

Comments

CRIMINAL FORFEITURE AND THE SIXTH AMENDMENT’S RIGHT TO JURY TRIAL POST- *BOOKER*

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INTRODUCTION

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (“RICO”) in 1970 in response to the perceived inadequacies of the common law.¹ The problem was simple: the common law focused solely on the criminality of the individual and punished accordingly.² A person who robbed another was locked up; intimidation and racketeering were met largely with individual indictments, convictions and terms of imprisonment. Thus, criminal enterprises or organizations—which did not fit neatly within the common law’s definition of a criminal—could engage in criminal behavior with some measure of impunity. Constituents may rot in prison, but

¹ G. Robert Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 EMORY L.J. 781, 783–84 (1987).

² *Id.*

the enterprises thrived. In 1969, President Nixon summarized the frustration felt by many law enforcement personnel in fighting one particularly entrenched criminal enterprise: though “[t]he arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations,” if “the property of organized crime remains, new leaders will step forward to take the place of those we jail.”³ To compound the problem, enterprise criminality was not limited to the mob; organizations ranging from unions to insurance companies served as fronts for criminal enterprises.⁴

In response, Congress enacted the Organized Crime Control Act—Title IX of which is RICO—and added three arrows to the prosecutor’s quiver. The first innovation was to hold organizations liable for the criminal activities of its members. Organizations now faced criminal sanction for felonies that traditionally only an individual could commit.⁵ To keep ringleaders incapacitated for longer, RICO beefed up the prison terms for those responsible for the enterprise’s criminal activity.⁶ Finally, RICO gave law enforcement personnel a new remedy that would “attack [the criminal enterprise’s] source of economic power itself”⁷: criminal forfeiture. The underlying premise of criminal forfeiture is simple. Upon conviction, a defendant or a criminal enterprise must forfeit to the government any property that facilitated the defendant’s criminal activity or that the defendant acquired through his criminal activity.⁸ This remedy was not new. Criminal forfeiture had been a familiar feature of English and early American common law. Congress simply resurrected it to fight a distinctly modern problem.⁹

As it turns out, both RICO and the long-dormant common-law remedy have proven to be popular. RICO prosecutions have expanded from the Mafia to include labor unions, adult entertainment businesses, street gangs, and debt-collection agencies. Similarly, forfeiture provisions have sprung up in other statutes in the years since Congress enacted RICO. Analogous forfeiture provisions now exist in legislation to curb the drug trade¹⁰ and

³ S. REP. NO. 91-617, at 78 (1969).

⁴ *Id.* at 76–77. In 1951, the Special Committee to Investigate Organized Crime led by Senator Estes Kefauver had first documented the scope of organized crime within the national economy. The affected industries ran the gamut. Alas, not even florists were immune from the clutches of enterprise criminality. *Id.* at 76.

⁵ Blakey, *supra* note 1, at 784; *see also* 18 U.S.C. § 1961(4) (stating that “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”).

⁶ Blakey, *supra* note 1, at 784.

⁷ S. REP. NO. 91-617, at 79.

⁸ *See infra* text accompanying notes 201–08.

⁹ S. REP. NO. 91-617, at 80 (containing Department of Justice’s evaluation of need for criminal forfeiture that traces its roots through the common law and justifies Congress’s ability to resurrect the form of punishment).

¹⁰ 21 U.S.C. § 853 (2000).

fight money laundering,¹¹ and as punishment for various other federal crimes.¹² Criminal forfeiture has truly become an established feature of federal law enforcement. Accordingly, the courts have had to situate this unique form of punishment within the body of doctrine governing the criminal trial.

Recently, the Supreme Court's decisions interpreting the Sixth Amendment have raised questions over the relationship between criminal forfeiture and the Sixth Amendment's jury-trial right. Following the Supreme Court's decision in *United States v. Booker*,¹³ defendants began to challenge forfeiture amounts based on facts not proved to a jury. In *Booker*, a fractured Court issued two seemingly contradictory holdings that invalidated sections of the Federal Sentencing Guidelines. Justice Stevens's majority opinion limited the available sentence under the Guidelines through the Sixth Amendment. Any fact that increased punishment above the statutory maximum had to be either admitted by the defendant or proved to a jury beyond a reasonable doubt.¹⁴ In remedying the constitutional violation, Justice Breyer's separate majority opinion held that the Federal Sentencing Guidelines were "effectively advisory," as the Court invalidated "the provision of the federal sentencing statute that makes the Guidelines mandatory."¹⁵

Various federal statutes—and not the Federal Sentencing Guidelines—exclusively govern the imposition of criminal forfeiture.¹⁶ Many defendants seized upon this fact in challenging forfeiture penalties based on facts not proved to the jury. Take the Federal Sentencing Guidelines out of the picture, the argument goes, and all that remains of *Booker* is Justice Stevens's broad constitutional holding. On its face, this would seem to place some limit on the imposition of forfeiture. Increasing a forfeiture amount based on facts not proved beyond a reasonable doubt appears to violate the requirements imposed by the Sixth Amendment following *Booker*. A series of appeals ensued across the country, in which defendants echoed this rationale. In turn, the challengers received a unified response from the Courts of Appeals: nice try, but *Booker* has nothing much to say about forfeiture.

This Comment questions the prevailing orthodoxy among the Courts of Appeals and asks why, as a policy matter, *Booker* is so irrelevant to criminal forfeiture. *Booker* does not simply explain the role that the Federal Sentencing Guidelines play in federal courts. Instead, it provides a helpful

¹¹ The Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956–1957 (2000).

¹² See 18 U.S.C. § 1956(c)(6)(D) (2000) (listing offenses).

¹³ 543 U.S. 220 (2005).

¹⁴ *Id.* at 244.

¹⁵ *Id.* at 245–46.

¹⁶ U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5E1.4 (Nov. 2006) [hereinafter SENTENCING GUIDELINES MANUAL] ("Forfeiture is to be imposed upon a convicted defendant as provided by statute.").

framework for questioning the relationship between the power of the state to impose criminal punishment and the roles of the judge and jury in setting that punishment. Though the reluctance to foist *Booker* into the forfeiture context is understandable, it is unclear whether *Booker* is completely silent as to the Sixth Amendment limits placed on criminal forfeiture.

The Court's holdings in *Booker* represent efforts to resolve two issues that are relevant to forfeiture. The first addressed "primary" rights and responsibilities, such as liberty and property interests. The majorities in *Booker* diverged as to whether a positively defined criminal sentence entitles a defendant to avoid punishment exceeding that sentence. In other words, has a defendant been unjustifiably denied his liberty when a statute specifies ten years in prison and he, in fact, receives a term of ten years and one day? One set of Justices said yes, because sentencing statutes create a clear entitlement that should be sharply enforced; another said no, as the nature of any entitlement is fuzzy at best. The second issue addressed by the Court deals with so-called "secondary" matters of procedure—in particular, the role that the jury verdict plays in defining the defendant's sentence. Though both majorities agreed that the verdict is relevant, neither could agree as to its proper role. Justice Stevens's majority opinion announced a clear rule governing the role of the jury verdict. *Any* fact that increases punishment must pass before the jury first. Conversely, Justice Breyer's dissenting opinion hedged a bit, opting for a case-by-case approach to the treatment of particular facts. For both issues—primary rights or secondary matters of procedure—the debate in large measure focused on whether rules or standards should govern.

Applying this framework to criminal forfeiture suggests that the jury verdict should be more relevant to criminal forfeiture than current doctrine would suggest. First, criminal forfeiture constitutes an implied condition on one's interests in certain forms of property and, accordingly, requires clearly defined limits. The statutory provisions setting out criminal forfeiture ought to be construed narrowly and must be linked directly to criminal activity for which the defendant has been convicted. This conclusion stems from the role property serves in limiting government, the potential for abuse that lies dormant in criminal forfeiture, and notions of fairness and predictability ensured by rules. This understanding of forfeiture would, in turn, preclude forfeiture for two types of activities: conduct of which the defendant has been acquitted and unindicted conduct that would independently form a separate criminal offense.

Second, criminal forfeiture is not merely an "aspect of sentencing" that a judge imposes free from the jury. The concept of the "statutory maximum" discussed in *Booker* arose as a limitation on judicial fact-finding that would effectively punish an offender for a more serious offense. Based on this logic, the "statutory maximum" for purposes of criminal forfeiture consists of the property that a defendant either gained from or used to facilitate the activity forming the basis of his conviction. The conviction—and thus

the jury's verdict—imposes a clear limit on criminal forfeiture. Though this definition suggests that most defendants to date would not be able to allege a constitutional violation, some practices—such as the use of acquitted conduct to increase punishment—would violate this statutory maximum.

To make this argument, it is necessary to tour three areas of legal scholarship. Part I summarizes the reasoning of the Courts of Appeals in denying that *Booker* affects criminal forfeiture. Part II provides an overview of the extant theory of rules and standards. The debate over the role of the jury and the nature of criminal punishment centers in large measure on the clarity of the limits placed on the government's power to punish and the jury's role in sentencing. Part III then shows the development of the criminal sentence as a legislatively defined entitlement before discussing the Court's decision in *Booker*. Part IV applies this conceptual framework to criminal forfeiture and suggests that forfeiture is more than an aspect of sentencing; it is a primary right that should be governed both by clear limits and the jury's verdict.

I. THE COURTS OF APPEALS AND CRIMINAL FORFEITURE

Criminal forfeiture is, in many ways, the ugly duckling of federal sentencing; it sits awkwardly among more elegant doctrine. Following the Supreme Court's holdings in *Booker*, its looks have not improved much. One by one, the Courts of Appeals have rejected claims that *Booker* alters the jury-trial requirement for criminal forfeiture. In reaching this conclusion, the courts have generally relied on three distinct lines of reasoning that remove criminal forfeiture from *Booker*'s shadow altogether.

First, several courts have held that criminal forfeiture is a form of indeterminate sentencing, which, by its very nature, can never raise Sixth Amendment problems following *Booker*. Indeterminate schemes—such as the regime that predated the Sentencing Guidelines—largely defer to the judge's determination of an appropriate sentence.¹⁷ Determinate schemes—adopted by several states and the Federal Sentencing Guidelines—are much more explicit in defining criminal sentences. Generally, these schemes set forth detailed sentencing procedures through legislative or quasi-legislative codes that map a sentence to the facts underlying the conviction.¹⁸ They provide a predefined recipe, of sorts, for imposing a sentence. Because one cannot define an appropriate amount of forfeiture in advance, several Courts of Appeals have held that forfeiture more closely resembles the former than the latter. As a result, because *Booker* spoke only of determinate sentencing, it left forfeiture untouched.

¹⁷ See *infra* notes 87–92 and accompanying text.

¹⁸ See *infra* notes 93–104 and accompanying text.

For example, in *United States v. Fruchter*, the Second Circuit employed similar reasoning in denying the defendant's challenge.¹⁹ In *Fruchter*, a jury had convicted the defendants of four counts of mail fraud, racketeering, RICO conspiracy and general conspiracy. However, it had acquitted them of two counts of fraud and deadlocked as to a third.²⁰ Nonetheless, the district court imposed forfeiture based, in part, on the acquitted counts of fraud. The Second Circuit affirmed, reasoning that criminal forfeiture was not a form of determinate sentencing and that *Booker* was thus inapplicable. Though *Booker* prohibited a "judicial increase in punishment beyond a previously specified range[,] in criminal forfeiture, there is no such previously specified range."²¹ Thus, because the judge was justified in considering any conduct within an indeterminate scheme, imposing punishment for acquitted conduct was permissible.²² Under this characterization of forfeiture, it sits as a conceptual relic from a bygone era and lies outside of *Booker*'s purview altogether.

Second, as a corollary to this argument, several Courts of Appeals have reasoned that no statutory maximum exists for criminal forfeiture. The concept of the statutory maximum arose in the Supreme Court's recent Sixth Amendment cases. It consists of the maximum sentence a court can impose based on facts that are either established by a guilty plea or proved to the jury beyond a reasonable doubt.²³ The effect is to hem in judicial fact-finding and limit the possible sentence of the offender. Thus, if unlawfully possessing a firearm carries a maximum of ten years in prison and a judge imposes a fifteen-year sentence based on his determination that the gun also facilitated a hate crime, the judge has exceeded the statutory maximum and presumably violated the Sixth Amendment.²⁴ Forfeiture statutes, however, do not contain a predefined forfeiture amount for each conviction; the amount hinges on the property used to commit the underlying offense, which necessarily varies in each case.

This fact has led many Circuits to reject the concept of a statutory maximum in the forfeiture context altogether. For example, in *United*

¹⁹ 411 F.3d 377, 383 (2d Cir. 2005).

²⁰ *Id.* at 379.

²¹ *Id.* at 383. The Second Circuit is not alone. In *United States v. Messino*, the Seventh Circuit noted that criminal forfeiture is "open-ended in that all property representing proceeds of illegal activity is subject to forfeiture." 382 F.3d 704, 713 (7th Cir. 2004). Because it spoke only of determinate regimes—which are by definition not "open-ended"—*Booker* was inapposite. See also *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (stating that the "the sixth amendment does not apply to forfeitures"). The Sixth Circuit agrees. See *United States v. Hall*, 411 F.3d 651, 655 (6th Cir. 2005) (noting that forfeiture constitutes a form of indeterminate sentencing, "which has never presented a Sixth Amendment problem").

²² *Fruchter*, 411 F.3d at 383–84.

²³ *United States v. Booker*, 543 U.S. 220, 244 (2005); see also *infra* notes 125, 138–39 and accompanying text.

²⁴ *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 469–71 (2000).

States v. Hall, the Sixth Circuit denied the defendant's claim that a jury-imposed forfeiture amount based on the preponderance of the evidence standard violated the Sixth Amendment.²⁵ The defendant argued that *Booker* required the jury to find each fact that would raise his punishment above the statutory maximum to be true beyond a reasonable doubt. The court, however, chided the defendant for relying on *Booker*, noting "the forfeiture statute at issue in this case (and, we suspect, most forfeiture statutes) does not contain a statutory maximum."²⁶ Rather, the forfeiture provision at issue simply required the defendant to forfeit any property that constituted proceeds from money laundering.²⁷ Once the jury determined that the defendant was, in fact, guilty of money laundering, its verdict was out of the picture.

Finally, the Courts of Appeals have held that the Supreme Court has already resolved the relationship between the jury's verdict and the forfeiture amount in an earlier case, *Libretti v. United States*.²⁸ In *Libretti*, the defendant was a profitable drug dealer who pleaded guilty to various federal drug, firearms, and money-laundering offenses.²⁹ As part of the plea, Libretti agreed to forfeit "all assets that were used to facilitate his criminal activity" and particular assets he had gained by plying the drug trade.³⁰ After Libretti waived his right to a jury trial, the district court entered the forfeiture order.³¹ Libretti appealed, claiming that the district court had failed to adequately apprise him of his right to a jury trial as to the forfeiture amount.³² The Supreme Court granted certiorari to determine, in part, whether the Sixth Amendment required a jury determination as to forfeitability.³³

In finding the defendant's waiver of a jury trial to be adequate, the Court rejected the defendant's claim that he had a right to a jury determination as to a forfeiture amount. The reason was simple. Criminal forfeiture is an "aspect of sentencing" and "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed."³⁴ The Court refused to foist the "Sixth Amendment right to jury determination of guilt or innocence" into the sentencing context.³⁵ Thus,

²⁵ 411 F.3d 651, 654–55 (6th Cir. 2005).

²⁶ *Id.* at 655.

²⁷ *Id.*

²⁸ 516 U.S. 29 (1995); *see also*, *United States v. Leahy*, 438 F.3d. 328, 331 (3d Cir. 2006) (crediting *Libretti* as the governing precedent).

²⁹ *Libretti*, 516 U.S. at 32.

³⁰ *Id.* at 34.

³¹ *Id.* at 34–35 (containing trial court's statements at the hearing for the plea agreement advising defendant that "all the property that's described in . . . Count 6 could be forfeited to the United States").

³² *Id.* at 37–38.

³³ *Id.*

³⁴ *Id.* at 49.

³⁵ *Id.*

the “right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection.”³⁶

The lower courts have understood *Libretti* to sever most ties between the jury verdict and forfeiture amount. In *United States v. Leahy*, the Third Circuit relied entirely on *Libretti* in rejecting a defendant’s challenge to a forfeiture amount under *Booker*.³⁷ The court treated the issue as long resolved; *Libretti* “flatly holds” that forfeiture does not raise any Sixth Amendment concerns.³⁸ In denying the defendant’s Sixth Amendment claim, the court cited *Libretti*’s conclusion that forfeiture was “an aspect of sentencing” and that the defendant did not “enjoy a constitutional right to a jury determination as to the appropriate sentence.”³⁹ The court then noted that, despite some apparent tension between *Booker* and *Libretti*, “as a Court of Appeals, [it was] not free to ignore” the Court’s holding in *Libretti*.⁴⁰ Absent more explicit guidance from the Supreme Court, *Booker* was irrelevant.

This broad characterization of *Libretti*, however, is not inevitable. *Libretti*’s reasoning does not rest on sentencing principles that are still completely sound. The Court in *Libretti* categorically denied the availability of “jury sentencing, even where the sentence turns on specific findings of fact.”⁴¹ The jury was, in short, irrelevant to the sentence imposed—a fact made “abundantly clear” by the Court’s precedent.⁴² However, this claim draws support from precedent that the Court has since limited to comport with the Sixth Amendment. The categorical disavowal of a role for the jury cited in *Libretti* applies only “to cases that do not involve the imposition of a sentence more severe than the statutory maximum.”⁴³ In turn, the Court in *Booker* defined the “statutory maximum” as “the maximum [sentence] authorized by the facts established by . . . a jury verdict.”⁴⁴ As a result, at least in some instances, *Libretti*’s categorical denial of any role for the jury in

³⁶ *Id.* The Court fractured somewhat as to the Sixth Amendment determination. Justice Souter concurred but would not have reached the issue at all. *Id.* at 52 (Souter, J., concurring). Justice Stevens dissented entirely. *Id.* at 54 (Stevens, J., dissenting).

³⁷ *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006).

³⁸ *Id.* at 332.

³⁹ *Id.* (citing *Libretti*, 516 U.S. at 49).

⁴⁰ *Id.*

⁴¹ *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986)).

⁴² *Id.*

⁴³ *Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000). The rule in *Libretti* traces to *McMillan*. 477 U.S. at 93. The Court subsequently limited *McMillan* in *Apprendi*. The Court in *Apprendi* stated that it was not overruling *McMillan*, but that it may revisit the case someday. 530 U.S. at 487 n.13.

⁴⁴ *United States v. Booker*, 543 U.S. 220, 244 (2005) (“[W]e reaffirm our holding in *Apprendi*: Any 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.”).

sentencing would be irreconcilable with *Booker*.⁴⁵ It is simply no longer accurate to say that the defendant “does not enjoy a constitutional right to [a] jury determination as to the appropriate sentence,”⁴⁶ at least sometimes.

These criticisms notwithstanding, the Courts of Appeals have consistently differentiated forfeiture from the constitutional mandates in *Booker*—whether by dint of the determinacy of the sentencing scheme or the reasoning in *Libretti*. Though *Libretti* is not entirely consistent with intervening precedent, it still trumps *Booker*. This Comment asks whether this is necessarily a good thing and whether *Booker* has nothing to say about forfeiture. Though the Courts of Appeals certainly cannot be faulted for interpreting *Booker* narrowly, the case does provide a helpful framework for analyzing the criminal sentence and the limits imposed on the state in imposing punishment. The battle of ideas underlying *Booker* concern both whether the rights affected by sentencing—liberty and, in the case of forfeiture, property—should be strictly protected from the state’s power to inflict criminal punishment and how the jury should be involved. In short, should predefined sentences and the jury-trial right be construed strictly, as rules, or loosely, as standards? The next Part briefly examines the different uses for rules and standards before delving into the Court’s holdings in *Booker* in Part IV.

II. RULES AND STANDARDS: THE FRAMEWORK FOR MODERN SENTENCING

The hypothetical is a familiar one in tort-law casebooks.⁴⁷ Justices Oliver Wendell Holmes and Benjamin Cardozo stand at opposite sides of the railroad tracks. Their job is to determine the substance of the law that will govern automobiles approaching an unguarded railroad crossing.⁴⁸ Holmes declares a clear rule: the driver “must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.”⁴⁹ Cardozo, however, rejects Holmes’s rule, saying that the driver “will learn nothing by getting out about the perils that lurk beyond”⁵⁰ and instead opts for a standard: a driver can cross unless “reasonable caution forb[ids] going forward.”⁵¹ In the end, the two will never agree because each believes that the problem demands a fundamentally different solution.

⁴⁵ Some defendants have argued that the Court has tacitly overruled *Libretti*. See, e.g., *United States v. Fruchter*, 411 F.3d 377, 381 (2d Cir. 2005) (noting defendant’s argument that the Court has overruled *Libretti* sub silentio).

⁴⁶ *Libretti v. United States*, 516 U.S. 29, 49 (1995).

⁴⁷ See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985) (citing M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 51–54 (3d ed. 1983)).

⁴⁸ *Id.*

⁴⁹ *Balt. & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927); see also Schlag, *supra* note 47, at 379.

⁵⁰ *Pokora v. Wabash Ry. Co.*, 292 U.S. 100, 104 (1933).

⁵¹ *Id.* at 101.

Cardozo sees the potential disaster in crossing the tracks as resulting from too many factors to distill into a simple rule. Holmes, however, sees the issue as being simple: the driver knows “that he must stop for the train, not the train stop for him.”⁵²

In fact, the distinction between rules and standards lies at the center of the Supreme Court’s divisions in *Booker*. Though cast in the terms of the scope of the Sixth Amendment and judicial discretion in sentencing, the Court’s disagreement concerned a larger fissure over the proper rules and standards in the sentencing process. First, the Court disagreed as to whether rules or standards govern the liberty interests affected by sentencing. In one view, the Sentencing Guidelines (or, more broadly, statutorily defined sentences) provide a stark limit on the state’s power to sentence; a conviction for a certain offense must not exceed the maximum in the statute. The other view would not construe the defined sentence as rigidly and, instead, would hem it in through a “reasonableness” standard. Second, the Court disagrees on secondary matters of procedure. One camp sees the jury-trial right as a strict rule governing the sentence, whereas another envisions a looser relationship to the verdict through notions of “due process.” This Part provides an overview of the conceptual framework that has developed surrounding both rules and standards before delving into the Court’s holding in the next Part. To that end, Section A contrasts rules and standards. Section B then discusses how both rules and standards can govern primary rights and secondary matters of procedure.

A. Rules and Standards Contrasted

Though rules and standards both play essential roles within the administration of the law,⁵³ each possesses distinguishing characteristics. Rules are identified by their “all-or-nothing” nature.⁵⁴ That is, if the rule’s predicate condition exists, then the result must occur or an exception must apply. To illustrate, consider the rule that provides the lifeblood for baseball: once a batter takes three strikes, he is out.⁵⁵ Now, there may be exceptions to this rule—for instance, if the catcher drops the third strike, the batter can run to first⁵⁶—but the exceptions do not change the all-or-nothing nature of the rule. After three strikes, the batter is either out or some exception applies.⁵⁷

Standards provide less guidance than rules in setting out legal obligations but are, nonetheless, just as prevalent within the law. A standard identifies or points towards a number of considerations that are relevant to a

⁵² *Goodman*, 275 U.S. at 69–70.

⁵³ Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *A.J.’s K Is Taken Away, Leading to Bizarre Win for Sox*, CBS SPORTSLINE, Oct. 12, 2005, http://cbs.sportslines.com/mlb/gamecenter/recap/MLB_20051012_ANA@CHW.

⁵⁷ Dworkin, *supra* note 53, at 25.

decision, but does not provide any guidance as to which should govern. Unlike rules, the terms of the standard do not necessarily require a particular result.⁵⁸ Thus, when approaching an unguarded railroad crossing a driver can cross unless “reasonable caution ford[bids] going forward,” but it is difficult to know in advance whether the driver will be stopping or zipping through. Conversely, though Justice Holmes’s rule may frequently entail needless stopping, an unguarded crossing ahead would at least alert the driver that he would be getting out of his car.

Thus, standards differ from rules in two important respects. First, and most notably, standards provide scant guidance for a decision-maker to rely on beforehand.⁵⁹ It is possible that the same standard would have dispositive weight in one set of circumstances, but be outweighed by countervailing considerations in another.⁶⁰ For example, no court would deny the common law principle that a plaintiff cannot wait forever to bring a tort. Nonetheless, the plaintiff’s delay in filing suit is always balanced against other considerations, such as the intent of the tortfeasor or the reasonableness of the delay under the circumstances.⁶¹ The same period of delay may extinguish one plaintiff’s rights but be excusable for another.⁶² A rule lacks this flexibility. Second, standards require the exercise of substantial discretion and judgment in each application. Unlike a rule, a standard does not contain a set of conditions that requires a particular outcome. Instead, a standard is simply a group of considerations that are relevant but not dispositive in a given situation.

These two differences are a function of the “determinateness” associated with rules and standards.⁶³ Thus, when a court or legislature chooses a rule or a standard to govern particular behavior, it makes a substantive choice regarding the clarity of that right or obligation. A rule generally correlates with greater confidence that the court or legislature has the information necessary to resolve a particular social problem without case-by-case resolution.⁶⁴ If the costs or risks of employing a standard on a case-by-case

⁵⁸ *Id.*

⁵⁹ Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–78 (1989).

⁶⁰ *Id.*

⁶¹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 939 cmt. b (1974) (discussing various countervailing considerations in applying doctrine of laches). Compare this to a statute of limitations where the reasons for the delay are only relevant for an exception to the rule: determining if the statute has been tolled.

⁶² *Id.*

⁶³ Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 544 (1999) (“The quality that identifies a ‘rule’ and distinguishes it from a ‘standard’ is the quality of determinateness. . . . [A] ‘rule’ is a posited norm that fulfills the function of posited norms, that is, settles questions of what ought to be done.”).

⁶⁴ HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (William Eskridge, Jr. & Phillip Frickey eds., 1994), reprinted in WILLIAM N. ESKRIDGE, ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 572 (3d ed. 2001).

basis outweigh the benefits given by individualized scrutiny, a rule would be preferable.⁶⁵ Omniscience, however, is not always possible. To that end, standards confer substantially more discretion upon the adjudicating body to reach a conclusion based on facts not presently known.⁶⁶

B. *Primary and Secondary Obligations Contrasted*

Rules and standards can be further differentiated by the function they perform in the administration of the law. “Primary” rules and standards constitute the majority of legislation governing behavior within society by “grant[ing] rights or impos[ing] obligations upon members of the community.”⁶⁷ Primary obligations exist where “the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate . . . is great.”⁶⁸ In other words, primary obligations require the general population to act in a certain way or else face some undesirable consequence.⁶⁹ For example, no one (presumably) enjoys paying taxes, but nearly everybody does. The primary obligation to turn over a portion of our income succeeds despite our reluctance because the IRS is justified in punishing those who evade taxes. Similarly, the government may promulgate primary rules or standards to “specify the level of damages to be awarded for a given harm, a standard of care, a list of prohibited acts, or the criteria an adjudicator should consider in making such determinations *ex post*.”⁷⁰

Primary rules and standards also serve to create individual rights that restrict the power of the government to act.⁷¹ The Fourth Amendment’s prohibition against “unreasonable searches and seizures” sets forth a primary right to be free from state interference that is “unreasonable.”⁷² This right orders primary obligations within society between the citizenry and the state according to the reasonableness standard. Because it is a standard, the precise contours of this limit on the executive were not particularly clear beforehand. The meaning of a “reasonable” search has only assumed a rec-

⁶⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 468–69 (1966) (“The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.”).

⁶⁶ *Id.*; see also Dworkin, *supra* note 53, at 32–40 (discussing discretion and its relationship to rules and standards generally).

⁶⁷ Dworkin, *supra* note 53, at 19.

⁶⁸ H.L.A. HART, *THE CONCEPT OF LAW* 86 (2d ed. 1961).

⁶⁹ *Id.*

⁷⁰ Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568 (1992).

⁷¹ See Schlag, *supra* note 47, at 394–99 (discussing how “the rules v. standards dispute resurfaces in the attempt to ascertain how . . . speech is protected against governmental suppression or regulation”); see also *infra* text accompanying notes 72–73.

⁷² See U.S. CONST. amend. IV.

ognizable shape after years of case law defining the right.⁷³ Nonetheless, the Fourth Amendment limits the power of the state to search its citizenry and affords a primary right to individual privacy.⁷⁴

“Secondary” rules, on the other hand, are “those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished.”⁷⁵ The power of *stare decisis* in cases involving statutory interpretation provides a discrete example of the differences between primary and secondary rules. In *Flood v. Kuhn*, the Supreme Court reexamined its prior holding that exempted baseball teams from federal antitrust laws.⁷⁶ Justice Blackmun’s majority opinion was hard pressed to rationalize the exemption afforded to baseball franchises when other professional sports did not enjoy similar protections.⁷⁷ The rule had become quaintly anachronistic given subsequent developments in federal antitrust law. Nonetheless, the Court refused to overturn the precedent, saying that “[i]f there is inconsistency or illogic in all this, it is an inconsistency and illogic . . . that is to be remedied by the Congress and not by this Court.”⁷⁸ In other words, though the Court ostensibly disagreed with the primary rule exempting baseball from antitrust regulation, the case announced a clear secondary rule: Congress was the appropriate institution for changing the primary rule regarding antitrust protection.⁷⁹ As *Kuhn* implies, secondary rules are necessarily concerned with the institutional design of the government and the conventions for creating and enforcing primary rules. Thus, secondary rules can

⁷³ Though this “clarity” may not be true in all instances. The tortuous path trod by the warrant requirement and the case law interpreting it has at least one Justice pleading for a return to the plain “reasonableness” standard. *See, e.g., California v. Acevedo*, 500 U.S. 565, 583 (1990) (Scalia, J., concurring) (discussing view that way out of “inconsistent jurisprudence” governing the warrant requirement “should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”).

⁷⁴ *See Kyllo v. United States*, 533 U.S. 27, 34 (2000) (discussing fact that use of certain technologies could “erode the privacy guaranteed by the Fourth Amendment”).

⁷⁵ Dworkin, *supra* note 53, at 19 (discussing H.L.A. Hart’s definition of secondary rules); *see also* HART, *supra* note 68, at 94–99.

⁷⁶ 407 U.S. 258 (1971) (discussing continued viability of *Federal Baseball Club v. National League*, 259 U.S. 200 (1922)).

⁷⁷ *Id.* at 278–84 (noting different treatment in various sports following *Federal Baseball Club v. National League*).

⁷⁸ *Id.* at 284.

⁷⁹ Professor Alexander provides another colorful example of the difference between primary and secondary rules:

Suppose, for example, that [all members of a basic society] agree that Lex has proven in the past to possess the reasoning ability and the knowledge to resolve moral controversies well. They might then all accept the following rule: “Let Lex decide . . . our moral controversies.” And let us suppose further that Lex begins his work by . . . issuing the following rule: “The speed limit shall be fifty-five miles per hour.” . . . The posited rule has authority to settle moral controversies because its promulgator, Lex, does. And he has authority because the society accepts a rule to that effect.

Alexander, *supra* note 63, at 536–37. In this example, “Let Lex decide” would serve as a secondary rule in Professor Alexander’s imagined society; the speed limit would constitute a primary rule.

frequently correspond to the branches of government and define the authority of each branch.⁸⁰

In deciding that *Booker* does not affect criminal forfeiture, the Courts of Appeals have made decisions about both primary obligations and secondary matters of procedure. First, the courts have imposed a primary standard over a defendant's interests in property. Because forfeiture affects the defendant's interests in various forms of property, it places an implied condition on property ownership. Your property is yours, the logic goes, as long as you do not gain it through or use it for criminal activity. In turn, property is a primary right. John Stuart Mill's famous trilogy of "life, liberty, and property" define the primary obligations thought to be essential to human flourishing. By stating that forfeiture lacks a statutory maximum—meaning no clearly defined limit—the precise contours of this property right are unclear in advance. As will be seen, the judge may be limited by other sources of law, but the statute is not one of them.

Second, the courts have decided that the secondary right to a jury trial does not affect a forfeiture amount. The process for imposing forfeiture runs through the judge, and not the jury. As an "aspect of sentencing" or a form of "indeterminate sentence" to be imposed by the judge, the jury is not constitutionally required at the sentencing phase. As it turns out, this view is not unique to forfeiture but is closely analogous to one view of sentencing set forth in *Booker*. After briefly sketching the advent of the Sentencing Guidelines, the next Part explains the Court's holding in light of the relationship between rules and standards.

III. FEDERAL SENTENCING AND *UNITED STATES V. BOOKER*: A TRANSITION FROM STANDARDS TO RULES AND BACK AGAIN

A criminal sanction—whether imposed through forfeiture, fine or imprisonment—enjoys an uncertain spot within the traditional conception of primary obligations. On one hand, primary rules and standards simply define when the state is justified in imposing a sanction. This would undermine a claim that the sanction itself, positively identified within the statute, affects primary obligations at all. That is, the "out" (and an umpire's attendant paroxysm) is a necessary feature of the three-strike rule. But—the argument goes—the out itself is not a separate right.

On the other hand, the sanction often places an implied condition on the enjoyment of some other right, such as liberty or the ownership of property. Aside from simply defining when the government may apply coercive

⁸⁰ The Constitution itself is replete with secondary rules crafting the vertical and horizontal structures of the American government. See, e.g., U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); U.S. CONST. art. I, § 7 ("All Bills for raising Revenue shall originate in the House of Representatives."); U.S. CONST. art. II, § 2 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate[.]").

force against an individual, a positive identification of a sanction imposes a limit on the state's ability to punish. This limit, in turn, gives an individual some primary right (affecting life, liberty or property) to be free from additional punishment at some point. After all, an umpire cannot call two outs or eject a player for three strikes. If these limits on the umpire are not rights enjoyed by the batter then what are they?

The Supreme Court's decision in *Booker* centered, in part, on this exact dispute. No Justice would deny that there are limits on the state's power to impose a sentence. However, the Justices diverge as to the nature of the primary and secondary obligations that accompany criminal sentencing. First, the Justices disagree as to the nature of the primary obligation contained in the criminal sentence. A set of Justices views the statutorily defined sentences to be rules; the state lacks the power to punish beyond the limit imposed by statute, and a defendant is entitled to a sentence that comports with the statute. This limit provides a residual liberty interest; a person is free, unless they commit certain predefined offenses. Conversely, a second set of Justices sees the sentence as being a less rigid standard; the sentence must be "reasonable," but doctrinal adherence to the punishment contained in the statute is unnecessary. Second, a similar divide characterizes the Justices' views regarding the secondary jury right and its role in sentencing. The constitutional majority considers any fact that increases punishment to be an "element" of the offense that must be proved to the jury. Justice Breyer's dissenting opinion, however, considers an "element"—and thus the jury's role—to be defined through a looser standard tied to due process.

Before delving into the particulars of the debate, it is helpful to see how the law arrived at this state of affairs in the first place. The sea change in sentencing that has occurred over the last thirty years served as a catalyst for the current debate over criminal sentencing. Section A below discusses the evolution of criminal sentencing at the federal level. Section B then outlines the advent of the Federal Sentencing Guidelines before Section C expands upon the Court's holdings in *Booker* in terms of rules and standards.

A. *Pre-Guidelines Sentencing*

From the earliest days of the American Republic and through the end of the twentieth century, the powers to impose a sentence and to define criminal conduct were largely separate. The federal judiciary has never possessed the ability to define crimes. The Supreme Court rejected the possibility of a federal criminal common law in the early days of the Republic, and the authority to define criminal offenses has since resided entirely in the halls of Congress.⁸¹ This "republican" form of criminal law was a departure

⁸¹ Justice Story made an impassioned argument for extending the common law power to define crimes to the federal courts, but the Supreme Court quickly nixed that idea. *United States v. Coolidge*,

from the largely judge-made system of criminal law that characterized the colonial era.⁸²

Conversely, the power to sentence was one exercised predominantly (if not exclusively) by the courts. Beginning in the earliest days of the founding era, Congress conferred substantial discretion upon the courts to levy the appropriate sentence in an individual case.⁸³ Except in capital cases, the First Congress granted nearly absolute discretion to courts to impose a sentence—giving little more than the maximum sentence to be imposed.⁸⁴ This broad delegation resulted from the fact that both the courts and Congress considered the proper sentence to rest on sundry considerations regarding the specific offender—dooming any effort to legislatively divine an appropriate sentence beforehand.⁸⁵ Judges seldom imprisoned offenders as punishment for serious offenses, stemming from the assumption during colonial times that “any notion of rehabilitation [was] absurd.”⁸⁶

By the mid-nineteenth century, however, two shifts occurred. First, imprisonment became the preferred form of punishment and rehabilitation

25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415, 415 (1816). Justice Marshall soon affirmed Congress’s role as the source of federal criminal law. In addition to preventing the *creation* of criminal law by the judiciary, Justice Marshall tied the judiciary to strict interpretive limits in judging cases under federal criminal law by sharply limiting the shadow cast by criminal statutes. *See* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) (“It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.”).

⁸² LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 63 (1993) (“A republican criminal justice system would . . . not tolerate cells of uncontrolled discretion[. . .]. This meant that all crimes, and their punishments, should be embodied in a single, clear, definitive code.”).

⁸³ *See* Crimes Act of 1790, ch. 9, 1 Stat. 112 (1790).

⁸⁴ *Id.* The First Congress included a variety of crimes in its first criminal statute, including arson on U.S. property, murder on the high seas, perjury, extortion, and forgery. *Id.* The punishments were mandatory for capital offenses. For example, “if any person or persons shall falsely make, alter, forge, or counterfeit . . . any . . . public security of the United States . . . every such person shall suffer death.” *Id.* at 115. However, the punishments available for non-capital offenses were defined simply by the maximum sentence that could be imposed. Thus, “if any person . . . shall . . . within the sole and exclusive jurisdiction of the United States . . . commit the crime of manslaughter, such person or persons shall be imprisoned not exceeding three years and fined not exceeding one thousand dollars.” *Id.*

⁸⁵ *See generally* MABEL A. ELLIOTT, *CONFLICTING PENAL THEORIES IN STATUTORY CRIMINAL LAW* 12–18 (1931); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 62 (1930); *cf.* *Gurera v. United States*, 40 F.2d 338, 340 (8th Cir. 1930) (“Instead of attempting the unprofitable, if not impossible, task of laying down legislative gradations with penalties for each, Congress wisely thought it best to raise the maximum penalty sufficiently high to take care of the serious violations and, at the same time, to express its intent or caution as to how such penalties should be applied by the courts.”).

⁸⁶ ARTHUR W. CAMPBELL, *LAW OF SENTENCING* 8 (3d ed. 2004). Rehabilitation was absurd, however, only with respect to the most serious crimes. It was an entirely appropriate justification with respect to those who had committed minor infractions. *See, e.g.,* *United States v. Moreland*, 258 U.S. 433, 445 (1921) (Brandeis, J., dissenting) (describing “duty to establish such a house [of corrections] ‘for restraint, correction, labour and punishment’ [that] was imposed upon every county of Pennsylvania at the same time”) (citing *Charter and Laws of the Province of Pennsylvania, 1682–1700*, edition of 1879, pp. 107–23, 192–208 (reenactment of 1693)).

became its underlying rationale.⁸⁷ This confluence sprung from a belief in penance over the pillory; society could reform those involved in crimes and rehabilitate them through imprisonment and hard labor.⁸⁸ Second, the judiciary and the executive branch (in the United States Parole Board) shared responsibilities for administering the sentence.⁸⁹ Judges set the minimum and maximum terms of imprisonment within a range provided by the legislature.⁹⁰ Trial courts enjoyed nearly absolute discretion, as sentences stood largely insulated from appellate review.⁹¹ After the judge imposed the minimum and maximum terms, power shifted to the Parole Board, which then enjoyed broad discretion in assessing when the offender was sufficiently reformed to go home.⁹² In the end, no one knew how long a criminal sentence would be until the prisoner was shown the door. Though the form of and responsibility for punishment had changed, one important feature remained the same: Congress defined the criminal offense but the actual sentence was never clearly promulgated in a formal sense before it had been served. When the Courts of Appeals have referred to forfeiture as a form of “indeterminate sentencing,” they are explicitly linking it to this era. Under the Circuit’s case law, the ensuing developments involving the Sentencing Guidelines left forfeiture untouched.

B. Uniformity and Retribution: The Federal Sentencing Guidelines

Though the indeterminate sentencing regime hit its stride in the first half of the twentieth century, it began to unravel in the 1970s. The most common criticisms levied against the indeterminate scheme centered on two things: the disparities in sentences for similar crimes across jurisdictions

⁸⁷ FRIEDMAN, *supra* note 82, at 78–82 (discussing ascendancy of the rehabilitative prison throughout the United States in the nineteenth century).

⁸⁸ CAMPBELL, *supra* note 86, at 9; *see also Moreland*, 258 U.S. at 450 (Brandeis, J., dissenting) (“Thus hard labor, which, in inflicting punishment for serious crimes, had first been introduced as a medium of disgrace, became the means of restoring and giving self-respect.”).

⁸⁹ An Act to Parole United States Prisoners, and for other purposes, ch. 387, 36 Stat. 819 (1910); *see also Mistretta v. United States*, 488 U.S. 361, 363–64 (1989) (commenting that indeterminate sentencing “obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender’s amenability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did exercise, very broad discretion”); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 18 (1998).

⁹⁰ CAMPBELL, *supra* note 86, at 10.

⁹¹ *Mistretta*, 488 U.S. at 364; *Dorszynski v. United States*, 418 U.S. 424, 441 (1973) (noting that “if a judge imposed a sentence within that range, his exercise of discretion as to where within the permissible range sentence should be fixed was not subject to challenge” on appeal).

⁹² *Brest v. Ciccone*, 371 F.2d 981, 982 (8th Cir. 1967) (holding that “courts are without power to grant a parole or to judicially determine eligibility for parole”); *Rifai v. U.S. Parole Comm’n*, 586 F.2d 695 (9th Cir. 1978) (discussing Parole Commission’s broad powers to set guidelines for release).

and the inadequacy of the rehabilitative justification for punishment.⁹³ The Federal Sentencing Guidelines grew out of a bipartisan endeavor to remedy these perceived flaws in the indeterminate sentencing scheme.⁹⁴ The Sentencing Reform Act of 1984 (“SRA”) aimed to simplify the diverse federal criminal laws into a common code that would serve as a set of guidelines for criminal sentencing.⁹⁵ As signed into law, the SRA established the United States Sentencing Commission (“Sentencing Commission”), which Congress consigned the sizable task of “provid[ing] certainty and fairness” in criminal sentencing, “avoiding unwarranted sentencing disparities” among similarly situated defendants, and “maintaining sufficient flexibility to permit individualized sentences where warranted.”⁹⁶

The SRA reformed criminal sentencing by consolidating the sentencing power previously held by the Parole Board and the judiciary, and conferring the combined power upon the Sentencing Commission.⁹⁷ The Guidelines also made all sentences determinate⁹⁸ (meaning that an imposed sentence would be predictive of time actually served)⁹⁹ and would be mandatory.¹⁰⁰ Finally, unlike the indeterminate scheme, the SRA provided for at least a minimal level of appellate review to ensure compliance with the Guidelines.¹⁰¹

The final product of the Sentencing Commission—the Federal Sentencing Guidelines—reshaped criminal sentencing and substantially limited judicial discretion to craft sentences. The Federal Sentencing Guidelines imposed primary rules on what had previously been a sentencing system

⁹³ See FRIEDMAN, *supra* note 82, at 411; William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 374–75 (1995).

⁹⁴ STITH & CABRANES, *supra* note 89, at 36.

⁹⁵ *Id.* at 39, 41. The original bipartisan group that drafted what would become the Sentencing Reform Act of 1984 was led by Democratic Senator Edward Kennedy and included Republican Senators John McClellan and Strom Thurman. *Id.* at 39. Senator Kennedy’s initial draft envisioned the Sentencing Commission that Congress ultimately created with the exception that the Commission would create advisory rather than mandatory sentences. Thus, before the bill was edited in 1978 to make the sentences mandatory, the consideration of the sentence emanating from the commission would be one factor among many in crafting a criminal sentence, and a judge would have discretion to alter the sentence if he stated “the specific reason” for the adjustment. *Id.* at 41 (quoting S. 1437, 95th Cong. 1st Sess. § 101(b) (1977)); see also CAMPBELL, *supra* note 86, at 15.

⁹⁶ 28 U.S.C. § 991(b)(1)(B) (2000).

⁹⁷ 28 U.S.C. § 994(a)(1) (authorizing Sentencing Commission to draft sentences and providing guidelines for crafting sentences based on nature of crime and defendant); 28 U.S.C. § 995(a)(1) (authorizing Sentencing Commission to promulgate rules); see also *Mistretta v. United States*, 448 U.S. 361, 367 (1988).

⁹⁸ 18 U.S.C. § 3624(a)–(b) (2000) (requiring prisoner to serve entire sentence unless setoff for satisfactory behavior).

⁹⁹ *Mistretta v. United States*, 448 U.S. 361, 367 (1989).

¹⁰⁰ 18 U.S.C. § 3553(b) (2000). The Court expressly invalidated this section in *Booker*. See *United States v. Booker*, 543 U.S. 220, 258–59 (2005).

¹⁰¹ 18 U.S.C. § 3742 (2000).

governed by both the rehabilitative standard and judicial or executive discretion. To remedy these perceived wrongs, the new Guidelines imposed a system possessing a certain mathematical rigidity.¹⁰² To that end, the Guidelines produced a byzantine, somewhat formulaic system of punishment that distilled the world of potential federal offenses into subcategories.¹⁰³

Thus, the Federal Sentencing Guidelines stood in marked contrast to the indeterminate regime it replaced. The bulk of authority for criminal sentencing now undeniably rested in the hands of the “junior-varsity Congress”¹⁰⁴ housed at the Federal Sentencing Commission. Though trial courts were not stripped of all authority to form particularized sentences, the book had seemingly closed on the centrality of judicial discretion. The only factor the Guidelines could not define in advance was the proper role for the jury in imposing a sentence.

C. The Recalibration of Federal Sentencing Authority: From Rules to Standards and United States v. Booker

As the systems of sentencing changed, so too did the understanding of the jury’s involvement in the process. Despite the continued agreement as to the need for juries in criminal cases, the precise contours of the jury right have been controversial. It is long settled that the jury right is a function of due process for serious offenses¹⁰⁵ and that proof beyond a reasonable doubt is required for all “elements” of an offense.¹⁰⁶ Additionally, judges have at least some leeway in the facts they consider while sentencing. Go much beyond these basic points of agreement, however, and divisions begin to surface.

Most controversially, the role of the jury in determining the defendant’s sentence has changed considerably over the last twenty years with the advent of determinate sentencing. In 1986, the Court held in *McMillan v. Pennsylvania* that a defendant did not have a right to a jury determination as to the possession of a firearm, a fact that exposed him to the state’s man-

¹⁰² Sort of. As will be seen, *Booker* has changed the math a bit. See *infra* text accompanying notes 129–33.

¹⁰³ U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, introductory cmt. (2004) (discussing way in which the Sentencing Guidelines “balance[d] the virtues and vices of broad, simple categorization and detailed, complex subcategorization”); see also William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990) (stating that Guidelines reflect a “system that blends the constraints of the offense of conviction with the reality of the defendant’s actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes”).

¹⁰⁴ *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

¹⁰⁵ *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

¹⁰⁶ *In re Winship*, 397 U.S. 358, 361 (1970) (“It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.”) (citing C. MCCORMICK, EVIDENCE § 321, at 681–82 (1954)).

datory minimum punishment.¹⁰⁷ The legislature had taken “one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm.”¹⁰⁸ State legislatures thus could have broad leeway in defining “sentencing factors”; nothing in the state’s scheme “warrant[ed] constitutionalizing burdens of proof at sentencing.”¹⁰⁹

This expansive leeway afforded to judges and legislatures, however, did not last long. In 2000, the Court expressly limited *McMillan* “to cases that do not involve the imposition of a sentence more severe than the statutory maximum.”¹¹⁰ The jury and not the judge had to find any fact that increased punishment above that authorized by statute. Four years later, the Court reaffirmed this holding and invalidated certain features of the determinate sentencing schemes adopted by several states that raised punishment based solely on judicial fact-finding.¹¹¹ The jury trial thus served to give effect to the “common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”¹¹² In both cases, the Court was narrowly divided; the Court announced each majority opinion over the booming dissents of four Justices. In turn, these divisions would carry over into *United States v. Booker*’s two majority opinions—with Justice Ginsburg providing the swing vote.

Booker came before the Court on joint appeal from a pair of drug convictions. A jury convicted Booker of possession with intent to distribute fifty grams of cocaine, resulting in a sentence under the Sentencing Guidelines of almost twenty-two years in prison.¹¹³ Based on the district court’s determination that Booker actually had 566 grams of cocaine in his possession at the time of arrest, the judge increased the punishment under the Sentencing Guidelines to a thirty-year sentence.¹¹⁴ The sole issue before the Court was whether this exercise of judicial fact-finding violated the Sixth Amendment’s guarantee to trial by jury.

The Court’s holdings consist of two separate majority opinions. The first opinion—that of the constitutional majority—held that the Sentencing Guidelines violated the Sixth Amendment by requiring judges to impose sentences above the statutory maximum based on facts that were not proved to the jury.¹¹⁵ This echoed the Court’s prior decisions that had invalidated

¹⁰⁷ 477 U.S. 79, 89–90 (1986).

¹⁰⁸ *Id.* at 89–90.

¹⁰⁹ *Id.* at 91–92 (finding it adequate that “Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof”).

¹¹⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000).

¹¹¹ *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

¹¹² *Id.* at 313.

¹¹³ *United States v. Booker*, 543 U.S. 220, 227 (2005).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 244.

certain types of judicial fact-finding. The second majority opinion—that of the remedial majority—held that the appropriate way to remedy the Sentencing Guidelines’ constitutional infirmity was to make them advisory and to provide appellate review for “reasonableness.”¹¹⁶

The debate that began in *McMillan* and that culminated in *Booker* involved two debates over the primary and secondary obligations governing sentencing. The first debate concerned whether determinate regimes confer clear rights upon criminal defendants. If the judge could not impose a sentence higher than that contained in a statute or sentencing scheme, the defendant enjoyed a corresponding liberty interest not to be punished above that maximum. This functioned as a clear rule; following conviction, the defendant’s liberty interests were clearly defined by the maximum sentence contained in the Sentencing Guidelines. The converse view—and the holding that eventually held sway for the remedial majority—would deny a rigid primary liberty interest in determinate schemes, instead cabining the state’s power to sentence through a looser “reasonableness” standard. Similarly, the Justices continued their disagreement over the proper role of the jury in the secondary procedure that governed the criminal trial. The constitutional majority reaffirmed the rule announced in *Apprendi* whereas the dissenters called for a more fluid understanding of when the jury would be needed to support a particular sentence and when a particular fact that increased punishment constituted an “element” of the offense.

I. Primary Rules: The Sentence As Rule or Standard.—The view that legislatively defined sentencing guidelines provide a set of primary rules first gained a majority prior to *Booker*. In *Blakely v. Washington*, the Supreme Court held that the Sixth Amendment precluded a judge’s determination that the defendant had used a firearm while kidnapping his estranged wife—a fact that exposed him to a greater punishment under Washington’s statutory scheme.¹¹⁷ Justice Scalia framed the issue in terms of the defendant’s entitlement to the punishment specified in the state’s sentencing guidelines. He first noted that, in general, judicial fact-finding is permissible where “the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence.”¹¹⁸ Justice Scalia continued:

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence—

¹¹⁶ *Id.* at 245.

¹¹⁷ *Blakely*, 542 U.S. at 298. In the recent Sixth Amendment jurisprudence, the Justices have been remarkably consistent in their views. The *Blakely* majority consisted of Justices Ginsburg, Scalia, Stevens, Souter, and Thomas. In three separate opinions, Justices Breyer, Kennedy, O’Connor, and Rehnquist dissented. The same blocs would exist in *Booker*, with Justice Ginsburg joining the remedial majority with the Justices who dissented in *Blakely*.

¹¹⁸ *Id.* at 309.

and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.¹¹⁹

In other words, rather than simply identifying a loose range of punishment, a statutory provision that provides a particular punishment for predefined behavior creates a primary “right” to a particular sentence.

In *Booker*, the constitutional majority echoed this rationale, conceiving of the sentence as part of a primary right enjoyed by the offender and listing benefits that are normally associated with rules.¹²⁰ First, the sentence that a person would receive for a particular crime could and should be determined *ex ante* with reference to the sentence prescribed in the Sentencing Guidelines.¹²¹ Justice Stevens characterized Congress’s purpose in the SRA as ensuring uniformity in sentencing. This underscored “the absurdity of the claim that Congress would find acceptable . . . the [remedial majority’s] restoration of judicial discretion” by making the Sentencing Guidelines advisory.¹²² In sum, Congress was not simply specifying a loose goal or baseline in the Sentencing Guidelines when it directed the District Courts to impose uniform punishments; it was announcing a clear rule that limited the state’s power to punish.

Second, both Justice Stevens and Justice Scalia noted that the statutorily defined sentences did not require case-by-case adjustment by the courts—the standard justification for choosing standards over rules. The Sentencing Commission had already balanced the relevant considerations in defining a sentence and codified the result as a mandatory rule within the Sentencing Guidelines. The Sentencing Guidelines were “the product of *policy decisions* by the Sentencing Commission.”¹²³ Thus conceived, Congress’s definition of the sentence created a “right to a determinate sentence” for particular behavior.¹²⁴ This view would restrict the trial court’s discretion to issue a “sentence within the statutory range” as determined by the jury’s verdict.¹²⁵

¹¹⁹ *Id.*

¹²⁰ For a discussion of the benefits of primary rules, see *supra* notes 63–66 and accompanying text.

¹²¹ See *United States v. Booker*, 543 U.S. 220, 303 (2005) (Scalia, J., dissenting) (“No headline describing the Sentencing Reform Act of 1984 (Act) would have read ‘Congress reaffirms judge-based sentencing’ rather than ‘Congress prescribes standardized sentences.’”).

¹²² *Id.* at 298 (Stevens, J. dissenting). In reaching his conclusion, Justice Stevens relies, in part, on legislative history. See *id.* at 297–99. Justice Scalia believes that this detour through the legislative history and subsequent legislative action is unnecessary; he reaches the same conclusion through the text alone. Justice Scalia described the remedial majority’s approach as “wonderfully ironic: In order to rescue . . . a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.” *Id.* at 304 (Scalia, J., dissenting); see also *id.* at 303 n.1 (containing Justice Scalia’s opt-out from use of legislative history).

¹²³ *Id.* at 305 n.3 (Scalia, J., dissenting).

¹²⁴ *Id.* at 302 (Stevens, J., dissenting).

¹²⁵ *Id.* at 312 (Scalia, J., dissenting); see also *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (“[N]othing . . . suggests that it is impermissible for judges to exercise discretion. . . . We have often

For the constitutional majority, the logical separation of criminal conduct and sentencing that existed under the indeterminate regime was no longer applicable in the determinate context.¹²⁶ In its place, the Congress had created a regime governed by a clear rule: following a conviction for certain offenses, a person could only receive a certain amount of punishment.¹²⁷ Whereas it was difficult to speak of an entitlement to a specific sentence within an indeterminate regime—where the length of a sentence was only known afterwards—the Sentencing Guidelines created rules guaranteeing a maximum sentence.¹²⁸ In short, one’s primary interest in liberty was contingent upon not committing certain acts. Once a person committed these acts, the state’s authority to remove his or her liberty extended only to the maximum sentence contained in the Sentencing Guidelines.

This view, however, did not carry the day. Justice Breyer, writing for the remedial majority, made the Sentencing Guidelines advisory and recast the right contained in the Guidelines under a “reasonableness” standard. First, Justice Breyer characterized Congress’s goals in the Sentencing Guidelines to be to confer discretion upon the courts to craft the appropriate sentence. Congress did not intend the previous system of judicial discretion to disappear. To that end, the Guidelines require the court to establish a “tie between a sentence and an offender’s *real conduct*” and to “ensur[e] similar sentences for those who have committed similar crimes in similar ways.”¹²⁹ The Sentencing Guidelines could not have done this. Criminal activity is too multifarious and “encompass[es] a vast range of very different kinds of underlying conduct” for punishment to be defined strictly in advance.¹³⁰ To ensure that this “tie” existed, a judge would have to consider a wide swath of information that would only be available at trial. As a result, Justice Breyer’s remedial majority opinion characterized the Sentencing Guidelines

noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.”) (emphasis in original).

¹²⁶ *Booker*, 543 U.S. at 292–93 (Stevens, J., dissenting) (discussing Congress’s motivation in passing Sentencing Reform Act after determination that the “discretion that Congress had conferred for so long upon the judiciary and the parole authorities was at the heart of sentencing disparity”) (emphasis omitted); see also *Blakely v. Washington*, 542 U.S. 296, 309 (2004); see also *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (“[T]he criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt . . . (and hence the length of the sentence to which he is exposed) will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.”) (emphasis omitted).

¹²⁷ *Booker*, 543 U.S. at 294–95 (Stevens, J., dissenting) (stating that “text [of Sentencing Reform Act] requires the sentencing judge to impose the sentence dictated by the Guidelines” and “instruct[s] judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal”).

¹²⁸ See *Blakely*, 542 U.S. at 305 (discussing why under an indeterminate regime that permitted judge to sentence defendant to death, the judge could “rely on facts outside the trial record in determining whether to sentence a defendant to death” because this would not produce a “sentence greater than what state law authorized on the basis of the verdict alone”).

¹²⁹ *Booker*, 543 U.S. at 252 (Breyer, J.) (emphasis).

¹³⁰ *Id.* at 251.

as being discretion-conferring, as opposed to rigid rules that sharply limited the power to sentence.

Second, the remedial majority defined the Sentencing Guidelines as considerations that were relevant to a sentence, but held that the final sentence only had to be “reasonable.” The myriad factors that justify punishment for a crime should not be reduced to a rigidly defined code.¹³¹ Instead, the proper sentence is the result of a “reasonableness” standard: a combination of both legislative command and, more importantly, judicial adjustment.¹³² As a result, a defendant enjoyed a primary right to be free from an unreasonable deprivation of liberty, but did not necessarily have a right to the exact sentence defined in the Sentencing Guidelines.

The remedial majority’s views were not new. Reliance on indeterminate sentencing schemes had largely characterized attitudes towards sentencing since the founding. More recently, the view that sentencing guidelines might be standards that require a dialogue between the judiciary and the legislature was eloquently set forth by Justice Kennedy:

Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.¹³³

Though Justice Kennedy refers to the codification of judicial “elaboration and evolution” into rules, he describes a process of refinement in which the sentences announced by the Sentencing Guidelines would not be strict or require particular sentences.¹³⁴ Some slack was needed in the process. In this way, the predefined sentences would simply be relevant factors to which judges could give varying weight in imposing a sentence. This iterative process renders any notion of the sentence as a right enjoyed by the defendant inapposite. Making the Sentencing Guidelines advisory and providing appellate review for “reasonableness” ensured that this iterative

¹³¹ See David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 267 (2005) (“All sentencing systems make use of information beyond the elements of the offense of conviction. This practice, known generally as ‘real-offense sentencing,’ is necessary because of the complexity and variety of criminal behavior and the need to keep criminal statutes relatively simple.”).

¹³² Some see this transition as further confusing sentencing jurisprudence. See Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 676 (2005) (“The *Booker* decision, remarkable for many reasons, found a way to make a conceptually muddled constitutional jurisprudence concerning sentencing procedures even more opaque.”).

¹³³ *Blakely*, 542 U.S. at 326–27.

¹³⁴ *Id.* Consistent with Justice Kennedy’s views, in his dissent, Justice Breyer rejected the argument that the Sentencing Guidelines were legislative, instead arguing that they are “administrative . . . in nature.” *Booker*, 543 U.S. at 331 (Breyer, J., dissenting) (emphasis omitted). The administrative nature of the Guidelines made them just that, guidelines and not formal rules.

dialogue occurred between the courts and the Sentencing Commission, serving as the de facto legislature.

The remedial majority and the dissenting Justices possess differing views regarding the type of primary obligations involved in predefined sentencing. Both sides would agree that the criminal sentence constitutes an implied condition on one's liberty. The baseline normative assumption is that a citizen enjoys the ability to pursue whatever goals he or she sees fit. This assumption gives way when that person commits certain predefined offenses.¹³⁵ Nonetheless, the state cannot impose limitless punishment on individuals. Just as the Fourth Amendment defines the boundaries between law enforcement and an individual's privacy interests, various doctrines hedge in the state's ability to punish, leaving a residual liberty interest. Thus, the state cannot punish in a manner that deprives the defendant of due process or that is both "cruel and unusual."¹³⁶ The debate riling the Court in *Booker*, in part, centers on whether and how the Sentencing Guidelines should similarly ensure a primary interest in liberty.

The remedial majority denied that the Sentencing Guidelines rigidly confer primary rights and, accordingly, opted for a standard to define the liberty interest contained in the Guidelines. Justice Breyer stated flatly that the Sentencing Guidelines do not "bind or regulate the primary conduct of the public."¹³⁷ This is not to suggest that any Justice would see the state's power to punish as being unlimited—or that imprisonment does not affect primary liberty interests. However, as evidenced by Justice Kennedy's dissent in *Blakely*, the primary rights guaranteed by a predefined criminal sentence should not be rigidly enforced. Sentencing was a "dialogue" between the legislature and the court, not a monologue by the Sentencing Commission.

Conversely, the dissenters—in opinions by Justices Stevens and Scalia—saw a clear liberty interest implicated in the Sentencing Guidelines and would have defined the limits on the state's ability to punish through rules. If a defendant was convicted for a certain offense, he could not receive a greater punishment than what was set out in the Guidelines. Congress had thus provided a "right to a determinate sentence" when it enacted the Sentencing Reform Act.¹³⁸ This would have the effect of setting an upper, but not necessarily a lower, limit on the sentence.¹³⁹ Further, it had

¹³⁵ This baseline is implicit in the presumption of innocence and the "reasonable doubt" requirement. "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship*, 397 U.S. 358, 363–64 (1970).

¹³⁶ See U.S. CONST., amends. V, VIII.

¹³⁷ *Booker*, 543 U.S. at 332 (Breyer, J., dissenting) (citing *Mistretta v. United States*, 488 U.S. 361, 396 (1989)).

¹³⁸ *Id.* at 302.

¹³⁹ See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 99 (1986) (Stevens, J., dissenting) (citing case law that "clarified that the Due Process Clause requires proof beyond a reasonable doubt of conduct

adopted this clear limit because the costs of judge-based sentencing—disparity and the unfairness of differing sentences for similarly situated offenders—were not worth the benefits of an individualized sentencing regime.¹⁴⁰ Thus, the Sentencing Guidelines preserved a primary interest in liberty and, as a result, should be construed as rules so as to protect that interest.

2. *Secondary Rules: The Jury's Verdict and the Sentence.*—The Court similarly disagreed as to the role the jury's verdict would play. The disagreement over the proper secondary procedure to regulate sentencing hinges on the definition of an “element” and a “sentencing factor.” Both the constitutional majority and the dissenters reject efforts by legislatures to bypass the scrutiny of the jury by simply labeling “elements” of the crime “sentencing factors.”¹⁴¹ For example, a legislature could not constitutionally assign the judge the task of determining the intent of a defendant in a murder case because “intent” is an essential element of the offense.¹⁴² Bypassing the jury's decision as to intent would make it vestigial; the difference between simple manslaughter and murder would rest exclusively on judicial fact-finding.

This hypothetical, however, would be an easy case. The exact difference between an “element” and a “sentencing factor” can be slippery. The classical definition of an “element” (that does little to resolve the issue) is

which exposes a criminal defendant to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties”); *see also* *Blakely v. Washington*, 542 U.S. 296, 333–34 (2004) (Breyer, J., dissenting) (discussing ways in which Sixth Amendment rule prohibits judge from departing upward from predefined sentences but permits her to depart downward).

¹⁴⁰ *Booker*, 543 U.S. at 296 (Stevens, J., dissenting) (“The notion that Congress had any confidence that judges would reduce sentencing disparities by considering relevant conduct . . . either ignores or misreads the political environment in which the SRA passed.”) (emphasis in original). A judge could still exercise discretion. However, “Congress only wanted judges to consider those characteristics within the limits of a mandatory system.” *Id.*

¹⁴¹ *Booker*, 542 U.S. at 235–36 (discussing threat to jury system raised by “facts selected by legislatures [that] increased the range of sentences possible for the underlying crime” without the jury's involvement); *see also* *Ring v. Arizona*, 536 U.S. 584, 597–98 (2002) (holding that law requiring judicially determined aggravating factor for death penalty was unconstitutional); *Apprendi v. New Jersey*, 530 U.S. 466, 491–92 (2000) (holding that state law permitting judicial determination of “hate crime” as a “sentencing enhancement” without jury verdict unconstitutional); *Jones v. United States*, 526 U.S. 227, 251–52 (1999) (requiring government to prove harm to victim to the jury beyond a reasonable doubt when bringing cases under federal carjacking statute); *McMillan*, 477 U.S. at 86 (stating that “in certain limited circumstances [the] reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged”). This principle is similar to the related due process constraints placed on the legislature's allocation of the burden of proof. The jury-trial right, as formulated as a structural check on the legislature, serves to prevent the legislature from defining criminal conduct in such a way as to lessen the state's burden. *See Mullaney v. Wilbur*, 421 U.S. 684, 698–701 (1975) (holding that due process clause forbids legislature from placing burden of proof on defendant for proof of element of crime).

¹⁴² *Cf. Mullaney*, 421 U.S. at 699–701 (discussing impropriety of forcing defendant to prove absence of intent in prosecution for murder).

any fact that is essential to increased punishment.¹⁴³ “Sentencing factors,” on the other hand, relate only to the way in which the defendant committed a crime. Returning to the example above, “intent” is essential to establish the blameworthiness of the defendant and to justify the imposition of a greater punishment for murder than for manslaughter.¹⁴⁴ The egregiousness of the crime, however, would be a sentencing factor. However, the Sentencing Guidelines routed predefined sentences to the particular facts of the conviction; a defendant could receive a greater punishment based on what were traditionally thought of as “sentencing factors.” Dozens of facts about the crime were now essential to a longer term in prison.

Despite these difficulties, the difference between “elements” and “sentencing factors” has clear procedural or secondary implications. Unlike a “sentencing factor,” “elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.”¹⁴⁵ The “elements” of the offense therefore serve to tether the maximum punishment a defendant can receive for a particular offense, called the statutory maximum, to a specific procedural right: the jury’s determination of particular facts. They are, at base, a limitation on both Congress’s power to define crimes and the court’s flexibility in imposing punishment free from the jury. As such, the secondary procedure governing the sentence—whether imposed by the judge or the jury—depends on whether that fact is an “element” or a “sentencing factor.”

The constitutional majority¹⁴⁶ held that the Sentencing Guidelines contained “elements” when that fact increased punishment above the statutory maximum for the offense. To ensure the involvement of the jury, the constitutional majority announced a clear secondary rule. The facts that the jury find constrain and hem in the maximum punishment a defendant could receive.¹⁴⁷ The judge could adjust the sentence within the predefined range, but the jury’s verdict must always determine which range was appropriate. The jury requirement “determined the upper limits of sentencing” based on the sentences defined by the Sentencing Commission.¹⁴⁸ As a result, the constitutional majority significantly expanded the definition of an “element” of a crime to include *any fact* that increases the available punishment

¹⁴³ See *Blakely*, 542 U.S. at 301–02 (citing JOEL BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)) (defining element as “any particular fact which the law makes essential to the punishment”).

¹⁴⁴ Cf. *Mullaney*, 421 U.S. at 698 (justifying proof of intent requirement in murder, in part, because “the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly”).

¹⁴⁵ *Jones*, 526 U.S. at 232.

¹⁴⁶ The constitutional majority consisted of Justices Ginsburg, Scalia, Souter, Stevens, and Thomas. With the exception of Justice Ginsburg, this same set of Justices dissented from the remedial majority opinion.

¹⁴⁷ *Booker*, 543 U.S. at 244 (Stevens, J.).

¹⁴⁸ *Id.* at 236 (Stevens, J.).

above the statutory maximum.¹⁴⁹ In turn, this would require extensive jury involvement in sentencing. Booker's sentence thus could not stand; the determination that he possessed additional amounts of cocaine usurped the jury's function.

As opposed to the clear limit imposed by the constitutional majority, the dissenting Justices would set the confines of a judge's sentencing discretion within a standard: "due process" limitations.¹⁵⁰ A court would evaluate whether certain facts were "sentencing factors" or "elements" through a "case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law."¹⁵¹ Because the Sentencing Guidelines contained considerations that were only relevant to punishment, and not guilt or innocence, they contained "sentencing factors" which could be considered by the judge without the jury's involvement.¹⁵²

Unlike the rule announced by the constitutional majority, a due process limit provides less *ex ante* guidance as to the procedure governing a sentence. First, a judge can increase punishment based on facts not contained in the jury's verdict, but it is not clear how far this power reaches. This standard generally aims to prevent the legislature from "shifting the prosecution for crimes to the penalty phase."¹⁵³ The line between an "element" (and the jury) and a "sentencing factor" (and the judge) is thus a fairly murky one. Second, this view would require minimal jury involvement in sentencing. Reiterating the Court's holding in *McMillan*, Justice Breyer's

¹⁴⁹ *Id.* See also *Blakely*, 542 U.S. at 303–04 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”) (emphasis in original); *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000) (Thomas, J. dissenting) (“[I]f the legislature . . . has provided for setting the punishment of a crime based on some fact . . . that fact is . . . an element.”).

¹⁵⁰ *Blakely*, 542 U.S. at 330 (Breyer, J., dissenting). Defining “due process” considerations as being distinct from and in opposition to the jury trial is an oversimplification. The jury trial right has been considered as part of general due process and is applied to the states through the Fourteenth Amendment’s due process clause. *In re Winship*, 397 U.S. 358, 364 (1970) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.”). In this manner, the jury trial is a function of due process. However, as used in Justice Breyer’s discussion and prior case law, the due process limitations are independent from the jury’s verdict and constitute an effort by the court to determine when Congress has gone too far in defining “elements” of the offense as sentencing factors. *Booker*, 543 U.S. at 330–31 (Breyer, J., dissenting) (“Congress [has] a degree of freedom (within constraints of fairness) to choose to characterize a fact as a ‘sentencing factor,’ relevant only to punishment, or as an element of guilt or innocence.”). A “due process” limitation would thus be much less stringent than the constitutional majority’s rule regarding the statutory maximum.

¹⁵¹ *Blakely*, 542 U.S. at 322 (O’Connor, J., dissenting). Justice O’Connor joined Justice Breyer’s dissenting opinion in *Booker*.

¹⁵² *Booker*, 543 U.S. at 330–31 (Breyer, J., dissenting) (“Congress [had] a degree of freedom (within constraints of fairness) to choose to characterize a fact as a ‘sentencing factor,’ relevant only to punishment, or as an element of a crime, relevant to guilt or innocence.”).

¹⁵³ *Blakely*, 542 U.S. at 322 (O’Connor, J., dissenting).

dissent denies that there is any jury right to the determination of drug amount or other “facts about the offender . . . or about the way in which the offender committed the crime.”¹⁵⁴ The resulting process—weighing a jury’s verdict, the Sentencing Guidelines, and judicial fact-finding—imposes a secondary standard on the procedure that governs sentencing. In some instances, the jury will be needed to determine a particular fact, but the need for the jury will not necessarily be known in advance.

Thus, as with the primary obligations, the Court disagreed as to whether rules or standards should govern the secondary procedures for sentencing. The constitutional majority would use the rule first announced in *Apprendi* that required the jury’s involvement in sentencing. No case-by-case analysis would be necessary to determine whether the jury was needed for a particular fact, like the use of a gun; the imposition of increased punishment above the statutory maximum alone would suffice. The dissenters would opt instead for a due process standard. The jury’s involvement was only necessary for facts at sentencing in certain cases where the court determined that Congress was bypassing the jury and making the judge the trier of fact.

IV. THE PRIMARY AND SECONDARY RULES OF CRIMINAL FORFEITURE

Armed with the appropriate framework from *Booker* and the primary and secondary rules governing sentencing, this Comment now returns to the question that has been percolating through the Courts of Appeals: What are the proper primary and secondary rules to govern criminal forfeiture? As with the Sentencing Guidelines, it is necessary to determine how forfeiture functions—if at all—as a primary right. Though the Courts of Appeals have not agreed, this section makes the case that the federal statutes imposing criminal forfeiture should be understood as an implied condition of property ownership and that the power to impose criminal forfeiture should be clearly limited. Because property has traditionally functioned as a defense against government overreaching, the limits to the state’s power to breach this border should be clearly defined through rules. As such, the limits on the state’s power to impose forfeiture lie solely in the consideration of facts related to the offenses forming the basis for the underlying conviction. This has the practical effect of eliminating two types of conduct from forfeiture consideration: acquitted conduct and conduct that is not contained in the indictment but would independently constitute a separate crime. In addition, because the limitations on forfeiture would be tied to a conviction, the jury would play an essential role in limiting forfeiture. Though the jury would not have to find every fact beyond a reasonable doubt, any fact that stemmed from acquitted or unindicted conduct could not justify forfeiture. After briefly explaining the history of forfeiture and

¹⁵⁴ *Booker*, 543 U.S. at 327 (Breyer, J., dissenting).

its long dormancy in the United States, the Comment applies the *Booker* framework to criminal forfeiture to justify these rules.

A. *The History of Forfeiture As a Primary Right*

Rather than being simply punishment, *in personam* forfeiture was tied up with the common law's understanding of the social contract. It was re-awakened after nearly two centuries of dormancy to fight a uniquely modern problem. The history and potentials for abuse that exist in the use of forfeiture as a criminal sanction justify clearly defined limits. Subpart 1 discusses the use of forfeiture at English common law, including the nature and scope of criminal forfeiture. To highlight the relative novelty of forfeiture as a feature of American criminal law, Part 2 discusses the transformation of forfeiture law within the colonies and its retirement as a form of punishment. Finally, Part 3 will discuss forfeiture's return in response to organized crime and the drug trade in the 1970s.

1. *English Common Law.*—Three forms of forfeiture existed at common law: the deodand, statutory forfeiture, and forfeiture that resulted from attainder. Although all three forms were nominally the same, they were the product of two separate traditions that rested on fundamentally different rationales. Traditional notions of *in rem* forfeiture were present in both the Greco-Roman¹⁵⁵ and Judeo-Christian¹⁵⁶ traditions as a form of exiation for death or injury caused by or through the use of certain forms of property. The sacrifice of the property—whether it be the ox that gored a neighbor, or the cart from which your friend fell—rested on the fiction that the thing, or *res*, was itself responsible for the harm.¹⁵⁷ As it initially came to the common law in the eleventh century, the liable *res* was represented through the deodand, which was simply any instrumentality that accidentally caused another person's death.¹⁵⁸ Although Parliament formally abol-

¹⁵⁵ HOLMES, OLIVER WENDELL, *THE COMMON LAW* 7–8 (Little, Brown and Co. 1945) (“If a slave killed a man, he was to be given up to the relatives of the deceased. . . . [I]f an animal had done damage, either the animal was to be surrendered or the damage paid for.”).

¹⁵⁶ Exodus 21:28 (“If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.”).

¹⁵⁷ 2 SIR FREDRICK POLLOCK & FREDRIC WILLIAM MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 473–74 (2d ed. 1923) [hereinafter POLLOCK & MAITLAND]. *But see* *Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916) (“At the base of the doctrine was superstition—the implication that the cart or the ox drawing it, for example, was morally affected from having caused the death.”).

¹⁵⁸ For example, in the eleventh century, Britton confined the use of deodands to those deaths resulting from “mischance . . . where no felony is committed.” BRITTON 33 (Francis Morgan Nichols ed., 1901) (1530). Sir Matthew Hale defined it as any “moveable good . . . that brings a man to an untimely death” and that is, ultimately, “forfeit to the king” and put to a “charitable use[e].” 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 419 (Sollom Emlyn ed., 1736). Though deodands were formally required to be put to a “pious use,” the king soon conflated piety and profitability. The more common occurrence was that deodands were doled out by the king as a “royal franchise to the perversion of their original design.” 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *302 (Wm. Carey Jones ed., 1915).

ished the deodand in 1846,¹⁵⁹ the innovation worked by the guilty *res* had extended to other areas of English law. Forfeiture was a staple feature of tax collection principally through admiralty and customs statutes.¹⁶⁰

In personam forfeiture, on the other hand, came to prominence in the common law as a fixed and potent form of punishment for treason and felonies.¹⁶¹ Felonies and treason comprised the two most serious violations of the king's peace—the common law shorthand for the social contract—and resulted in attainder, or the legal death of the convicted.¹⁶² With the removal of one's civil rights following attainder, the benefits of property ownership vanished. Thus, following a conviction for treason, the offender forfeited all of his real property and chattels to the king.¹⁶³ Blackstone justified forfeiture as a punishment for treason because “he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society.”¹⁶⁴ As the most visible denial of this social contract, treason called for the most draconian punishment, including death and the loss of one's rights to convey property.

Similarly, felony convictions resulted in the forfeiture of all real property and chattels. The king gained all of the offender's chattels but, unlike treason, only enjoyed a year and a day of waste on the offender's real property, which then went to the lord.¹⁶⁵ Though the felonies that gave rise to forfeiture varied throughout the common law, they tended to be limited to crimes deemed the most “atrocious” and offensive to the crown.¹⁶⁶ The relationship between forfeiture and felony was so close that Blackstone characterized felonies as crimes below treason that required forfeiture, but that

¹⁵⁹ 1846, 9 & 10 Vict., c. 62 (U.K.).

¹⁶⁰ James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 774–75 (1977); see also G. Robert Blakey, *Section 1963 Criminal Penalties*, 18 US NITA 1963 (2005).

¹⁶¹ See *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 682 (1974) (“The basis for these forfeitures [following felonies and treason] was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.”).

¹⁶² Edward C. Wiener, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. L. REV. 225, 230 (1980).

¹⁶³ The forfeiture of one's estate and personal property as punishment for treason was unwaveringly consistent throughout the common law. Commenting in the thirteenth century, Bracton commented that conviction for treason warranted “the extreme penalty, with torture, [and] the loss of all his goods.” 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 335 (S.E. Thorne trans., 1968) (1569). Nearly five centuries later, the law was unchanged, as Coke described that the “law doth give to the king in satisfaction of this offence, all the lands, &c, which the offender hath.” SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 19 (William S. Hein Co. 1986) (1644).

¹⁶⁴ 4 BLACKSTONE, *supra* note 158, at *383.

¹⁶⁵ This division of forfeiture stems from the Magna Carta. As a result of the compromise achieved at Runnymede, the king enjoyed a year and a day of the profits for the real property following which the property escheated to the lord's estate. See MAGNA CARTA art. 32.

¹⁶⁶ 1 BLACKSTONE, *supra* note 158, at *299 (listing felonies imposing forfeiture).

did not necessarily result in capital punishment.¹⁶⁷ In other words, a crime was a felony because forfeiture resulted from conviction. In this way, the common law defined felonies less in terms of the heinousness of the offense but in terms of the gravity of the punishment.

Forfeiture did not stem from the feudal scheme of ownership, but was implicit in the social contract itself. “[A]ll property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities.”¹⁶⁸ When a person violated the municipal law, he forfeited the right to the benefits conferred by the social contract, which included his property. The king, “who is the person supposed to be offended” by the transgression, would thus stand in the public’s place in reclaiming the property through forfeiture.¹⁶⁹

Because property was linked to the civil rights of the citizenry, the imposition of forfeiture could only follow a felony conviction and, in turn, required a jury trial.¹⁷⁰ Forfeiture provided an effective means of ensuring loyalty to the crown or the feudal lord and, to that end, adhering to the laws of the land served as a predicate to property ownership itself.¹⁷¹ Immediately following conviction, the king enjoyed the forfeiture of the offender’s goods as of right.¹⁷² This prerogative, however, contained some procedural limitations. Except for cases of treason, “it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any mans’ [sic] possessions upon bare surmises without the intervention of a jury.”¹⁷³ Any grant of forfeiture prior to conviction for felony would be “illegal and void.”¹⁷⁴ Despite the need for the jury, its role was limited. The jury only convicted the offender; because all of the offender’s property was forfeit after a felony conviction, the jury could not govern the scope of forfeiture.¹⁷⁵

2. *Forfeiture in the Colonies and the United States.*—The colonies adopted English common law, though not in its entirety. *In personam* forfeiture survived briefly in the colonies and the United States. Attainder as

¹⁶⁷ 4 *id.* at *98. Blackstone conceded that felonies had come to be synonymous with crimes other than treason that imposed capital punishment. However, “properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.” *Id.*

¹⁶⁸ 1 *id.* at *299.

¹⁶⁹ *Id.*

¹⁷⁰ 3 *id.* at *260.

¹⁷¹ JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 202 (5th ed. 2002) (“Above all the lord needed loyal vassals. If a tenant breached his oath of loyalty or refused to perform feudal services, his land was forfeited to the lord.”).

¹⁷² 3 BLACKSTONE, *supra* note 158, at *260.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Note, *A Proposal to Reform Criminal Forfeiture under RICO and CCE*, 97 HARV. L. REV. 1929, 1937–38 (1984) (noting inability of jury to “protect the defendant against an excessive forfeiture”).

punishment for treason existed both before¹⁷⁶ and after¹⁷⁷ the ratification of the Constitution. Particularly during the Revolutionary War, the use of attainder and forfeiture provided a potent weapon against “loyalist” forces.¹⁷⁸ To that end, *in personam* forfeiture retained much of its common law flavor; loyalists were declared “attainted” and property reverted to the colony just as it had previously gone to the king.¹⁷⁹

Similarly, attainder for felonies initially remained in the colonies, though as a statutory creation¹⁸⁰ that the colonies applied inconsistently.¹⁸¹ Following ratification of the Constitution, attainder quickly went out of style. The First Congress quickly banned the use of *in personam* forfeiture, attainder, and corruption of blood,¹⁸² and several states passed similar laws in the years thereafter.¹⁸³ With the death of attainder, American legislatures effectively laid criminal forfeiture to rest for the next two centuries.¹⁸⁴

In rem forfeiture, on the other hand, came to predominate American forfeiture law. Use of statutorily imposed forfeiture predicated on the *in rem* fiction developed expansively.¹⁸⁵ The First Congress passed statutes authorizing forfeiture resulting from customs violations¹⁸⁶ and subsequent

¹⁷⁶ See, e.g., *Marks v. Johnson*, 1 Kirby 228 (Conn. Super. Ct. 1787) (holding that offender’s “estate was adjudged to be forfeit to this state” following a conviction for treason).

¹⁷⁷ See, e.g., *Dunham v. Drake*, 1 N.J.L. 315, 315 (N.J. 1795) (citing forfeiture of estate as appropriate punishment for high treason); *Boyd v. Banta*, 1 N.J.L. 266 (N.J. 1795) (same); *Cruden’s Ex’rs v. Neale*, 2 N.C. 338 (N.C. Super. Ct. L. & Eq. 1796) (same); *Hogg’s Ex’rs v. Ashe*, 2 N.C. 471 (N.C. Super. Ct. L. & Eq. 1797) (commenting that debts owed to traitor would be subject to forfeiture); *Palmer v. Horton*, 1 Johns. Cas. 27 (N.Y. Sup. Ct. 1799) (finding that forfeiture of estate for treasonous husband did not forfeit wife’s dower).

¹⁷⁸ See *Robins Islands Pres. Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 411–12 (2d Cir. 1992).

¹⁷⁹ *Id.* at 411.

¹⁸⁰ Maxeiner, *supra* note 160, at 776; cf. 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 4 (1823–1829) (“In order . . . to find our forfeitures for crimes . . . we must look to the statute creating the offence, of which [Massachusetts has] several hundreds, and several thousands in the United States.”).

¹⁸¹ Maxeiner, *supra* note 160, at 776 (“[T]he law of forfeiture varied substantially from colony to colony. . . . [F]orfeiture consequent to attainder was largely abolished in Massachusetts, in disuse in New York, but fairly widely used in Pennsylvania and Virginia.”). The Constitution itself substantially limited the English common law of attainder by removing corruption of blood as punishment for conviction of treason. U.S. CONST. art. III, § 3, cl. 2; see also THE FEDERALIST NO. 43 (James Madison).

¹⁸² Act of Apr. 30, 1790, ch. 9, § 24; see also *United States v. Bajakajian*, 524 U.S. 321, 332 n. 7 (1998) (“The First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes . . . and Congress reenacted this ban several times over the course of two centuries.”) (internal citations omitted).

¹⁸³ Maxeiner, *supra* note 160, at 779.

¹⁸⁴ 1 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 567 (7th ed., Boston, Little, Brown, & Co. 1852). Bishop cited “no precedents for a general practice of sentencing prisoners to forfeit particular articles of property” although he did note that it was “sometimes required by statute.” *Id.*

¹⁸⁵ See Maxeiner, *supra* note 160, at 779–80; see also BISHOP, *supra* note 184, at 567.

¹⁸⁶ *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 460 (7th Cir. 1980). The first *in rem* forfeiture statute was passed before the First Congress created the judiciary and executive depart-

Congresses gradually expanded the use of forfeiture over the next two centuries through statutes requiring forfeiture for admiralty,¹⁸⁷ customs and revenue violations,¹⁸⁸ and the possession of contraband.¹⁸⁹ The only serious hiccup in the use of the guilty *res* fiction occurred with the passage of the Confiscation Acts during the Civil War, in which Confederate property in the North became subject to forfeiture.¹⁹⁰ Though the forfeiture proceedings were, in effect, punishment for rebellion—reminiscent of the treatment of British loyalists—they were upheld as both *in rem* proceedings and valid exercises under the war powers of the President.¹⁹¹

3. *The Return of In Personam Forfeiture.*—Criminal forfeiture reappeared in federal criminal law through two Acts in 1970, and the use of *in personam* forfeiture quickly spread as a form of punishment for distinctly modern crimes. First, the Organized Crime Control Act—Title IX of which is the Racketeer Influenced and Corrupt Organizations Act¹⁹² (“RICO”)—resurrected forfeiture as a type of “enhanced sanction[] and new remed[y] to deal with the unlawful activities of those engaged in organized crime.”¹⁹³ Congress conceived of RICO as a response to the steady drumbeat of requests by law enforcement agencies for greater powers to fight organized crime.¹⁹⁴ Thus, as part of the expanded powers given to law enforcement by RICO, forfeiture provided a means to attack the wealth of criminal enter-

ments. *Id.* See Act of July 31, 1789, 1 Stat. 29 (“And if any goods, wares, or merchandise subject to duty, shall be removed from the wharf or place where the same may be landed, before they shall be weighed or gauged . . . all such goods, wares and merchandise, so removed, shall be forfeited.”).

¹⁸⁷ See, e.g., *In re The Malek Adhei*, 43 U.S. (2 How.) 210, 234–35 (1844) (upholding seizure of ship and contents under 1819 Act against “piratical aggression”); *In re The Palmyra*, 25 U.S. (12 Wheat.) 1, 12, 14 (1827) (upholding seizure of ship under federal anti-piracy law) (Story, J.); *In re The Rugen*, 14 U.S. (1 Wheat.) 62, 66–67 (1816) (involving Swedish ship seized for trading with enemies of the United States).

¹⁸⁸ See, e.g., *United States v. Origet*, 125 U.S. 240 (1888) (upholding forfeiture of “four cases of merchandise, seized for forfeiture for violations of the customs revenue laws”).

¹⁸⁹ See, e.g., *In re The Harbour Trader*, 42 F.2d 858 (2nd Cir. 1930) (upholding forfeiture under National Prohibition Act).

¹⁹⁰ See *Maxeiner*, *supra* note 160, at 785–87; see also, e.g., *In re The Amy Warwick*, 1 F. Cas. 808 (D.C.D. Mass. 1862) (upholding seizure of ship and coffee in case involving delivery of coffee to Confederacy).

¹⁹¹ *Maxeiner*, *supra* note 160, at 787.

¹⁹² Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1963 (2000).

¹⁹³ S. REP. NO. 91-617, at 2 (1969) (Conf. Rep.).

¹⁹⁴ In 1950, the Kefauver Committee first documented the extent to which the wealth accumulated through criminal activity permitted organized crime to infiltrate legitimate businesses. S. REP. NO. 82-141, at 2 (1951) (Conf. Rep.). In 1965, the National Crime Commission attributed the growth in organized crime to the inability of law enforcement to effectively stem the growth of criminal enterprises through existing procedures. S. REP. NO. 91-617, at 44–45 (1969) (Conf. Rep.). The President’s message on “Organized Crime,” issued just prior to Congress’s enactment of the Organized Crime Control Act, bemoaned that, despite the successes in prosecuting criminal syndicates, criminal enterprises were “more firmly entrenched and more secure than ever before.” *Id.*

prises and excise the criminal elements from legitimate businesses.¹⁹⁵ Traditional forms of punishment, such as imprisonment, were ineffective and simply prompted “compulsory retirement” whereby “new people step[ped] forward to take the place of those convicted.”¹⁹⁶

Also in 1970, Congress provided forfeiture as punishment for committing certain drug crimes. The Comprehensive Drug Abuse Prevention and Control Act¹⁹⁷ (“Drug Forfeiture Act”) requires forfeiture following conviction for all drug felonies.¹⁹⁸ As with the RICO’s forfeiture provision, the Drug Crime Forfeiture Act aims to undermine the profitability of drug crimes by “attacking the economic bases of drug traffickers.”¹⁹⁹ Finally, in 1986, Congress passed a general forfeiture statute that initially targeted only money laundering. Congress has since expanded this provision to target crimes ranging from fraud against financial institutions to crimes involving motor vehicles.²⁰⁰

Rather than criminalizing a specific type of conduct, Congress attached criminal forfeiture as a new form of punishment for otherwise criminal conduct. For example, RICO’s forfeiture provision broadly targets persons or enterprises engaged in “pattern[s] of racketeering activity” consisting of broad categories of prohibited behavior.²⁰¹ The level of criminality within an enterprise only becomes punishable under RICO as a “pattern” consisting of “at least two acts of racketeering activity,”²⁰² known as “predicate acts.” RICO defines predicate acts by reference to numerous state and federal criminal statutes or common law crimes.²⁰³ Thus, forfeiture is simply an enhanced punishment for otherwise criminal activity.

¹⁹⁵ See S. REP. NO. 91-617, at 78 (1969) (Conf. Rep.). Congress stated that, thanks to RICO, “it should be possible to remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.” *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 21 U.S.C. § 801 (2000).

¹⁹⁸ SARAH N. WELLING ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT, AND RICO 562 (1998). In broadly defining the substantive offenses that trigger criminal forfeiture, the Drug Forfeiture Act makes it unlawful to, among other offenses, “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . or . . . a counterfeit substance.” 21 U.S.C. § 841.

¹⁹⁹ *United States v. Nichols*, 841 F.2d 1485, 1494 (10th Cir. 1988); see also *United States v. Wendling*, 359 F. Supp. 2d 850, 855 (D.N.D. 2005) (“The intent of Congress in enacting the forfeiture statute is to punish, deter and disempower criminals.”).

²⁰⁰ WELLING, *supra* note 198, at 571.

²⁰¹ 18 U.S.C. § 1962(a)–(d) (2000).

²⁰² See 18 U.S.C. § 1961(5) (2000).

²⁰³ See 18 U.S.C. § 1961(1). “Racketeering activity” includes “murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical” and violations of any one of fifty federal laws. *Id.*

Congress explicitly linked the use of *in personam* forfeiture to the common law tradition of attainder in England and the colonies²⁰⁴ and, as at common law, permitted forfeiture to reach both real and personal property.²⁰⁵ The list is impressive and exhaustive. “[R]eal property, including things growing on, affixed to, and found in land and . . . tangible and intangible personal property, including rights, privileges, interests, claims and securities”²⁰⁶ are subject to forfeiture under both RICO²⁰⁷ and the Drug Crime Forfeiture Act.²⁰⁸ Any form of property that a person can conceivably possess can also be forfeited. Courts have upheld forfeiture ranging from interests in a coffee shop where two gangs had met to “resolve certain misunderstandings”²⁰⁹ to two houses in which the defendant stored his inventory of drugs.²¹⁰

As a result, determining what constitutes forfeitable property hinges upon the property’s relationship to the crime. Thus, a drug dealer’s proceeds from a drug sale are forfeited after his conviction, as are the car that he sold them in and the cell phone used to talk with his customers. As a result, criminal activity is capable of tainting otherwise “innocent” property, meaning property that does not constitute contraband. If the defendant used his family business to launder his drug proceeds, he could forfeit his entire interest in the business. Finally, otherwise innocent activity that supports the criminal offenses subjects any property used in that conduct to forfeiture.

As at common law, the proceeds from criminal forfeiture go to the state. Assets seized by the Department of Justice become part of the Assets Forfeiture Fund and the Seized Asset Deposit Fund.²¹¹ The money acquired through forfeiture goes to fund federal and state law enforcement programs. Thus, these Funds “cover certain operating costs” related to the Department of Justice’s Asset Forfeiture Program including “equitable sharing payments to state, local, and foreign governments; joint law enforcement operations; contract services in support of the program; and satisfaction of innocent third party claims.”²¹²

However, the modern criminal forfeiture provisions differ from their common law analogues in one important respect: modern forfeiture falls

²⁰⁴ S. REP. NO. 91-617, at 79 (1969) (Conf. Rep.). Congress noted that “[t]he use of criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.” *Id.*

²⁰⁵ 18 U.S.C. § 1963 (2000).

²⁰⁶ *See* 18 U.S.C. § 1963(b)(1)–(2); 21 U.S.C. § 853(a)(1)–(2) (2000).

²⁰⁷ 18 U.S.C. § 1963(a)(1)–(3) (2000).

²⁰⁸ 21 U.S.C. § 853(b) (2000).

²⁰⁹ *United States v. Angiulo*, 897 F.2d 1169, 1212 (1st Cir. 1990).

²¹⁰ *United States v. West*, 977 F.2d 281, 292 (4th Cir. 1989).

²¹¹ DEP’T OF JUSTICE, ASSET FORFEITURE FUND, JMD ASSET FORFEITURE PROGRAM, available at <http://www.usdoj.gov/jmd/afp/> (last updated Mar. 19, 2004).

²¹² *Id.*

far short of attainder. The purpose of modern forfeiture is to remove the economic bases for criminal activity and not to guarantee loyalty to the government. The blanket attainder worked at common law would be too blunt an instrument for these more modest goals. To that end, some limiting principles are necessary to differentiate the targeted modern forfeiture from attainder. As will be seen, the courts have placed this limiting principle in the judge's hands by categorizing forfeiture as an "aspect of sentencing" that lacks a "statutory maximum."

B. *Criminal Forfeiture and the Sixth Amendment*

The idiosyncratic nature of forfeiture—tracking the taint of criminality through an offender's property—makes the punishment, in a word, weird—at least legally speaking. As discussed at the outset, forfeiture enjoys an uncertain spot within criminal sentencing. The federal judiciary has had to incorporate a form of punishment that has been missing from criminal sentencing since the founding into a criminal justice system that has since changed considerably. The Courts of Appeals have concluded that the most recent development in sentencing—*Booker* and the Sixth Amendment—has left criminal forfeiture untouched. In so doing, they have viewed forfeiture in terms substantially similar to the remedial majority in *Booker*: forfeiture provisions announce general primary standards regarding an offender's property rights that do not have a "statutory maximum." Similarly, the role of the jury in determining certain facts is best governed through a due process standard that accommodates substantial judicial discretion.

The conflicting rules and standards contained in *Booker* explain the current doctrine governing criminal forfeiture and the jury requirement. Criminal defendants have latched on to the broadly phrased rule announced in *Booker* and argue that any fact that increases forfeiture beyond an amount supported by the jury verdict violates the Sixth Amendment. Judges nonetheless uphold forfeiture amounts based on facts not proven to the jury.²¹³ In so doing, the courts view the sentence as falling within the judge's discretion and the property interests affected by forfeiture as a primary standard.

This section proposes an alternative way to view criminal forfeiture in light of the *Booker* framework: the statutory provisions that permit criminal forfeiture limit the state's power to punish in much the same way as the constitutional majority conceived of the criminal sentence. Similarly, the secondary rule announced by the constitutional majority in *Booker* governs the imposition of that right. Subpart 1 explains the way in which criminal forfeiture functions as a primary rule. Subpart 2 then explains how the concepts of "elements" and "sentencing factors" fit within the secondary rules governing criminal forfeiture.

²¹³ See, e.g., *United States v. Fruchter*, 411 F.3d 377 (2nd Cir. 2005).

1. *The Primary Rule of Criminal Forfeiture.*—Both before and after *Booker*, the trend has been to conceive of criminal forfeiture as being a primary standard governing one's property interests. In turn, the state's power to impose forfeiture—to effectively convert private property into public property following conviction—has been hedged in by a standard. It is possible for the state to go too far in abrogating an offender's property rights, but that line is fuzzy at best. The contours of this line have been drawn through two areas of law: the Eighth Amendment's prohibition against excessive fines and the recent decisions by the Courts of Appeals in rejecting Sixth Amendment challenges to criminal forfeiture.

The view that forfeiture constitutes a primary standard arguably originates in the Supreme Court's decision to characterize forfeiture as a type of fine that is imposed following conviction. In *Alexander v. United States*, the lower court had upheld the forfeiture of the defendant's interests in ten pieces of commercial real estate and thirty-one businesses for selling four obscene magazines and three obscene videotapes at his stores.²¹⁴ The defendant challenged the forfeiture amount, in part, alleging that it constituted an excessive fine under the Eighth Amendment and the district court denied his claim. In holding that the Eighth Amendment applied to *in personam* forfeiture, the Court noted that, as "monetary punishment," criminal forfeiture was "no different, for Eighth Amendment purposes, from a traditional fine."²¹⁵ The Court has since reconfirmed what this quote suggests. Criminal forfeiture is limited by the Eighth Amendment's prohibition against "excessive fines" and, accordingly, forfeiture amounts cannot be "grossly disproportionate."²¹⁶

More recently, the Courts of Appeals have reaffirmed the view that criminal forfeiture constitutes a primary standard governing an offender's property rights. The Courts of Appeals have accomplished this by denying that the concept of a "statutory maximum" applies at all in the forfeiture context. In *Booker*, Justice Stevens's and Justice Scalia's dissenting opinions portrayed the statutory maximum as a clear rule that limited the state's ability to punish and preserved the defendant's entitlement to a particular sentence.²¹⁷ In the forfeiture context, however, the Courts of Appeals have denied that any such limit exists.²¹⁸ In other words, the concept of the statu-

²¹⁴ 509 U.S. 544 (1993).

²¹⁵ *Id.* at 559.

²¹⁶ See *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (holding that the Court was "adopt[ing] the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents"); see also U.S. CONST. amend. VIII.

²¹⁷ See *infra* notes 119–28 and accompanying text.

²¹⁸ See, e.g., *United States v. Hall*, 411 F.3d 651, 651 (6th Cir. 2005) (holding that expansive definition of statutory maximum in *Booker* did not affect criminal forfeiture because it lacks a statutory maximum); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (holding that "the sixth amendment does not apply to forfeitures"); *United States v. Reiner*, Crim. No. 04-127-P-H-0, 2005 U.S. Dist. LEXIS 23436, at *5–6 (D. Me. Oct. 12, 2005).

tory maximum—developed in the Sixth Amendment context—adds nothing to the protections afforded by the Excessive Fines Clause of the Eighth Amendment.

Treating forfeiture as a type of fine solely limited by the Eighth Amendment is consistent with Justice Breyer’s remedial majority opinion in *Booker*. Forfeiture, as a part of the criminal sentence, constitutes a primary standard. First, the sole limitation placed on the state’s power to abrogate property rights through forfeiture lies in a loose standard—“grossly disproportionate” punishment.²¹⁹ Much like the “reasonableness” standard announced by the remedial majority in *Booker*, there is little *ex ante* guidance as to what forfeiture amounts will be excessive.²²⁰ Both a “reasonable” deprivation of liberty and something less than a “grossly disproportionate” forfeiture of property pass muster. True to form, a court evaluates “grossly disproportionate” forfeiture in light of a variety of considerations based on the facts at trial. The lower courts look to several factors: the type of crime; whether the criminal conduct was part of a larger criminal scheme; other punishment imposed on the offender; and the harm caused by the defendant’s activities.²²¹ These factors, however, are merely benchmarks. A court is free to consider any factor that is relevant to determining the proportionality of the offense.²²²

Second, because there is no “statutory maximum” for purposes of criminal forfeiture, case-by-case adjudication is necessary. According to the Courts of Appeals, forfeiture remains a form of “indeterminate sentencing” that predated the Sentencing Guidelines and that confers discretion upon the sentencing court.²²³ This substantial discretion necessarily precludes an entitlement to a particular level of punishment. Statutory forfeiture provisions are indeterminate and thus cannot impose a clear primary entitlement to a forfeiture amount. Both of these characteristics—lack of *ex ante* guidance and case-by-case adjudication—are consistent with conceiving of forfeiture as a primary standard affecting the property rights of the criminal offender.

Several considerations, however, merit placing a clearer limit on the imposition of forfeiture through some form of primary rule. First, property serves as a necessary defense against government overreaching.²²⁴ Liberty interests—such as those implicated by the Sentencing Guidelines—are un-

²¹⁹ *Bajakajian*, 524 U.S. at 336.

²²⁰ LAW OF ASSET FORFEITURE § 10-2 (Matthew Bender ed., 2004).

²²¹ *Id.* (“In practice, a court will rarely find a forfeiture judgment to be disproportionate.”).

²²² *United States v. \$ 100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004) (“When examining the proportionality of a forfeiture to the gravity of the offense, we are not required to consider ‘any rigid set of factors.’”) (quoting *United States v. Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003)).

²²³ See *supra* notes 17–21 and accompanying text.

²²⁴ Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

derstandably protected to a greater extent than property interests.²²⁵ Though property is clearly a junior member in the trilogy of “life, liberty, and property,” limitations on the deprivation of property serve as an essential facet of limited government.²²⁶ By allowing private ownership, the system of property rights serves as a mechanism for separating the public from the private and the state from the individual.²²⁷ Moreover, “property performs the function of maintaining independence, dignity, and pluralism in society by creating zones within which the majority has to yield to the owner.”²²⁸ Property thus provides an indispensable tool in ensuring individual liberty and autonomy. Forfeiture transfers the private domain guaranteed by property to the public and, more particularly, the state itself.²²⁹ Thus conceived, rather than being merely an aspect of sentencing, the limits on criminal forfeiture help define the limits between the state and the individual and are thus as a primary right enjoyed by the defendant.

That forfeiture provides an effective tool for breaching the border between the individual and the state is clear from its history. At common law, forfeiture provided a mechanism for ensuring the supremacy of the crown. The king prevented felonies—those activities deemed the most offensive to the crown—through forfeiture. As Blackstone explained, the definition of a felony was linked with the abrogation of the offender’s property rights, and not the more serious imposition of capital punishment.²³⁰ The threat of losing all of one’s property—and not one’s life or liberty—provided the basis for enforcing the social contract. Similarly, during forfeiture’s brief appearance in the United States prior to 1970, it provided an effective tool for targeting groups that the state sought to incapacitate: the loyalists following the Revolutionary War and, though couched in terms of *in rem* forfeiture, Confederates during the Civil War.²³¹ Finally, in resurrecting forfeiture as a form of punishment, Congress noted the inadequacies of imprisonment in curtailing organized criminality. Though resurrected for the noble purpose of combating criminal enterprises, forfeiture’s usefulness also points to its potential for abuse. The ability to remove any group of individuals “from their sources of economic power” should have clear limits.²³² Apart from

²²⁵ *Alexander v. United States*, 509 U.S. 544, 556 (1993) (citing *Blanton v. North Las Vegas*, 489 U.S. 538, 542 (1989) for proposition that the “loss of liberty is a more severe form of punishment than any monetary sanction”).

²²⁶ THE FEDERALIST NO. 54, at 357 (James Madison) (Edward Mead Earle ed., 1976) (“Government is instituted no less for protection of the property, than of the persons, of individuals.”).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *See, e.g., United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004) (stating that “when a ‘car is properly seized by the police pursuant to a forfeiture statute,’ the government has ‘a greater possessory interest in the car than the owner’”).

²³⁰ *See supra* notes 166–69 and accompanying text.

²³¹ *See supra* note 179 and accompanying text.

²³² S. REP. NO. 91-617, at 78 (1969) (Conf. Rep.); *see also supra* note 195.

providing a mechanism for extinguishing private property rights, the state directly benefits from the proceeds gained from criminal forfeiture. This does not suggest that prosecutors improperly seek, or judges unjustifiably impose, forfeiture in order to pad the state's fisc. However, the fact that any upward error made in the calculation of forfeiture accrues to the benefit of the state underscores the need for a structural check against government overreaching.²³³

Second, in addition to being a particularly potent form of punishment, forfeiture affects other rights in a more direct and profound manner than either imprisonment or fines. For example, in *Alexander v. United States*, the Court upheld government seizure of the entirety of the defendant's business following an obscenity conviction for selling a handful of obscene magazines.²³⁴ In dissent, Justice Kennedy noted that the executive had seized upon the potential to "move against certain types of disfavored speech."²³⁵ The Attorney General had recently called for the use of forfeiture to systematically shut down pornography businesses.²³⁶ In urging the Court to proceed cautiously with criminal forfeiture following obscenity convictions, Justice Kennedy noted that the "constitutional concerns raised by a penalty of this destructive capacity are distinct from the concerns raised by traditional methods of punishment."²³⁷

Justice Kennedy's dissent illustrates the way in which forfeiture differs from a traditional fine: it eliminates individual choice over the use of certain forms of property and substitutes the preferences of the state. It is certainly the case that a prohibitively expensive fine could force the defendant to sell his property or interests in a business. This would effectively produce the same form of monetary punishment as forfeiture.²³⁸ Though likely, the defendant's sale of his business is not inevitable; the defendant may find an alternate means to finance his penalty. Forfeiture, however, precludes this option. Additionally, forfeiture replaces the choices of private actors with the government's. An offender may still decide to sell the entirety of his adult-entertainment business following an obscenity conviction to pay a fine. However, the non-obscene inventory (and the ideas contained within them) would be redistributed to private parties within the "marketplace of ideas," as opposed to being appropriated by the state. Thus, in this way, forfeiture could be used as a tool for removing disfavored ideas that, while

²³³ Of course because any downward error would accrue to the benefit of the defendant, forfeiture is a zero-sum game.

²³⁴ 509 U.S. 544, 548 (1993).

²³⁵ *Id.* at 563 (Kennedy, J., dissenting).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 556 (1993) (Rehnquist, C.J.) (stating that a "a fine of several hundred thousand dollars would certainly be just as fatal to most businesses—and, as such, would result in the same degree of self-censorship—as a forfeiture of assets").

protected by the First Amendment, are merely sold alongside unprotected materials as part of an enterprise.

Finally, the limits and benefits listed by the Court in *Booker* in justifying the sentence as a primary standard do not apply as clearly to forfeiture. In the first place, a “reasonable” sentence imposed under the Sentencing Guidelines is at least pegged fairly closely to some baseline: the maximum sentence listed in the Guidelines. The Sentencing Guidelines are not entirely irrelevant for forfeiture. Courts sometimes assess whether a forfeiture amount is “excessive” in light of the maximum fine contained in the Sentencing Guidelines for the offense.²³⁹ However, the protections afforded by the “grossly disproportionate” standard are much more lax. The minimum and maximum fines listed in the Guidelines frequently differ by more than an order of magnitude.²⁴⁰ In addition, the maximum applicable fine is frequently defined by statute, which can raise the upper limit even further.²⁴¹ As a result, courts may have to assess whether a forfeiture amount is “grossly disproportionate” based on fines ranging from a few thousand dollars to several million.²⁴² This broad leeway in sentencing is akin to the uncontrolled sentencing scheme that predated the Sentencing Guidelines—and that resulted in unacceptable inconsistencies in punishment. However, unlike the indeterminate scheme, there is no structural check—like the Parole Board—that can limit forfeiture.

More fundamentally, however, the structural checks and balances that are possible under the Sentencing Guidelines are unavailable in the forfeiture context. In part, Justice Kennedy defended the use of a primary standard to govern criminal sentencing because it facilitated communication between the courts and legislature.²⁴³ The back-and-forth between the courts and the legislature—made possible by a “reasonableness” standard governing the sentence²⁴⁴—permits a dialogue between the courts and legislatures regarding the appropriate sentence. With forfeiture, however, this dialogue has a limited vocabulary. The legislative definition of forfeiture is incapable of much refinement following judicial interpretation because it is tied to the particulars of an offender’s criminal activity.²⁴⁵ Thus, aside from limiting the types of forfeitable property or the crimes that require forfei-

²³⁹ See, e.g., *United States v. Asquini*, No. 98-10293, 1999 U.S. App. LEXIS 15088, at *9–10 (9th Cir. July 2, 1999) (looking to Sentencing Guidelines to determine whether amount imposed was “grossly disproportionate”).

²⁴⁰ *Id.*

²⁴¹ *Id.* (stating that available fines ranged from \$12,500 to \$4,000,000); see also SENTENCING GUIDELINES MANUAL, *supra* note 16, § 5 E1.2(c)(4) (stating that maximum fine listed in Federal Sentencing Guidelines “does not apply if the defendant is convicted under a statute authorizing . . . a maximum fine greater than \$250,000”).

²⁴² See, e.g., *Asquini*, 1999 U.S. App. LEXIS 15088, at *9.

²⁴³ *Blakely v. Washington*, 542 U.S. 296, 326–27 (2004).

²⁴⁴ See *supra* notes 133–34 and accompanying text.

²⁴⁵ See *supra* note 201 and accompanying text.

ture, Congress can do little to adapt to judicially imposed forfeiture amounts.

Though the forfeiture provisions are not written in numerical terms, a “statutory maximum” limiting the power of the state to impose forfeiture exists. Just as the dissenting opinions of Justices Scalia and Stevens envisioned the Sentencing Guidelines as an entitlement enjoyed by criminal defendants, a comparable entitlement exists in the forfeiture context: the underlying offenses giving rise to forfeiture. For example, RICO’s forfeiture provision requires forfeiture of property that is related to “racketeering,” which is defined with respect to various federal and state crimes.²⁴⁶ A defendant could thus be convicted of “racketeering” based on two acts of bribery or extortion within a ten-year period. In imposing forfeiture after conviction, then, the defendant’s primary interests in property extend only to that property that is not tainted by the crimes linked in the statute. To the extent that the property is not acquired through or used to facilitate bribery or extortion, the statute precludes forfeiture.

This clear boundary on the imposition of forfeiture obviates many of the risks posed by criminal forfeiture. First, the border between the state and the individual is brighter, which limits the state’s power to unjustifiably abrogate property interests. Though modern forfeiture retained much of its common law flavor, it is strictly limited to certain predefined offenses. Thus, a clear limit pegged to the underlying conviction provides a stronger safeguard against the risk of the attainder that resulted at common law. Second, this rule focuses squarely on the acts that justify the imposition of forfeiture and, as such, is more guided than the broad consideration of gross disproportionality. By not using property to facilitate certain criminal offenses, an offender can effectively ensure that the property is not subject to forfeiture. Though the defendant has no right to possess property that facilitates or that is the profit from his criminal activity, his untainted property remains untouched.

Describing forfeiture in this way says little about whether current practice would need to change; courts do recognize that the power to impose forfeiture is statutorily based and not unlimited.²⁴⁷ However, two types of conduct could not form the basis for forfeiture under this conception of the primary right: acquitted conduct and unindicted conduct that would otherwise constitute an offense requiring forfeiture. Because the primary rule is tied to convictions for underlying criminal offenses, both of these limitations relate to the appropriate secondary rule governing forfeiture. What

²⁴⁶ 18 U.S.C. § 1963 (2000) (stating that offenders “shall forfeit property” that is acquired or that facilitated “violations of section 1962”); *see also* 18 U.S.C. § 1962 (2000) (imposing liability for “racketeering”); 18 U.S.C. § 1961(a)(1) (2000) (defining “racketeering” in terms of various common law felonies).

²⁴⁷ *See, e.g.,* *United States v. Genova*, 333 F.3d 750, 760–61 (7th Cir. 2003) (discussing statutory basis for forfeiture and need to hem closely to statute’s requirement that “proceeds” are forfeitable).

limits does the jury-trial right place on the information a judge can consider and how does this relate to the primary right to be secure in one's property? The next subpart addresses these questions.

2. *The Secondary Rule of Criminal Forfeiture.*—Conceiving of the limits on criminal forfeiture as a primary right linked to the substantive offense defined by statute would preclude the use of two types of information. First, a court could not consider acquitted conduct in imposing forfeiture. Several courts have concluded that acquitted conduct can form the basis for forfeiture.²⁴⁸ Relying on Supreme Court precedent that permits the use of acquitted conduct when imposing a prison term,²⁴⁹ courts similarly consider acquitted conduct in calculating the forfeiture amount. For example, in *United States v. Fruchter*, the Second Circuit imposed forfeiture following the defendants' conviction for racketeering.²⁵⁰ The jury had convicted the defendants of RICO and general conspiracy and two counts of mail fraud, and acquitted them of two additional counts of fraud.²⁵¹ In punishing the defendants, the court imposed forfeiture for the acquitted conduct, saying that it had formed part of the "racketeering activity."²⁵² The defendants thus forfeited property that the jury had determined was not part of the underlying pattern of racketeering activity, violating their primary interests in property that did not facilitate criminal activity. The form of "racketeering" proven to the jury was less invidious than the forfeiture amount imposed. As a result, concluding that property is forfeitable based on offenses that the government has not proven widens the ability of the state to impose forfeiture beyond the limits imposed by law: the substantive offenses contained in the statute.

Second, a court could not impose forfeiture for unindicted conduct that would form a separate substantive offense but which was not presented to the jury. Take, for example, RICO's forfeiture provisions. A defendant must forfeit any property that facilitated or that constitutes proceeds from a "pattern of racketeering activity."²⁵³ RICO, in turn, defines "racketeering activity" with respect to various state and federal crimes, called predicate acts.²⁵⁴ Based on the proposed rule, if a jury convicts a defendant of racketeering based on three acts of extortion, a judge could not then order forfei-

²⁴⁸ See, e.g., *United States v. Salvano*, No. 502-CR-051, 2006 WL 2546477, *9 (N.D.N.Y. Aug. 28, 2006) (permitting use of acquitted conduct in imposing forfeiture); *United States v. Fruchter*, 411 F.3d 377 (2d Cir. 2005) (same); *Genova*, 333 F.3d at 762 ("Even counts on which the jury acquits may be considered in sentencing, if the judge finds by a preponderance of the evidence that the criminal activities occurred."); *United States v. Hasson*, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003).

²⁴⁹ *United States v. Watts*, 519 U.S. 148, 153 (1997).

²⁵⁰ 411 F.3d 377.

²⁵¹ *Id.* at 379.

²⁵² *Id.* at 384.

²⁵³ 18 U.S.C. §§ 1961, 1962, 1963 (2000).

²⁵⁴ 18 U.S.C. § 1961.

ture for conduct that would itself constitute a predicate act—such as money laundering, dealing a controlled substance, or bribery—but which was not contained in the indictment. Though the acts might have been in furtherance of the racketeering enterprise in the judge’s estimation, if the acts themselves would constitute independent offenses, they cannot justify forfeiture. To do so would permit the judge to impose forfeiture for otherwise criminal acts without the jury first passing judgment.

Two considerations justify the secondary rule that the jury must find any offense that imposes forfeiture. First, the notion that forfeiture cannot issue without the jury passing judgment on the underlying offense was an established feature at common law. At common law, forfeiture only resulted from felonies, which required the “intervention of a jury.”²⁵⁵ Thus, an alleged offense or an offense that the judge alone found to be true could not result in forfeiture. The seriousness of forfeiture prohibited the king from “enter[ing] upon or seiz[ing] any mans’ [sic] possessions upon bare surmises.”²⁵⁶ Because criminal forfeiture is of recent vintage in the American system of punishment, the procedures and limits that governed forfeiture at common law are particularly significant.²⁵⁷ By requiring each offense forming the basis for conviction to pass before the jury, the protections afforded at common law can be adapted to current practice.

Second, the limits imposed by the Sixth Amendment are intended to prevent the de facto conviction of a more serious offense through judicial fact-finding. Limiting forfeiture to the underlying offenses provides an objective gauge for determining when the judicial determination of facts poses the risk of imposing a greater punishment than the jury verdict will allow.²⁵⁸ For example, imagine that a person has been convicted of both extortion and bribery as part of a criminal enterprise under RICO, but was acquitted of charges of dealing in a controlled substance. Imagine further that the judge must determine the proportion of tainted money seized from the defendant’s bank account. The judge would be free to consider evidence of deposits and withdrawals into the bank account, proceeds placed in the bank account resulting from investments made with illicit funds, the amount of interest earned on the account, and so forth. The jury would not have to find each of these facts true beyond a reasonable doubt, even though they

²⁵⁵ 3 BLACKSTONE, *supra* note 158, at *260.

²⁵⁶ *Id.*

²⁵⁷ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 477–78 (2000) (crediting practice at common law in justifying holding regarding the Sixth Amendment).

²⁵⁸ *United States v. Booker*, 543 U.S. 220, 249–58 (2005). The fact that the deposit of money into an account does not need to be proven beyond a reasonable doubt, whereas criminal conduct related to property in the account does, means that the indictment will not need to contain each of these facts beforehand. See also Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker*, 39 GA. L. REV. 895, 917–18 (2005) (describing logic underlying *Apprendi v. New Jersey* as focusing on the punishment the defendant faced and whether legislative determination of “sentencing factors” was a “principled basis for treating [separate punishments] differently”).

are technically “necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict.”²⁵⁹ In considering these facts based on the preponderance of the evidence, there would be little risk that the defendant would be *de facto* convicted of a more serious offense. That is to say, the consideration of withdrawals will not necessarily expand the “racketeering activity” that tainted the funds in the account.

However, if the judge finds by a preponderance of the evidence that funds related to dealing in a controlled substance are present within the account and imposes forfeiture for that amount, the offense that gives rise to forfeiture has changed from “racketeering activity” consisting of two predicate acts to “racketeering activity” consisting of three predicate acts. This has the practical effect of convicting the defendant of a more serious offense—namely a more invidious form of “racketeering activity.” This conception of the “statutory maximum” as preventing the imposition of a more serious form of punishment is fully consistent with the fear of legislative bootstrapping that forms the basis for the constitutional majority’s opinion in *Booker*. Though the offender will not serve prison time for three predicate acts, he will receive a punishment for three predicate acts, with one act being proved only by the preponderance of the evidence. Though convictions of two, three, five or fifty predicate acts would all constitute a “pattern of racketeering activity” under RICO, it does not follow that the criminal forfeiture amount that is merited from the convictions would be identical.²⁶⁰

CONCLUSION

This Comment has argued that the proper framework for analyzing criminal forfeiture lies in the debate over the proper primary and secondary rules governing criminal forfeiture. Though the Courts of Appeals have largely concluded that the facts found by the jury are only loosely related to the ultimate amount of criminal forfeiture imposed, this Comment has argued for a clearer relationship between the jury’s verdict and the forfeiture amount imposed. Specifically, by applying the general framework underlying the debate in the Supreme Court’s seminal case, *United States v. Booker*, this Comment concludes that conceiving of criminal forfeiture as a primary rule, as defined by the offense or offenses forming the basis of the conviction, is preferable to the standard adopted by the Courts of Appeals.

²⁵⁹ *Booker*, 543 U.S. at 249–58.

²⁶⁰ See *United States v. Cianci*, 218 F. Supp. 2d 232, 234–35 (D.R.I. 2002) (“[T]he requirement that a violation of § 1962 be established means that, to determine what property is forfeitable, reference must be made to the RICO violation(s) for which a defendant was convicted.”); cf. *Edwards v. United States*, 523 U.S. 511, 515 (1998) (arguing that defendant may have a claim if he was sentenced above maximum for cocaine-only conspiracy absent findings that conspiracy included effort to sell crack as well); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083–88 (2d Cir. 1984) (overturning sentence and fine because it was unclear whether conviction resulted from a cocaine-related conspiracy, a marijuana-related conspiracy, or both).

In turn, this primary right to property ought to be related to the jury's underlying conviction through an adapted form of the rule announced by the constitutional majority in *Booker*.

