statement of reasons. The effect of such a rule in the federal system would be to shield a sentence within the applicable range (such as that imposed on Rita) from serious appellate scrutiny without raising any necessary inference of the incorrectness/unreasonableness of a sentence outside the range. But the permissive inference approach does not assist in determining the reasonableness of sentences outside the range (such as that imposed on Claiborne). It says nothing about how to weight factors identified as reasons for sentencing outside the range, i.e., will any rational justification be considered equal in weight to the existence of the range? Nor does it solve the proportionality problem, i.e., does a sentence a long way outside the range require a stronger justification than one closer to the range?

The middle option is some form of rebuttable presumption of correctness of the range suggested by rule or guideline. Adoption of this approach would require settling a number of subsidiary questions. First, a rebuttable presumption can be either very strong or very weak in its practical effect depending on what is legally required to overcome the presumption. The Supreme Court would have to decide what strength it preferred and signal that preference through its description of the presumption. Second, the

government is surely right that if the guideline range is to be afforded some special weight, even as the necessary starting point for judicial choices, this extra weight implies a principle of proportionality in judging the end point of the sentencing process.

However, conceding the inevitability of a proportionality principle does not answer the questions of how far a court may vary from the presumptively reasonable range before risking reversal or of what justifications he may properly offer for the variance. Third, a key question in the federal setting will be whether a judge may explain his choice to impose a sentence outside of the range based on a disagreement with the policy choices made by the Commission in drafting the guidelines and thereafter implicitly ratified by Congress. If that class of explanation is permitted as part of the justification for a non-guideline sentence, then the presumption favoring the guideline range is very much weakened.

Fourth, and finally, given many variations in sentencing systems to which the Court's constitutional rulings apply, the Court might elect to go beyond the language of presumptions to address other features of sentencing rules that act to constrain judicial discretion. These include, but are surely not limited to: (1) whether the fact of conviction generates only a small number of determinate, single-point sentences from which the judge must choose (as was the case under California law in *Cunningham*), or instead generates ranges within which the judge may exercise discretion (as was true in Washington in *Blakely* and is the case under the federal guidelines); (2) in systems where conviction generates ranges, whether the ranges are wide or narrow, and whether there are few or many possible ranges; and (3) whether the universe of facts the court is to consider in determining whether to sentence in a range higher than that suggested by

conviction alone is small or large. For example, the Court might distinguish the federal system post-*Booker* from the California system pre-*Cunningham* by observing that the federal system creates ranges, not single determinate sentences; the federal system allows for movement between many different ranges, while the California system had only three options; and the federal Sentencing Reform Act in combination with the Guidelines and policy statements identify far more facts, factors, and purposes as relevant to the judge's ultimate choice than did California. Based on distinctions of this kind, the Court might conclude that a rebuttable presumption of reasonableness is permissible in context of the overall federal system when it might not be in California.

Conclusion

The snippet from Lewis Carroll with which this article began pops up fairly regularly in legal literature, customarily to give a literary voice to the unexceptional observation that legal quarrels over the meaning of words are often arguments about the distribution of power. Still, even if neither the general point about law nor the choice of literary tag to illustrate it is startlingly original, both are, I think, unusually apt as applied to the Supreme Court's recent Sixth Amendment jurisprudence. In the line of cases beginning with *Apprendi* and running through *Cunningham* we have found out that "statutory maximum sentence" doesn't mean the maximum sentence set by statute, but something altogether different, and we have been introduced to a bright line rule that is anything but. Most importantly, we have watched the Court decide a series of cases nominally about the Sixth Amendment right to a jury trial that have had virtually no practical effect on how many cases are decided by juries or even on the issues decided by juries in those cases that go to trial. Particularly in the federal system, the locus of the

Rita and *Claiborne* cases, the effect of the new Sixth Amendment regime on jury practice has been nil. The jury trial rate in federal courts is now lower than it was before *Booker*.⁴⁴ And in those cases that go to trial, juries decide no more facts related to sentencing than they did before *Booker*. The entire debate about the post-*Booker* federal sentencing world has had nothing to do with juries, and everything to do with the allocation of sentencing power between the judiciary (trial and appellate), Congress, and federal prosecutors.

If the Court is wise, it will address the issue of which is to be master of federal sentencing squarely in *Rita* and *Claiborne* and use these cases to develop Sixth Amendment law in a way that constructively balances the interests of the constitutional actors. A rule that insists that the fact of conviction must grant judges absolute sentencing discretion or none at all does not accomplish this end. By contrast, a rule that permits legislatures and their administrative sentencing commission surrogates to create fact-driven guidelines with a moderately presumptive effect allows the legislature to influence sentencing through rulemaking and the executive to influence sentencing through presentation of evidence, but gives proper scope to the exercise of judicial intelligence and authority.

⁴⁴ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. C (2007) (reporting guilty plea rate of 95.7% in 2006 as compared to 95.6% in fiscal 2005 pre-*Booker*).

