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Cunningham v. California: The Shifting Balance of Judge and Jury

Laurie Jaeckel

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CUNNINGHAM V. CALIFORNIA: THE SHIFTING BALANCE OF JUDGE AND JURY

INTRODUCTION

Over the past three decades, a wave of sentencing reform has spread across the country and revolutionized state sentencing laws. State legislatures and sentencing commissions from Alaska to Arkansas have replaced discretionary sentencing laws with an assortment of structuralized guidelines and systems that seek to increase uniformity and fairness in sentence decision making.[1] One preeminent commentator noted that "[t]he field of sentencing, once rightly accused of being lawless, is now replete with law."[2] Yet recent United States Supreme Court cases have placed the sustainability of modern sentencing laws in jeopardy. In its latest blow to determinate sentencing, the United States Supreme Court held in *Cunningham v. California*[3] that California's determinate sentencing law violated the Sixth Amendment by allowing a judge rather than a jury to find facts exposing a defendant to a lengthier sentence.[4] By invalidating California's sentencing scheme, *Cunningham* raises the foremost question in sentencing philosophy: is justice better served through judges or juries?

An investigation into recent United States Supreme Court cases reveals conflicting answers to this question. In the seminal case *Apprendi v. New Jersey*,[5] the Supreme Court established the principle that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to a jury beyond a reasonable doubt.[6] In 2005, the Court applied the *Apprendi* principle in *United States v. Booker*[7] to override the Federal Sentencing Guidelines.[8] However, the two majority opinions delivered in *Booker* left the future of determinate sentencing in a conceptual and pragmatic morass. While the first opinion concentrated on the constitutional problems with the Guidelines' reliance on judicial fact-finding,[9] the remedial opinion rendered the Guidelines wholly advisory,[10] giving judges more discretion than they held previ-

1. *See* Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 9-10 (2005); *see also* Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENT'G REP. 123, 123 (1993), *available at* 1993 WL 613746.
2. Berman, *supra* note 1, at 1.
3. 127 S. Ct. 856 (2007).
4. *Id.* at 860.
5. 530 U.S. 466 (2000).
6. *Id.* at 490.
7. 543 U.S. 220 (2005).
8. *Id.* at 244.
9. *See id.* at 226, 234, 244.
10. *Id.* at 246.

ously. This surprising remedy endorsed a vision of sentencing where judges reigned supreme over juries.

Cunningham recalibrated the balance between judge and jury. The opinion reaffirmed the central holding of *Apprendi* while retreating from *Booker*'s broad vision of judicial discretion. Because *Cunningham* marks the most recent development in a growing body of United States Supreme Court sentencing jurisprudence, it provides a unique window into a longstanding tension in sentencing philosophy and an important opportunity to evaluate the future course of sentencing reform. Part I of this comment explains the background of sentencing reform and contextualizes *Cunningham* within the backdrop of modern sentencing reform and contemporary Supreme Court sentencing jurisprudence. Part II analyzes the majority opinion in *Cunningham* and the two dissenting opinions. Part III examines how the majority opinion reflects a split in the sentencing community over whether to entrust sentencing power to judges or juries. After *Cunningham*, states are left with diametrically opposed options for sentencing reform: (1) a sentencing system that calls upon juries—either at trial or in a bifurcated sentencing proceeding—to find the facts necessary to increase sentences above a statutory maximum; or (2) a system that gives judges broad discretion to individualize sentences within a statutory range. To provide states with some guidance, this comment argues that a system of jury fact-finding is a better choice for states that rarely employ enhanced sentences; however, for states that employ such sentences on a regular basis, a discretionary system is more appropriate. Ultimately, the comment concludes that the lack of direction offered by the Court in *Cunningham* leaves state legislatures with the task of choosing the superior system without the guidance of our nation's highest court.

I. BACKGROUND

Since the late 1970s, the United States has gone through a remarkable period of sentencing reform and innovation.[11] Concerned about sentencing disparity, judicial inconsistency, and rising crime rates, states began to switch from indeterminate to determinate sentencing systems.[12] Instead of allowing judges broad discretion in sentencing, as they were afforded under indeterminate systems, determinate sentencing systems established sentencing guidelines that prescribed presumptive sentences a judge must impose for ordinary crimes.[13] A handful of recent Supreme Court cases, however, have challenged the constitutionality of these sentencing laws. These cases set a strong precedent for the holding in *Cunningham* and demonstrate the Court's ongoing concern for judicial fact-

11. *See* Berman, *supra* note 1, at 8-9.
12. *Id.*
13. *Id.* at 9-10.

finding that elevates a defendant's sentence beyond a maximum statutory period.

A. Modern Sentencing Reform

In the first seventy years of the twentieth century, states afforded judges "nearly unfettered discretion" to decide an appropriate sentence for defendants.[14] Most states employed this discretionary or indeterminate approach to sentencing and grounded the approach in the rehabilitative model of criminal punishment.[15] According to this model, "sentences [should] be tailored to the rehabilitation prospects and progress of each individual offender."[16] Judges were thought to have superior expertise and insight into the length of sentence that would best suit the rehabilitative needs of each offender.[17] In turn, they had broad authority to determine a defendant's sentence within a prescribed statutory range.[18]

However, this highly discretionary approach led to unpredictability and judicial inconsistency in sentencing.[19] Evidence of sentencing disparity emerged during the 1960s and 1970s as studies began to suggest that sociological characteristics such as race, gender, and economic status influenced the sentencing outcomes of certain offenders.[20] In addition, with crime rates rising, support for the rehabilitative model began to wane.[21] Critics and legal scholars began to propose reforms that could lead to greater uniformity and predictability in sentencing.[22] Many criminal justice scholars, led by the influential Judge Marvin Frankel,

14. *Id.* at 3; *see also* MICHAEL TONRY, SENTENCING MATTERS 6 (Oxford University Press 1996); Mistretta v. United States, 488 U.S. 361, 363 (1989) (commenting on the wide discretion given to federal judges to impose sentences during this time).

15. Berman, *supra* note 1, at 3; *see also* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 5-7 (1981) (discussing the dominance of the rehabilitative ideal in the United States until the 1970s).

16. Berman, *supra* note 1, at 3; *see also* Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (1987) ("[w]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officers familiar with the case to choose a disposition tailored to the offender's need for treatment.").

17. Berman, *supra* note 1, at 4; *see also* Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT'G REP. 83, 84 (2002) (discussing the view of the judge as sentencing expert in rehabilitative sentencing systems).

18. *See* Berman, *supra* note 1, at 4; *see also* Hirsch, *supra* note 16, at 3.

19. Berman, *supra* note 1, at 8; *see also* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (discussing studies showing unwarranted sentencing disparities); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-74 (1977) (reviewing data of judicial sentencing disparity).

20. Berman, *supra* note 1, at 8; *see also* William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 358-62 (1991); Nagel, *supra* note 19, at 895.

21. Berman, *supra* note 1, at 8; *see also* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 3-34, 59-123 (Hill & Wang 1976); JAMES Q. WILSON, THINKING ABOUT CRIME 169 (Basic Books 1975); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 3-72 (Basic Books 1975).

22. Berman, *supra* note 1, at 9.

came to propose some form of sentencing guidelines.[23] Reformers used sentencing guidelines to form determinate systems wherein criminal sentences were mandated according to specialized procedures and judicial findings of aggravating or mitigating facts.[24]

The federal government joined the sentencing reform movement by passing the Sentencing Reform Act of 1984.[25] The legislation created the Federal Sentencing Guidelines and imposed a determinate sentencing scheme upon the federal courts.[26] Liberals favored federal sentencing reform because of concerns about judges who discriminated on the basis of race, class, and gender; conservatives supported sentencing reform because of concerns about judges being too lenient on criminals.[27] This bipartisan distrust of judges led to an overhaul of the federal system and the replacement of discretionary sentencing with a set of mechanical formulas and rules.[28]

States followed in the footsteps of the federal government by creating sentencing commissions and adopting determinate sentencing schemes that prescribed presumptive sentencing ranges for various offenses.[29] Although the structure and form of these sentencing systems varied, it was clear the "sentencing revolution" made an enormous impact on state sentencing laws.[30] Meanwhile, the ongoing tension between judge and jury remained. While the overall power of judges decreased under determinate sentencing laws, the laws required judges to make sentencing determinations based upon judicial findings of fact. As a result, the role of fact-finder shifted from jury to judge. This shift forced the Supreme Court to confront the issue of whether determinate sentencing laws violated the Sixth Amendment's right to a jury trial.

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23. *Id.* at 8; *see also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988).

24. *See* Berman, *supra* note 1, at 9-10.

25. Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1361 (1999) (reviewing KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998)).

26. STITH & CABRANES, *supra* note 25, at 77.

27. Wright, *supra* note 25, at 1361.

28. The Guidelines established a mathematical system of calculating the proper punishment, taking into account factors such as offense level and prior criminal conduct. The Guidelines replaced individualized moral judgment with "complex quantitative calculations that convey the impression of scientific precision and objectivity." STITH & CABRANES, *supra* note 25, at 82, 84-85.

29. *See* Berman, *supra* note 1, at 9-10.

30. *See id.* at 11.

B. Background Cases

1. *Apprendi v. New Jersey*[31]

In *Apprendi*, the Supreme Court addressed the question of whether penalty enhancements imposed by a judge by a preponderance of the evidence violated the Sixth Amendment.[32] The defendant in *Apprendi* pled guilty to two counts of possession of a firearm for an unlawful purpose, a second-degree offense under New Jersey law punishable by five to ten years imprisonment.[33] However, a separate hate-crime statute allowed the sentencing judge to provide for an "extended term" of imprisonment based on the judge's finding by a preponderance of the evidence that the crime was committed with "racial animus."[34] The trial judge in *Apprendi* applied the enhancement statute and increased the defendant's sentence to twelve years.[35] The Supreme Court found that this sentence enhancement violated the Sixth Amendment because, "[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."[36]

Apprendi initiated the trend of using the Sixth Amendment as a tool to limit judicial fact-finding in sentencing. Professor Erwin Chemerinsky argues that *Apprendi* stands for a simple principle: "Under the Sixth Amendment, it is wrong to convict a person of one crime and sentence that person for another."[37] The trial judge in *Apprendi* violated this principle because the jury convicted the defendant of possession of a firearm for an unlawful purpose, and yet the judge sentenced him for this offense and a separate offense under the hate-crime statute for a crime involving racial animus.[38] The Court reasoned in *Apprendi* that the New Jersey legislature could not hide behind the label of "sentencing enhancement" to mask a determination concerning an element of the crime that needs to be proven to a jury beyond a reasonable doubt.[39] Justice Stevens described the ruling as a matter of "simple justice," and a basic extension of previous legal precedents guaranteeing due process of law and the right to trial by jury.[40]

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31. 530 U.S. 466 (2000).
32. *Id.* at 469.
33. *Id.* at 468-69.
34. *Id.*
35. *Id.* at 471.
36. *Id.* at 490.
37. Erwin Chemerinsky, *Sentencing Guideline Law and Practice in a Post-*Booker *World: The Road to* Booker*: Making Sense of* Apprendi *and Its Progeny*, 37 MCGEORGE L. REV. 531, 532 (2006).
38. *Id.* at 534.
39. *Apprendi*, 530 U.S. at 476.
40. *Id.*

In contrast, the dissent in *Apprendi* regarded the case as "watershed change in constitutional law"[41] and anything but an extension of previous legal precedents.[42] The Court split five to four in *Apprendi*, with Justices O'Connor and Breyer writing contentious dissents.[43] Justice O'Connor argued that the Sixth Amendment did not require the majority rule in *Apprendi* and warned that "in light of the adoption of determinate-sentencing schemes by many States and the Federal Government," the consequences of the majority's opinion would be severe.[44] Justice Breyer stressed the practical and administrative reasons why judges, rather than juries, traditionally assessed sentencing factors.[45] He explained that in the sentencing process there are "far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury."[46] Furthermore, he argued, the Constitution does not embody such a requirement[47] and the *Apprendi* rule would impede legislative efforts to provide guidance and consistency in sentencing.[48]

2. *Blakely v. Washington*[49]

Blakely extended *Apprendi*'s holding to penalty enhancements occurring within a maximum statutory range. In 1998, Washington resident Ralph Howard Blakely, Jr., was convicted of kidnapping his estranged wife.[50] Under Washington's Sentencing Reform Act, the standard sentence for second-degree kidnapping was fifty-three months.[51] However, at the sentencing hearing, the trial judge found that Blakely committed the crime with "deliberate cruelty," and increased the penalty to ninety months.[52] Blakely's elevated sentence was within Washington's statutory maximum for second-degree kidnapping and allowed under the state's sentencing guidelines, which provided that sentencing judges could impose higher sentences if they found "substantial and compelling reasons justifying . . . exceptional sentence[s]."[53]

In another five to four decision, the Supreme Court held that Washington's guidelines were unconstitutional because they violated Blakely's Sixth Amendment right to a jury trial.[54] Justice Scalia explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maxi-

41. *Id.* at 524 (O'Connor, J., dissenting).
42. *Id.* at 525.
43. *Id.* at 468, 523, 555.
44. *Id.* at 544 (O'Connor, J., dissenting).
45. *Id.* at 555-57 (Breyer, J., dissenting).
46. *Id.* at 557.
47. *Id.* at 555.
48. *Id.* at 565.
49. 542 U.S. 296 (2004).
50. *Id.* at 298.
51. *Id.* at 300.
52. *Id.*
53. *Id.* at 299.
54. *Id.* at 298, 314, 326, 328.

mum he may impose without any additional findings."[55] By finding that Blakely acted with "deliberate cruelty," the trial judge in *Blakely* did not determine a sentencing factor, but rather an element of the offense that needed to be proved to the jury beyond a reasonable doubt.[56] The *Blakely* majority supported *Apprendi*'s dramatic vindication of the role of the jury, and Justice Scalia concluded the opinion by stating: "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[57]

In contrast, the dissent in *Blakely* denounced the majority opinion as an unneeded encumbrance upon sentencing. Justice O'Connor predicted that the ruling would trigger the end of "[o]ver 20 years of sentencing reform," and that "tens of thousands of criminal judgments" would be placed in jeopardy.[58] Justice Kennedy argued that the holding would force states to "scrap everything and start over."[59] Similarly, Justice Breyer concluded that states would be left with a narrow range of options for sentencing reform and argued that *Apprendi*'s holding should have been limited to prevent the dismantling of sentencing reform efforts.[60] Like the other dissenting justices, Justice Breyer expressed concern over how the decision in *Blakely* would affect the Federal Sentencing Guidelines.[61] This question would soon be answered by *United States v. Booker*.[62]

3. *United States v. Booker*[63]

The Supreme Court granted certiorari in *Booker* only six weeks after it decided *Blakely*.[64] Like Washington state's sentencing guidelines, the Federal Sentencing Guidelines employed judicial fact-finding in order to boost sentences into a higher guideline range.[65] Not surprisingly, the same five justices who comprised the majorities in *Apprendi* and *Blakely* found that there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]."[66] In a five to four decision, the Court held that the Guidelines violated the Sixth Amendment by allowing judges to make additional findings of fact in order to compute increases in applicable sentencing ranges.[67] The majority opinion authored by Justice Ste-

55. *Id.* at 303-04.
56. *Id.* at 301, 303-04.
57. *Id.* at 313.
58. *Id.* at 326 (O'Connor, J., dissenting).
59. *Id.* at 328 (Kennedy, J., dissenting).
60. *Id.* at 330, 346 (Breyer, J., dissenting).
61. *Id.* at 346-47.
62. 543 U.S. 220 (2005).
63. *Id.*
64. Berman, *supra* note 1, at 38.
65. *Booker*, 543 U.S. at 227.
66. *Id.* at 233.
67. *Id.* at 225-26, 234-37, 244.

vens reaffirmed the holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[68]

In a separate opinion authored by Justice Breyer, the Court fashioned a remedy for Justice Stevens's majority ruling.[69] Instead of engrafting a Sixth Amendment jury trial right onto the Guidelines (as suggested by the dissent), Justice Breyer chose to render the Guidelines wholly advisory.[70] By severing and excising certain provisions of the federal sentencing statute that made the Guidelines mandatory, the Breyer majority held that the statute "[fell] outside the scope of *Apprendi*'s requirement."[71] Justice Breyer reasoned that this remedy was in line with congressional intent and that an engrafted jury system was "far more complex than Congress could have intended."[72] Last, the Court instituted a "reasonableness" standard for appellate review of federal sentences.[73]

Critics denounce *Booker* for its incoherence and inconsistency.[74] The Breyer remedy seemed to bear no relation to the Sixth Amendment violation or to past precedent.[75] One scholar astutely noted that "to culminate a jurisprudence that previously seemed interested in vindicating the role of the jury in modern sentencing systems, *Booker* devised a remedy for the federal system that granted federal judges more sentencing power than they had ever wielded previously."[76] *Booker*'s surprising remedy for judicial infringement upon the province of the jury was to give judges more power than they held in the past. In the wake of *Booker*, federal judges gained discretionary muscle while the power of the jury's verdict remained the same.

II. *CUNNINGHAM V. CALIFORNIA*[77]

The trio of *Apprendi*, *Blakely,* and *Booker* raised questions about the permissible scope of judicial fact-finding under a variety of state sentencing schemes.[78] Before *Cunningham*, the Court had not addressed whether a sentencing system like California's—which employed a triad system of upper, middle, and lower-term sentencing—was constitutional

68. *Id.* at 244.
69. *Id.* at 245.
70. *Id.*
71. *Id.* at 259.
72. *Id.* at 254.
73. *Id.* at 261.
74. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677 (2006).
75. *Id.*
76. Berman, *supra* note 1, at 39.
77. 127 S. Ct. 856 (2007).
78. *See* People v. Black, 113 P.3d 534, 542 (Cal. 2005), *vacated*, 127 S. Ct. 1210 (2007).

under the Sixth Amendment.[79] *Cunningham* solidified the views of *Apprendi* and *Blakely* while retreating from *Booker*'s surprising endorsement of judicial discretion. In doing so, it readjusted the balance between judge and jury and realigned the trajectory of modern sentencing jurisprudence.

A. Facts

Petitioner John Cunningham was convicted under California state law of continuous sexual abuse of a child.[80] California's determinate sentencing law (DSL) made the offense punishable by a lower term sentence of six years, a middle term sentence of twelve years, or an upper term sentence of sixteen years.[81] In particular, the DSL required the "imposition of the middle term, unless there [were] circumstances in aggravation or mitigation of the crime."[82] It allowed a judge to impose the upper term only if, after considering all of the relevant facts, "the circumstances in aggravation outweigh[ed] the circumstances in mitigation."[83] California's sentencing rules provided a nonexclusive list of aggravating circumstances, including "facts relating to the crime" and "facts relating to the defendant."[84] In addition, the DSL permitted a judge to consider any "additional criteria reasonably related to the decision being made."[85] However, under the DSL, "a fact that is an element of the crime . . . [could] not be used to impose the upper term."[86] In Cunningham's case, the sentencing judge found by a preponderance of the evidence six aggravating circumstances and one circumstance in mitigation.[87] The judge concluded that Cunningham's aggravators outweighed the lone mitigating factor, and imposed an upper-term sentence of sixteen years.[88]

B. Procedural History

A panel of the California Court of Appeal affirmed the decision of the sentencing judge.[89] The California Supreme Court denied review of the case, [90] but in *People v. Black*,[91] an earlier decision, it held that the DSL did not violate a defendant's Sixth Amendment right to a jury trial.[92] One justice dissented in *Black*, arguing that the DSL only sur-

79. *See id.* at 542-43.
80. *Cunningham*, 127 S. Ct. at 860.
81. *Id.*
82. *Id.* at 861.
83. *Id.* at 863 n.9.
84. *Id.* at 863.
85. *Id.*
86. *Id.*
87. *Id.* at 860-61.
88. *Id.* at 861.
89. *Id.*
90. *Id.*
91. 113 P.3d 534 (Cal. 2005), *vacated*, 127 S. Ct. 1210 (2007).
92. *Id.* at 547-49.

vived Sixth Amendment inspection if: "(1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record. . . ."[93]

The United States Supreme Court granted certiorari in *Cunningham* and reversed the decision of the Court of Appeal.[94]

C. Majority Opinion

In an opinion authored by Justice Ginsburg, the Court held that California's DSL violated the Sixth and Fourteenth Amendments.[95] Chief Justice Roberts and Justices Stevens, Scalia, Souter, and Thomas joined in the majority opinion.[96] Adhering to precedent, the majority found that the DSL violated *Apprendi*'s "bright-line rule" that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."[97] Specifically, the majority found the DSL violated *Apprendi* because it allowed a judge to find facts by a preponderance of the evidence, elevating a defendant's sentence to an upper term.[98]

The majority in *Cunningham* ruled that the middle term, and not the upper term, as interpreted by the court in *Black*, was the relevant statutory maximum for constitutional analysis.[99] The majority concluded 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."[100] Under this rule, the DSL's statutory maximum was the middle term because the upper term required judicial fact-finding of aggravating factors.[101]

Even though the DSL gave judges broad discretion to identify aggravating factors, the majority reasoned that the jury verdict did not reflect these factors and thus the DSL did not satisfy the Sixth Amendment requirement.[102] Justice Ginsburg quickly dismissed the *Black* court's arguments that the DSL survived Sixth Amendment inspection because it reduced penalties over the prior indeterminate system and required sentence "enhancements," as opposed to sentence elevations, to be charged in the indictment and proved to a jury beyond a reasonable doubt.[103] She

93. *Black*, 113 P.3d at 550 (Kennard, J., dissenting).
94. *Cunningham*, 127 S. Ct. at 871.
95. *Id.* at 860.
96. *Id.* at 859.
97. *Id.* at 868.
98. *Id.*
99. *Id.* at 871.
100. *Id.* at 868.
101. *Id.*
102. *Id.* at 869.
103. *Id.*

explained that *Apprendi*'s "bright-line rule" does not exclude sentencing systems that allow for the submission of some facts to judges and some facts to juries.[104] Under *Apprendi* and *Blakely*, all facts essential to punishment (other than the fact of a prior conviction) must be submitted to the jury and proved beyond a reasonable doubt.[105]

In addition, the *Cunningham* majority found the *Black* court's comparison between the DSL and the post-*Booker* federal system unpersuasive.[106] Justice Ginsburg reasoned that "California's DSL does not resemble the advisory system the *Booker* Court had in view" because "judges are not free to exercise their discretion to select a specific sentence within a defined range."[107] Cunningham's sentencing judge did not have the discretion to choose a sentence within a range of six to sixteen years, but rather was required to select the twelve-year sentence if he did not find any circumstances in aggravation or mitigation.[108] Further, the DSL's requirement that judge-determined sentences be reasonable did not make it immune to Sixth Amendment inspection.[109] Justice Ginsburg held that "[t]he reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints."[110] By rejecting the *Black* court's comparison to the federal system, the Court reaffirmed the important role of the Sixth Amendment in sentencing jurisprudence.[111] *Cunningham* departed from *Booker*'s broad vision of judicial discretion and elevated the role of the jury in the sentencing process.

D. Dissenting Opinions

1. Justice Kennedy

Justice Kennedy's dissent stressed the practical reasons why judges rather than juries should hold authority in deciding sentences.[112] "Judges and sentencing officials have a broad view and long-term commitment to correctional systems," Justice Kennedy wrote. "Juries do not."[113] Justice Kennedy argued that the *Apprendi* principle could be limited by distinguishing between sentencing enhancements based on the nature of the offense and sentencing enhancements based on the nature of the of-

104. *Id.*
105. *Id.*
106. *Id.* at 870.
107. *Id.* (internal quotations omitted).
108. *Id.*
109. *Id.*
110. *Id.* (emphasis in original).
111. *See id.* at 876 ("*Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.") (emphasis omitted).
112. *Id.* at 872 (Kennedy, J., dissenting).
113. *Id.*

fender.[114] The *Apprendi* rule would be applied to the former and not to the latter.[115] Under the offense/offender distinction, juries would be required to find facts relating to the nature of the offense, for instance if a weapon was used, while judges could continue to find facts relating to the nature of the offender, for instance the offender's lack of remorse.[116] The majority had rejected this distinction, holding that "*Apprendi* itself . . . leaves no room for the bifurcated approach Justice Kennedy proposes."[117]

2. Justice Alito

Justice Alito argued that California's DSL was indistinguishable from the post-*Booker* federal system.[118] First, both systems granted sentencing judges "considerable discretion in sentencing."[119] Like the federal advisory system, California's DSL granted trial judges wide discretion to choose from a non-exhaustive list of aggravating and mitigating factors.[120] A California trial judge could also consider "[g]eneral objectives of sentencing"[121] and any "additional criteria reasonably related to the decision being made."[122] The DSL "recognize[d] that a sentencing judge must have the ability to look at *all* the relevant facts—even those outside the trial record and jury verdict—in exercising his or her discretion."[123] Second, like the federal system, the DSL required that judicial discretion be exercised reasonably.[124] Even when a judge decided to impose the standard middle term, his or her decision was reviewable for reasonableness.[125] Justice Alito argued that these two factors—broad judicial discretion and a reasonableness standard of review—satisfied the requirements for constitutionality outlined by the Court in *Booker*.[126]

Additionally, Justice Alito contended that aggravating circumstances do not necessarily need to be adjudicative facts.[127] He found that California judges possess the power "to take into account the full panoply of factual and policy considerations that have traditionally been considered by judges operating under fully discretionary sentencing regimes."[128] Even if the California system did require judges to find some aggravating facts, judicial fact-finding was not fully inconsistent with

114. *Id.*
115. *Id.*
116. *Id.* at 872-73.
117. *Id.* at 869 n.14 (majority opinion).
118. *Id.* at 873 (Alito, J., dissenting).
119. *Id.*
120. *Id.* at 877.
121. *Id.* (quoting Cal. Rule of Court (Criminal Cases) 4.410(a)).
122. *Id.* (quoting Cal. Rule of Court (Criminal Cases) 4.408(a)).
123. *Id.* at 878 (emphasis in original).
124. *Id.*
125. *Id.*
126. *Id.* at 873.
127. *Id.* at 879.
128. *Id.*

Booker.[129] Justice Alito argued that "*Booker*'s reasonableness review necessarily supposes that some sentences will be unreasonable in the absence of additional facts justifying them."[130] In order for judges to support their choices of higher or lower sentences, they must reference some facts.[131] Therefore, Justice Alito reasoned, "it is consistent with the Sixth Amendment for the imposition of an enhanced sentence to be conditioned on a factual finding made by a sentencing judge and not a jury."[132]

The majority rejected Justice Alito's argument on the ground that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge."[133] In what might prove to be *Cunningham*'s most enduring line, Justice Ginsburg declared: "*Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."[134] In the end, the Court split into two camps. The majority praised the role of the jury while the dissent clung to *Booker*'s endorsement of judicial discretion. These conflicting opinions would be reflected in the Court's disparate proposals for reform.

III. ANALYSIS

Cunningham struck a blow to sentencing reform. Under *Cunningham*, states can essentially choose between two options: (1) a sentencing system that calls upon juries—either at trial or in a bifurcated sentencing proceeding—to find the facts necessary to increase sentences above a statutory maximum; or (2) a system that gives judges broad discretion to individualize sentences within a statutory range.[135] The majority did not impose a specific remedy on California, but rather left California free to choose between converse schemes.[136] As a result, *Cunningham* raises the question: why are decision makers left with such contradictory proposals for reform?

This comment argues that the Court's divergent proposals mirror a split in the sentencing community over whether to entrust sentencing power to judges or juries. As the most recent outgrowth of the *Apprendi-Blakely* line of cases, *Cunningham* presents an excellent opportunity to explore the tension in sentencing philosophy and its implications for the future of sentencing reform. In the end, *Cunningham* gave states little guidance on which of the two sentencing systems is better suited to

129. *Id.* at 879-80.
130. *Id.* at 880.
131. *See id.*
132. *Id.*
133. *Id.* at 863-64 (majority opinion).
134. *Id.* at 870.
135. *Id.* at 871.
136. *See id.*

achieve the interests of justice. Accordingly, the latter parts of this section examine *Cunningham*'s two systems in detail and advise states on the best options for reform. For states that rarely impose enhanced sentences, a system of jury fact-finding, particularly a bifurcated jury system, is the better choice. For states that regularly impose enhanced sentences, however, a discretionary system of advisory guidelines is more appropriate.

A. Judge or Jury: Conflicting Proposals for Reform

The sentencing community stands divided on whether to entrust sentencing power to judges or juries. Supporters of judicial discretion believe that judges are able to individualize sentences in a way that cannot be accomplished by a mechanical set of rules or procedures.[137] Some have argued that: "[g]enuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories."[138] Judges possess the ability to look at a host of unique factors and impose case-specific sentencing judgments.[139] Also, they are able to combine their insights about individual cases with an understanding of the criminal justice system as a whole.[140] Because judges sentence regularly, they have the opportunity to improve their sentencing methodology and become more consistent in their sentencing practices.[141]

Critics of judicial sentencing charge that judicial discretion leads to "unwarranted sentencing disparity."[142] Unwarranted sentencing disparity results when judges impose different sentences in cases that are alike in relevant ways.[143] A large amount of literature discusses racial discrimination in sentencing outcomes, with considerable scrutiny applied to the disparate treatment of African Americans.[144] Even today, when there is more diversity in the leadership of the courts, young black and Latino males are subject to particularly harsh sentences as compared to other offender populations.[145] This disparity goes against the ideal of equal treatment under the law and principles of social justice.

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137. STITH & CABRANES, *supra* note 25, at 82.

138. *Id.*

139. *See* William W. Schwarzer, Commentary, *Judicial Discretion in Sentencing*, 3 FED. SENT'G. REP. 339, 339 (1991).

140. Wright, *supra* note 25, at 1373.

141. *Id.* at 1378.

142. Paul J. Hofer, Kevin R. Blackwell, & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241-44 (1999).

143. Wright, *supra* note 25, at 1361; *see also* 28 U.S.C.A. § 991(b)(1)(B) (2007).

144. *See* TUSHAR KANSAL, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4-6 (Marc Mauer ed., The Sentencing Project 2005); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 733 (2001).

145. KANSAL, *supra* note 144, at 1-2, 7-10.

Distrust of judicial discretion also developed out of concern that judges are especially susceptible to corruption. Scandals involving corrupt judges are not uncommon in the United States and throughout the world.[146] For instance, in 1996, a California court found three California Superior Court judges and an attorney guilty of corruption.[147] The attorney had given the judges a total of $100,000 in gifts in return for favorable assistance.[148] In the end, two judges resigned and one was removed.[149] As can be expected, scandals of this magnitude led to negative public perceptions of judges. In an early 2005 Harris Poll, only a small percentage (22%) of one thousand adults surveyed had a "great deal" of confidence in the judiciary.[150] About sixty percent had "only some" confidence and twenty percent had "hardly any" confidence.[151] Over the past decade, fears of overt judicial bias (i.e. judicial corruption) intensified public distrust of the judiciary and contributed to various calls for sentencing reform.[152]

Disparity in sentencing, mistrust of the judiciary, and the elevation of the role of the jury by the *Apprendi-Blakely* line of cases have led some scholars to propose enacting jury sentencing in non-capital cases.[153] In 2003, Professor Jenia Iontcheva argued that the reintroduction of jury sentencing is "the final logical step suggested by the *Apprendi* line of decisions."[154] She contended that jury sentencing would lead to more legitimate sentencing practices.[155] Juries possess a more democratic and diverse composition than the ranks of state judges, and deliberation among jurors is likely to transform individual biases.[156] Juries are also better able to represent "the conscience of the community" and reflect

146. J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT'L L.J. 341, 342 (1998).

147. *Id.*

148. *Id.*

149. *Id.*

150. Harris Interactive, Overall Confidence in Leaders of Major Institutions Declines Slightly (Harris Poll #21, March 17, 2005), http://www.harrisinteractive.com/harris_poll/index.asp?PID=550 (last visited September 12, 2007).

151. *Id.*

152. For instance, in South Dakota in 1996, a small but disgruntled minority campaigned for a Judicial Accountability Initiative Law ("J.A.I.L.") which would have allowed litigants to sue judges for various kinds of misconduct. The J.A.I.L. website stated that its supporters aimed "to end the rampant and pervasive judicial corruption in the legal system of the United States." The site also guaranteed that J.A.I.L. would do away with the widespread problem of "arbitrary decision-making by judges." Leita Walker, *Protecting Judges from* White*'s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 383 (2007). The initiative ultimately failed to pass. *Id.*

153. Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 294 (2005); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999).

154. Iontcheva, *supra* note 153, at 314.

155. *Id.* at 344.

156. *Id.* at 363-64.

public outrage at the transgression of community standards.[157] The public perceives juries to be fairer than the judicial system in general, and increased juror participation in sentencing would likely increase these positive attitudes.[158] Juries could render individualized judgments and bring fresh perspectives to the process of sentencing.[159]

However, opponents of jury sentencing charge that juries are not capable of making consistent sentencing decisions. Two studies from Texas found greater variability in jury sentencing than in judicial sentencing.[160] As one scholar has noted: "Unable to situate the case before them within the larger sentencing framework, juries . . . render disparate judgments in similar cases in violation of the basic principle of equality before the law."[161] Critics of jury sentencing believe that juries do not possess the expertise to deal effectively with complicated issues.[162] For instance, in *In Re Japanese Electric Products Antitrust Litigation*,[163] the United States Court of Appeals for the Seventh Circuit held that juries are ill-equipped to hear cases involving complex civil issues and that in those cases the Seventh Amendment does not guarantee the right to a jury trial.[164] Jurors, like judges, possess subjective biases, but may be less inclined than judges to adhere to the principles of the law. Critics accuse jurors of basing their verdicts on irrelevant factors, such as a defendant's or counsel's appearance, or even the defendant's race or ethnicity.[165] Several extensive studies of capital juries found that racial discrimination played a role in juries' decisions to impose the death penalty.[166] While juries have a more democratic make-up than the ranks of state judges, they may be just as susceptible to unconscious biases.[167]

In the end, there is no clear consensus on whether to entrust judges or juries with sentencing power. Accordingly, the disparate proposals in

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157. Lanni, *supra* note 153, at 1782.

158. Iontcheva, *supra* note 153, at 348-49.

159. *Id.* at 350, 353.

160. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 30-32 (1994); Charles W. Webster, *Jury Sentencing – Grab-Bag Justice*, 14 SW. L.J. 221, 226 (1960).

161. Iontcheva, *supra* note 153, at 356.

162. *See* Wright, *supra* note 25, at 1378; Weninger, *supra* note 160, at 5; Charles O. Betts, *Jury Sentencing*, 2 NAT'L PROB. AND PAROLE ASS'N J. 369, 372 (1956).

163. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (7th Cir. 1980).

164. *Id.*

165. H.M. LaFont, *Assessment of Punishment – A Judge or Jury Function?*, 38 TEX. L. REV. 835, 842 (1959-1960).

166. David C. Baldus ET AL., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1679 (1998) (finding that in Philadelphia, defendants convicted of killing white victims were more likely to be sentenced to death); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trial: An Analysis of Post-*Gregg *Outcomes*, 7 JUST. Q. 189, 189 (1990) (finding that, in Kentucky, blacks accused of killing whites were more likely to be charged with a capital crime and sentenced to die than homicide offenders); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 593-628 (1980).

167. Iontcheva, *supra* note 153, at 363.

Cunningham reflect the inability of sentencing scholars to agree on the appropriate method of sentencing reform. Both judge- and jury-centered sentencing systems possess inherent strengths and weaknesses. Judges bring training and expertise while juries bring inclusiveness and democratic deliberation. The *Cunningham* opinion neglected to give state legislatures guidance on which system to impose, instead leaving the choice to individual states. Perhaps the only unifying principle from *Cunningham* is that state legislatures will no longer be able to give weight to specific aggravating factors and require judges to find the presence of those factors by a preponderance of the evidence.[168]

To retain the structure of their determinate systems, state legislatures can either give more power to juries by moving toward a bifurcated jury system, or they can give more power to judges by moving toward an indeterminate sentencing regime. To paraphrase the words of Justice Breyer: "The ball now lies in [each state's] court."[169]

B. Jury Systems

The first option for state legislatures under *Cunningham* is to preserve the basic makeup of determinate sentencing, but add a new twist of jury fact-finding.[170] States essentially have two alternatives in this regard: (1) a complicated charge system where aggravating factors are encompassed within the elements of the crime; or (2) a bifurcated jury system where juries decide in an after-trial proceeding whether aggravating factors are proven beyond a reasonable doubt.[171] In the first system, juries would need to render special verdicts stating not only whether the elements of the crime were met, but also whether aggravating factors were present.[172] In the second system, one jury would determine if a defendant was guilty and a bifurcated jury would decide beyond a reasonable doubt any fact (other than a prior conviction) that raises a defendant's sentence beyond a maximum statutory period.[173]

1. Charge Systems

In charge systems, all crimes would have a complex set of elements in order to encompass the facts that would increase the sentence of a criminal offender.[174] Each crime would be defined by a multitude of factors, including, for example, the presence of violence, the type of weapon involved, the degree of injury to the victim, or the amount of drugs possessed or distributed.[175] Thus, a robbery statute might increase

168. Cunningham v. California, 127 S. Ct. 856, 868 (2007).
169. United States v. Booker, 543 U.S 220, 265 (2005).
170. *Cunningham*, 127 S. Ct. at 871.
171. Blakely v. Washington, 542 U.S. 296, 334, 336 (2004) (Breyer, J., dissenting).
172. *Id.* at 334.
173. *Id.* at 336.
174. *Id.* at 334.
175. *Id.*

punishment based upon the following factors: the nature of the institution robbed; the presence of a firearm; any serious bodily injury to the victims; or any large property loss.[176] The charge system requires only a single jury, but necessitates that the jury render a special verdict based upon the aggravating factors for each offense.[177]

As noted by Justice Breyer in his dissent in *Apprendi*, the charge system puts defendants in a difficult position of denying guilt while offering proof about how they committed a crime.[178] For example, a defendant could be put in the position of saying, "I did not sell drugs, but I sold no more than 500 grams."[179] Also, prosecutors in the charge system would control both the charge and the punishment.[180] Prosecutors could use this power to engage in so-called "charge bargaining" and indict similar defendants with different aggravating factors for the same *real* criminal conduct.[181] Additionally, the charge system would force prosecutors to "charge all relevant facts about the way the crime was committed before a pre-sentence investigation examines the criminal conduct, perhaps before the trial itself."[182] This system would require a prosecutor to decide which elements of the crime to charge the defendant with before discovering and evaluating all the evidence.[183]

For these reasons, it is easy to dismiss the charge system as an inequitable method of sentencing reform.

2. Bifurcated Jury Systems

Bifurcated jury systems cure many of the problems associated with charge systems, but they come with administrative costs.[184] Bifurcated trials cost states more money, add complexity to sentencing enterprises, and require additional judicial resources.[185] Like charge systems, bifurcated jury systems might also increase prosecutorial power.[186] Some defendants in a bifurcated jury system might become more hesitant to go to trial and risk two jury decisions.[187] However, some defendants might benefit from the system if the increased cost of trial "makes prosecutors

176. *Id.*
177. Apprendi v. New Jersey, 530 U.S. 466, 555-56 (2000) (Breyer, J., dissenting).
178. *Id.* at 557.
179. *Id.*
180. *Blakely*, 542 U.S. at 334 (Breyer, J., dissenting).
181. *Id.*; Joy Anne Boyd, Commentary, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 595 (2004) (defining "charge bargaining" as a form of plea bargaining in which the prosecutor would agree to drop certain charges if the defendant agrees to plead guilty to other charges).
182. *Blakely*, 542 U.S. at 334 (Breyer, J., dissenting).
183. *Id.*
184. *Id.* at 336.
185. *Id.*
186. *Id.* at 334, 338.
187. *Id.* at 337.

more willing to cede certain sentencing issues to the defense."[188] Under a bifurcated jury system, a defendant could bargain with a prosecutor in order to avoid a lengthy trial and a drawn-out sentencing proceeding.[189]

Most states favor adopting the bifurcated jury system.[190] Such a system allows them "to continue to adhere to the principles on which their [determinate] systems were based and to do so with minimal changes to sentencing procedures."[191] Many states are confident in the ability of determinate sentencing systems to reduce sentencing disparity and increase sentencing predictability.[192] Currently, four states employ a bifurcated jury system.[193] Most of these states utilize bifurcated juries only when evidence in support of an aggravated sentence is inadmissible at trial.[194] When such evidence is admissible, however, the states use a charge system and juries render special verdicts on aggravating factors.[195] The split system reduces administrative costs, but does not address the previously discussed problems with charge systems.

States considering a *pure* bifurcated jury system may be encouraged by the success of a workable model already in place in Kansas.[196] Under the Kansas system, a judge decides what facts to introduce at trial and what facts to introduce at sentencing.[197] A post-trial jury—usually the same jury as used in the trial phase—determines beyond a reasonable doubt any aggravating factors which may increase the defendant's sentence.[198] If a jury finds aggravating factors present in a specific case, the judge may impose an elevated sentence, but is under no obligation to do so.[199]

The Kansas model is successful for a number of reasons.[200] First, enhanced sentences "have been a historical rarity in Kansas."[201] Either prosecutors do not tend to seek enhanced sentences or most sentences fall within the standard range. Similarly, most criminal sentences in

188. *Id.*
189. *Id.*
190. Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT'G REP. 7, 2 (2005).
191. *Id.*
192. *Id.* at 5.
193. KAN. STAT. ANN. §§ 21-4716(b), 21-4718(b) (2005); MINN. STAT. § 244.10 (2005); 2005 Or. Laws ch. 463, §§ 3(1), 4(1); S.B. 5312, 60th Leg., Reg. Sess., ch. 377, sec. 10 (Wash. 2007); H.B. 2070, 60th Leg., Reg. Sess., ch. 205, sec. 2 (Wash. 2007). These are the states that use juries to find sentencing factors, not the states that employ so-called "jury sentencing" where juries decide and impose the actual sentence.
194. *See* MINN. STAT. § 244.10 subsec. 5; Or. Laws ch. 463, §§ 3(1), 4(1); S.B. 5312, 60th Leg., Reg. Sess., ch. 377, sec. 10; H.B. 2070, 60th Leg., Reg. Sess., ch. 205, sec. 2.
195. *Id.*
196. Stemen & Wilhelm, *supra* note 190, at 2.
197. Katie M. McVoy, Note, *"What I Have Feared Most Has Now Come to Pass":* Blakely, Booker, *and the Future of Sentencing*, 80 NOTRE DAME L. REV. 1613, 1637 (2005).
198. Stemen & Wilhelm, *supra* note 190, at 2.
199. McVoy, *supra* note 197, at 1637.
200. Stemen & Wilhelm, *supra* note 190, at 3.
201. *Id.*

Kansas are determined through plea bargains which do not require additional jury fact-finding.[202] Defendants admit to the presence of certain facts in order to receive negotiated sentences. Third, anecdotal evidence suggests that post-verdict sentencing juries are rarely employed and that when they are, the use of such juries "does not create significant additional burdens on the system."[203]

The flaw in the Kansas system is that judges retain the discretion to use the jury-determined factors as they please. Judges can use the jury-determined factors to sentence a defendant beyond a presumptive range, or they can ignore the factors and sentence the defendant within the standard range.[204] Bifurcated juries are of no value if a judge can simply nullify the jury's conclusions. Uniformity also suffers if judges possess the discretion to decide if and when to use the jury-determined factors.[205] Judges operating under indeterminate sentencing schemes possess the same freedom to ignore or utilize relevant sentencing factors, but such systems do not require the added costs of bifurcated juries.

Nevertheless, the success of the Kansas model provides support for the proposition that a bifurcated jury system is the best approach for states that rarely impose enhanced sentences. Such an approach allows states to preserve the basic structure of their determinate sentencing systems while rendering these systems *Cunningham*-compliant. If a state's use of jury fact-finding in sentencing is minimal, the evidence from Kansas suggests that the two-tiered jury system will not impose significant burdens on the criminal justice system and will not add large administrative costs.[206] The reality of criminal justice today is that most sentences are reached through plea bargaining, a process that decreases the need for jury fact-finding.[207] In addition, jury fact-finding is not needed when judges impose aggravated sentences on the basis of past criminal conduct.[208]

To improve upon the Kansas system, states should require judges to adhere to the jury's factual findings. Allowing a judge to nullify the jury's factual conclusions only undercuts the legitimacy of a bifurcated jury system. A system that uses the structure of the Kansas model, but actually gives weight to the decisions of the jury, would better promote the goals of uniformity and consistency in sentencing. Such a system is the best option for states that rarely impose enhanced sentences because it allows them to retain the structure of their determinate sentencing systems without a large increase in administrative costs. States can continue

202. *Id.*
203. *Id.*
204. *Id.* at 2.
205. *See* McVoy, *supra* note 197, at 1629.
206. *See id.* at 1640-41.
207. Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting).
208. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

to mandate sentences according to the presence of aggravating and mitigating factors because these factors are determined by a bifurcated jury. By adding a new twist of jury fact-finding, states can continue to sentence offenders according to the principles and procedures of determinate sentencing without a large increase in cost and complexity.

3. Indeterminate Sentencing Systems

However, if states impose enhanced sentences on a regular basis, a bifurcated jury system will likely add significant costs and complexity to state sentencing enterprises. States prescribing enhanced sentences frequently would be wise to consider implementing indeterminate sentencing systems. Fortunately, the second option under *Cunningham* is to allow judges broad discretion to individualize sentences within a statutory range.[209] The Supreme Court has consistently found that such a system "encounters no Sixth Amendment shoal."[210] In *Booker*, the Breyer majority created a remedy for the federal system that allowed judges wide power to sentence criminal defendants according to individualized notions of justice.[211] The majority found that such a remedy "falls outside of the *Apprendi* requirement."[212]

a. Pure Indeterminate Systems

Pure indeterminate systems give judges wide leverage to determine sentencing factors.[213] Judges could take into account both offense and offender characteristics in order to individualize sentences to specific offenders.[214] They could consider the charged conduct, the offender's life circumstances, and the offender's prospects for rehabilitation.[215] Under a pure indeterminate system, judges would also be able to use their expertise and knowledge to situate sentences within the framework of the criminal justice system as a whole.[216] They could rely on their experience and knowledge to improve sentencing practices and adjust their sentencing according to the best practices and available research.[217]

Indeterminate systems are not without flaws, though.[218] A purely indeterminate system could lead to the same sentencing disparities that

209. Cunningham v. California, 127 S. Ct. 856, 871 (2007).
210. *Id.*
211. McConnell, *supra* note 74, at 666.
212. United States v. Booker, 543 U.S. 220, 259 (2005).
213. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 53 (2006).
214. Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("We should be clear that nothing in this history suggests that it is impermissible for judge to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing judgment within the range prescribed by statute.").
215. Berman, *supra* note 1, at 3-4.
216. Wright, *supra* note 25, at 1373.
217. *Id.* at 1378.
218. *See* Blakely v. Washington, 542 U.S. 296, 314-16 (2004) (O'Connor, J., dissenting).

determinate sentencing systems were created to counteract.[219] Justice Breyer noted in his *Blakely* dissent that under discretionary systems, "[t]he length of time a person spent in prison appear[ed] to depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence."[220] If history is any indication, judges could return to the same sentencing practices that led to disparities in sentencing based on sociological factors like race, gender, and economic status.[221] This type of system would neither promote uniformity nor fairness in decision-making.

b. Advisory Guideline Systems

A more nuanced version of indeterminate sentencing would allow for the employment of advisory sentencing guidelines.[222] Judges would be advised to take certain factors into account and would be required to justify departures from a set of advisory sentencing guidelines.[223] Guidelines could provide information about statistical averages, codify best practices, and provide "mental anchors or benchmarks that exert gravitational pull [upon judges]."[224] Recent studies suggest that voluntary guidelines reduce inter-judge disparity because judges follow the guidelines out of concern for their reputations or apprehension about being labeled deviant.[225]

An advisory guidelines system is closely in line with the remedy fashioned in *Booker*, and provides states with a viable alternative to jury fact-finding. This system is more appropriate for states that employ sentence enhancements on a regular basis because it is less costly and less complicated than a bifurcated jury system.[226] So far, three states—Indiana, Tennessee, and now, California—employ advisory guidelines.[227] Concerns about the costs and burdens of jury fact-finding may have driven the choices of both Indiana and Tennessee.[228] A Tennessee task force on sentencing reported that jury fact-finding would "increase service time of jurors, increase jury trial time on the court docket, impose increased burdens on public defenders and district attorneys and otherwise increase the costs of the administration of justice."[229] Evidence

219. *See id.* at 318.
220. *Id.* at 332 (Breyer, J., dissenting).
221. *See* Berman, *supra* note 1, at 8.
222. Berman & Bibas, *supra* note 213, at 70.
223. *Id.* at 71.
224. *Id.* at 69.
225. *Id.*
226. *See* Stemen & Wilhelm, *supra* note 190, at 4.
227. *Id.*
228. *Id.*
229. *Id.* (citing GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIMINAL SENTENCING, REPORT OF THE GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIMINAL SENTENCING 3 (2005)).

from Tennessee and Indiana suggests that for states with a higher than average rate of imposing enhanced sentences, switching to a voluntary system is a "more practically appropriate reaction than the creation of jury fact-finding."[230]

To improve upon a system of advisory guidelines, states should implement a reasonableness standard of appellate review. Implementing a reasonableness standard of review within an advisory guideline system would promote consistency and guide appellate courts "in determining whether a sentence 'is unreasonable' . . . ."[231] Douglas Berman and Stephanos Bibas argue that the standard of appellate review for sentencing decisions should be "reasoned judgment."[232] In other words, judges should conform to the presumptive guidelines range when there is good reason to conform and depart from the range when there are specific reasons for doing so.[233] A specific method for promoting "reasoned judgment" is to require sentencing judges to adhere to procedural steps.[234] These steps would require judges to "find guidelines facts, calculate guidelines ranges, consider departures and statutory factors, recognize that the guidelines are not mandatory, and give reasoned explanations for sentences whether they fall within or outside the presumptive range."[235] "Appellate courts [would] reverse sentences that do not comply with [the] procedures and presume reasonable . . . those sentences that do comply."[236] This system of review gives judges room to depart from sentencing guidelines when necessary, but encourages judges to comply with the guidelines in ordinary cases.[237]

To curb judicial bias in sentencing, states should promote judicial education and awareness-raising. Judges cannot overcome biases if they are not aware of them.[238] To educate judges on sentencing disparity, states could offer judicial courses about different forms of race, gender, and ethnic discrimination. Judges would be required to attend at least one of these courses per calendar year. During the courses, judges could do a self-inventory of potential biases and assess how these biases might affect judicial decision making.[239] Judges could then make a conscious effort to set those biases aside in order to render fairer and more impartial decisions.[240] The work of bar associations to develop sections devoted to women and minorities and the efforts of these sections to edu-

230. *Id.* at 6.
231. United States v. Booker, 543 U.S. 220, 261 (2005) (quoting 18 U.S.C. § 3742(e)(3) (1994 ed.)).
232. Berman & Bibas, *supra* note 213, at 70.
233. *Id.* at 70-71.
234. *Id.* at 71.
235. *Id.* (citation omitted).
236. *Id.*
237. *Id.*
238. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 58 (1994).
239. *Id.* at 58-59.
240. *Id.* at 58.

cate the legal public about myths related to biases should also be emphasized in order to eradicate prejudice within the legal system.[241]

Finally, to promote consistency in sentencing, states could set up a computer database that would allow judges access to information concerning average sentences for specific crimes. Court administrators in Scotland developed such a system in order to help judges recognize relevant sentencing patterns.[242] Scottish judges tap into the system by determining the "aspects of the case . . . 'relevant' for purposes of comparison."[243] Judges select the category of the crime (such as theft or sexual assault), offense characteristics (type of weapon, victim, etc.), and offender characteristics (criminal history, sex, age, etc.) from the computer software.[244] The database then yields information about sentences imposed in past cases, including a complete distribution of the ranges of sentences imposed.[245] This system allows judges to conform their sentences to past cases and draw on the guidance of relevant sentencing patterns.[246] States could implement such a system by using their own statistical sentencing data or data from the federal system.

After the Supreme Court's decision in *Cunningham*, the state of California choose to implement a system of advisory guidelines.[247] Senate Bill 40, authored by Senator Gloria Romero, modified the DSL to afford judges the discretion to decide whether to sentence a defendant to a low, middle, or upper term.[248] The bill stated that the choice of the appropriate term will "rest within the sound discretion of the court."[249] It required judges to state their reasons for choosing a certain sentence length, but allowed judges the discretion to choose amongst the three sentencing ranges.[250] Such a system is the best option for states that regularly impose enhanced sentences because it is less costly and complicated than a bifurcated jury system. This system allows states to retain the basic framework of their sentencing guidelines but converts these guidelines into advisory procedures. To improve upon a system of advisory guidelines, states should also provide for judicial education and technological assistance. This modified system would represent the most equitable method of indeterminate sentencing reform.

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241. *See id.*
242. Wright, *supra* note 25, at 1386.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Governor Signs Bill Changing California Sentencing Laws*, U.S. STATE NEWS, April 2, 2007, at 1, *available at* 2007 WLNR 6349945; *see also* Millie Lapidario, *Defense Bar Split on Bill's Answer to* Cunningham, THE RECORDER (San Francisco), Mar. 13, 2007, at 1.
248. *Governor Signs Bill Changing California Sentencing Laws*, *supra* note 247, at 1.
249. *Id.*
250. *Id.*

CONCLUSION

The proverbial sentencing reform ball is now in the court of the states.[251] The *Cunningham* decision hardened the central holdings of *Apprendi* and *Blakely* while retreating from *Booker's* broad vision of judicial discretion.[252] *Cunningham* left states with two divergent proposals for reform: (1) a sentencing system that calls upon juries—either at trial or in a bifurcated sentencing proceeding—to find the facts necessary to increase sentences above a statutory maximum; or (2) a system that gives judges broad discretion to individualize sentences within a statutory range.[253]

The diametrically different proposals offered by the Court in *Cunningham* reflect a spilt in the sentencing community over whether to entrust sentencing power to judges or to juries. Judges possess the expertise and knowledge to craft sentences that accurately reflect the circumstances of the offense and the offender. However, unlimited judicial discretion can led to sentencing disparity. As Attorney General Robert H. Jackson pithily expressed: "It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition."[254] In response, some sentencing scholars have suggested employing jury sentencing. Juries have a more democratic makeup than the ranks of state judges and can better express community outrage. On the other hand, jurors possess subjective biases and may lack the expertise to handle complicated criminal cases. The sentencing community remains conflicted on the judge-jury issue and will likely remain so in the years to come.

In the near future, states affected by *Cunningham* will need to reform their determinate sentencing schemes. States infrequently imposing enhanced sentences would be wise to switch to a bifurcated jury system, specifically a system that requires judges to adhere to the jury's recommendations. On the other hand, states imposing enhanced sentences on a regular basis may find an indeterminate system more appropriate. By implementing advisory guidelines, a reasonableness standard of review, and judicial training and education within an indeterminate system, states can reduce sentencing disparity. Regardless of which system states choose, at the heart of the sentencing struggle will remain the tension between judge and jury, and the difficulty of harmonizing the objectives

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251. *See* Cunningham v. California, 127 S. Ct. 856, 871 (2007).

252. *See id.* at 860, 871.

253. *Id.* at 871.

254. James A. Anderson, Jeffrey R. Kling & Kate Smith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 275 (1999) (citation omitted).

of individualized justice and fairness with the goals of uniformity and consistency.

Laurie Jaeckel[*]

* J.D. Candidate, 2009, University of Denver Sturm College of Law. I would like to thank Professor Rashmi Goel for her guidance, Dave Ratner for his input on drafts, and the Law Review staff for their advice and assistance. Most of all, I would like to thank my mother for her constant love and tireless support.