1-1-2008

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Why Sentencing by a Judge Satisfies the Right to Jury Trial: A Comparative Law Look at *Blakely* and *Booker*

Susan F. Mandiberg*

I. INTRODUCTION

In the last quarter of the twentieth century, Congress and many state legislatures adopted mandatory, determinate sentencing systems. These systems continued the traditional practice of sentencing by judges, but severely restricted the ability to customize the sentence to individual circumstances. Removing such judicial discretion was a major step in advancing punishment goals and achieving more uniform and predictable sentencing. Nevertheless, in a series of cases decided between 2004 and 2007, the Supreme Court held that several of these schemes were unconstitutional. The Court declared that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Nevertheless, the Court did not mandate jury fact finding for all sentencing decisions. Legislatures can continue the practice of judicial sentencing, but only if judges have substantial discretion to find facts, weigh them, and choose a sentence within the range set by the jury’s verdict. Such a system of judicial sentencing satisfies a defendant’s Sixth Amendment right to jury trial.

This conclusion is puzzling. When the legislature authorizes a range of punishment for a particular crime, a jury provides protection at the upper end through its ability to acquit the defendant. However, even when convicted, most defendants are not in danger of receiving the maximum sentence. On the contrary, for most people convicted of a crime, the facts that matter are those that result in some lesser sentence, and those facts may constitutionally be found by a judge. But why should this be so? If jury fact finding is essential to establishing the maximum sentence, why is it not also essential to establishing the sentence that is actually imposed? Why does sentencing by a judge satisfy the Sixth Amendment right to jury trial?

This article suggests that the answer lies in the nature of the judge’s role in the common law jury trial. The common law afforded the judge broad discretion to thwart the directives of the legislature and the desires of the prosecution, and this independence extended to sentencing. It is true that mandatory sentences existed in England, in the colonies, and in nineteenth-century United States. However, criminal trial courts had a variety of discretionary mechanisms to avoid

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imposing mandatory sentences that seemed unjust to individual defendants. During the early twentieth century, indeterminate sentencing replaced mandatory sentencing for most crimes. This new approach maximized the ability of judges to effect individualized justice. However, the late twentieth-century mandatory sentencing schemes broke from this tradition, essentially eliminating individualized justice for the first time in the United States. In overturning those schemes, the Supreme Court has restored the “right to jury trial” as a right to flexibility and individualization throughout the trial and sentencing process.

However, history does not provide the complete answer. The notion that the “right to jury trial” means the right to a trial court with significant sentencing discretion is buttressed by comparing the common law system with the civil law, or Continental, approach. Discretion characterizes the common law criminal trial in general, including the judicial role. Conversely, discretion is anathema to the civil law model of criminal justice. Indeed, at least some Justices had this contrast in mind when the Supreme Court found constitutional fault with the mandatory, determinate sentencing schemes. Such schemes may produce efficiency and uniformity, similar to civil law systems; however, the Framers opted to reject these values in favor of freedom from state control of criminal justice.

This article suggests that the Sixth Amendment right to jury trial guarantees defendants an adjudication and sentencing scheme in which the legislature does not have the last word on a defendant’s fate. If the trial court as a unit—both jury and judge—has significant discretion to thwart legislative mandates, the Sixth Amendment right is satisfied. Section II reviews the Court’s cases connecting sentencing to the Sixth Amendment right to jury trial. Section III.A shows that the common law trial court, consisting of the judge-jury unit, traditionally had broad discretion to avoid imposing unjust sentences in individual cases. Section III.B explores how this trial court discretion is characteristic of the common law tradition, in contrast to the civil law approach as exemplified by post-Revolutionary France. Section IV concludes that the determinate sentencing schemes represented a move toward the civil law tradition; the Court’s recent cases, in contrast, brought sentencing back within the common law fold.

4. Mandatory sentencing schemes can shift the locus of power to prosecutors as well as to legislatures. See Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989, 1041-42 (2006). This article, however, focuses on trial-court independence from legislative mandates.
5. Cf. id. at 994 (treating judge and jury as a unit for purposes of separation-of-powers analysis).
6. For an explanation of the emphasis on post-Revolutionary France, see infra Part III.B.1.
II. SENTENCING AND THE SIXTH AMENDMENT RIGHT TO JURY TRIAL

The jury has been the presumed fact finder in criminal trials in the common law tradition for centuries. However, as this tradition has played out in the United States, the jury has increasingly functioned as a gatekeeper; its finding of guilt opens the door to a second hearing in which the judge, sitting alone, imposes a sentence, the severity of which depends upon facts other than those the jury considered.

For most of the twentieth century the jury carried out this gatekeeper function under an “indeterminate sentencing” model. This model gave the judge total discretion to choose a sentence between the absolute maximum and the mandatory minimum, if any, set by the legislature. Judges did not have to make formal findings of fact, and there was no meaningful review of the substance of the sentence. The indeterminate sentencing model resulted from late nineteenth-century reform movements and was influenced by the new disciplines of sociology and psychology. Not surprisingly, this sentencing model...

7. See infra Part III.B.2.

8. Rachel E. Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 100-01 (2003) (noting that the move away from fixed sentences for felonies began before the U.S. Constitution was framed and became the norm in the nineteenth- and twentieth-centuries). The Supreme Court has used the gatekeeper concept in a more negative sense. See Jones v. United States, 526 U.S. 227, 243-44 (1999) (“If a potential penalty might rise from 15 years to life on a nonjury determination, the jury’s role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping . . . .”).

9. In earlier centuries, the jury’s verdict was often preliminary to a judge’s use of a variety of discretionary mechanisms that would mitigate the effect of ostensibly mandatory sentences. See infra notes 77-113.


11. The term “indeterminate” has two meanings. The meaning highlighted here involves statutes that give judges a broad range of options, not only to choose among fines, probation conditions, and prison, but also to choose a maximum term of incarceration if prison was the punishment. See, e.g., Mistretta v. United States, 488 U.S. 361, 363 (1989); Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 NW. U. L. REV. 1441, 1442-43 (1997). Another meaning of “indeterminate” applies in systems that allow parole: regardless of the maximum term announced by the court, the prisoner’s actual time in prison is set by a parole board. Based on the prisoner’s behavior inside and potential for rehabilitation outside, the parole board can release a convict far earlier than the judge had decreed. See, e.g., Bowman, Fear, supra note 10, at 301-03.

championed individualization and the goal of rehabilitation. The United States Supreme Court upheld the constitutionality of this model in *Williams v. New York*.

In the late twentieth century, however, many jurisdictions abandoned this model and substituted a structured sentencing approach. The change grew out of disillusionment with indeterminate sentencing. Rehabilitation did not seem to be working. In addition, indeterminate sentencing produced great inconsistencies in the treatment of persons convicted of the same or similar crimes. The lack of uniformity seemed unfair and also made it difficult for a particular defendant to predict the likely sentence if convicted. The structured sentencing schemes, on the other hand, while differing in mechanics, had one attribute in common—they all restricted the exercise of judicial sentencing discretion.

The guideline sentencing scheme adopted by the federal government provides a useful example of one approach to structured sentencing. The guidelines and accompanying application directions are comprehensive and relatively precise. Judges must explain their factual and legal decisions, outlining their application of the guidelines to the case at hand. Either the prosecution or the defense can seek *de novo* review of both facts and law. As originally established, judges had unreviewable discretion only within the small sentencing range that results from application of the rules. Compared to

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13. See, e.g., Barkow, supra note 8, at 71, 87; Berman, supra note 10, at 654; Bowman, *Failure*, supra note 10, at 1321; Bowman, *Fear*, supra note 10, at 300-01.


15. For a history of the move toward determinate sentencing, see, for example, Barkow, supra note 8, at 84-89; Berman, supra note 10, at 655-59; Bowman, *Failure*, supra note 10, at 1322-23; Bowman, *Fear*, supra note 10, at 314-16; Klein, supra note 10, at 699-702. For a brief description of varieties in determinate sentencing models, see, for example, Pizzi, supra note 10, at 6-10.


17. Cf. Mueller, supra note 12, at 674-75 (noting tension between "classical penology's" emphasis on harm and mental state and individualized sentencing).

18. See generally UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL. For a description of how the guidelines work, see, for example, Barkow, supra note 8, at 89-94, and Bowman, *Failure*, supra note 10, at 1323-26.

19. See generally UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL. See also Bowman, *Failure*, supra note 10, at 1347 ("[T]he guidelines rules for applying the sentencing table have literally doubled in length since 1987."); O. Kate STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 91-92 (1998) (characterizing guideline fact finding as tedious and complex, comparable to "agency fact finding given to special tribunals," and giving examples).

20. The judge has to state the reasons for imposing a particular sentence, both in open court and in a written transcript. 18 U.S.C. § 3553(c) (2000 & Supp. 2008). In addition, a judge who departs from the guideline sentence normally has to state the reasons for doing so "with specificity in the written order of judgment and commitment . . . ." 18 U.S.C. § 3553(c)(2) (Supp. 2008).

21. See infra note 59.


previous federal approaches, the shift caused by this system was dramatic: as far as sentencing was concerned, federal courts had essentially become administrative arms of Congress and the United States Sentencing Commission. However, in 2006, the Supreme Court declared this system to be unconstitutional. In its place, the Court made the guidelines advisory and clarified that the trial court’s decision could be reversed only if it was unreasonable.

The demise of the federal mandatory guideline system came toward the end of a series of cases beginning in 1998, in which the Court considered the sentencing roles of legislatures, juries, and judges. The cases concerned structured sentencing schemes that shared one characteristic. Through a variety of mechanisms, these systems allowed or required the judge to impose a more

25. Id. at 259-60 (requiring sentencing judges to calculate the guideline sentence to advise their decisions); see also id. at 233 (noting that merely advisory guidelines “would not imply the Sixth Amendment”). Booker involved two different majorities: one that determined the constitutional merits (id. at 225) and a different one that held that the guidelines would be treated as advisory. Id. at 244. However, both majorities agreed that such advisory guidelines would comport with the Sixth Amendment. Id. at 233 (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not imply the Sixth Amendment.”); id. at 245 (adopting the remedy of advisory guidelines).
26. Id. at 260-61. In the new federal advisory guideline scheme, an appellate court can reverse a sentence that is unreasonable. See infra notes 61-68 (discussing later development of the “reasonableness” review standard).
28. Some basic parameters remained uncontroversial. The legislature has the power to define the elements constituting a crime. Jones, 526 U.S. at 243 n.6, 252 n.11. The legislature can also determine the range of punishment—that is, the minimum and maximum penalties—for that crime. Apprendi, 530 U.S. at 490 n.16 (indicating that the legislative function is to determine a maximum sentence that does not “exceed[] that which is, in the legislature’s judgment, generally proportional to the crime”); Jones, 526 U.S. at 243 n.6 (addressing maximum penalty); Harris, 536 U.S. 545 (reconfirming legislature’s power to set mandatory minimums); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (establishing legislature’s power to set mandatory minimums). The prosecution must allege the elements in the charging instrument and prove them beyond a reasonable doubt to a jury (or to a judge when the defendant waives the jury). See generally Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). No member of the Court has challenged these basic principles.
29. Ring, 583 U.S. 584 (capital punishment scheme that allowed judges to find facts supporting death penalty); Blakely, 542 U.S. 296 (multi-statute scheme limiting punishment to standard range, but allowing higher punishment if judge found additional facts); Booker, 543 U.S. 220 (statutorily authorized guideline scheme limiting punishment to standard range, but allowing higher punishment if judge found additional facts); Cunningham, 127
serious punishment than the one authorized by the jury’s verdict. This higher maximum sentence was based on “sentencing factors,” findings of fact made by the judge alone and based on a standard lower than proof beyond a reasonable doubt. The Court found all of these models to violate the Sixth Amendment right to jury trial because they failed to comport with the standard announced in Apprendi v. New Jersey:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse this statement of the rule . . . . “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”

Although the cases focus on the right to jury trial, they also reveal that the presence or absence of judicial discretion is a crucial factor in whether a sentencing system violates that right. The importance of judicial discretion emerges from a comparison between three of the structured sentencing schemes struck down by the Court and the judicial sentencing schemes that remain constitutional. The disallowed schemes—those of Washington, the federal

S. Ct. 856 (statutory presumptive sentencing scheme limiting punishment to middle punishment but allowing higher sentence if judge found additional facts).

30. See Apprendi, 530 U.S. at 485 (noting that the Court coined the term in McMillan “to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge”); see also McMillan, 477 U.S. at 86 (using the term); Jones, 526 U.S. at 232-39 (discussing the difference between elements and sentencing factors); Apprendi, 530 U.S. at 478, 483 n.10, 494 (discussing the difference between sentencing factors and elements).

31. Apprendi, 530 U.S. at 490 (quoting from the concurring opinions of Justices Stevens and Scalia in Jones). The Court mentioned due process (id. at 469), but it focused its reasoning on the Sixth Amendment right to jury trial. Id. at 475-77. Note also that the focus is on the maximum sentence. It is constitutional for the legislature to impose a mandatory minimum even though, in a very real way, doing so increases the punishment based on facts not found by the jury. Harris v. United States, 536 U.S. 545 (2002). Compare id. at 572-78 (Thomas, J., dissenting) (explaining how mandatory minimums increase punishment); McMillan, 477 U.S. at 103 (Stevens, J., dissenting) (explaining same).

32. A case before the Court in the 2008 term may indicate how central a factor judicial discretion is. See Oregon v. Ice, 128 S. Ct. 1657 (2008) (accepting certiorari on the question “[w]hether the Sixth Amendment, as construed in [Apprendi and Blakely] requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant”).

33. The Court has also indicated that sentencing by a jury would satisfy the Sixth Amendment right to jury trial. The legislature can attach a mandatory sentence to the jury’s verdict, or it can accomplish jury sentencing through bifurcated trials. Booker, 543 U.S. at 287 (Stevens, J., dissenting in part); Blakely, 542 U.S. at 334-37 (Breyer, J., dissenting); see also Cunningham, 127 S. Ct. at 871 n.17 (listing states that, following Apprendi and Blakely, retained determinate sentencing “by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence”).

34. In the Washington scheme, one statute established an absolute maximum punishment for Class B felonies. However, a second statute set out a “standard range” with a lower maximum for the Class B felony for 112
government, and California—employed a similar dynamic. The jury's verdict established the absolute maximum sentence; however, the law restricted the punishment to a lower sentence unless the judge found additional facts. These dynamics meant that the lower sentence was the real maximum sentence for Sixth Amendment purposes. The higher sentence based on judicial fact finding violated the Apprendi standard.

The two that remain constitutional—indeterminate sentencing and the advisory guidelines approved by the Court for federal sentencing—are superficially similar to these unconstitutional approaches. As with the disallowed systems, the jury's verdict establishes the absolute maximum sentence, but lower sentences are possible. Similarly, in both approaches the legislature authorizes the judge to rely on sentencing factors—facts that do not have to be alleged in the indictment or proved beyond a reasonable doubt. The difference between these systems and the unconstitutional schemes is the presence of judicial discretion. In these valid systems, the judge has complete or almost complete discretion to choose any sentence in the range. Indeed, the Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”

which the defendant was convicted. The sentence was restricted to this lower maximum, unless the judge found "substantial and compelling reasons justifying an exceptional sentence.” In that case, the judge was allowed (but not required) to impose the higher sentence. A judge imposing the higher sentence had to base the reasons on facts other than those used in computing the standard range. The judge had to support an exceptional sentence with written findings of fact and conclusions of law, and the appellate court could reverse using a "clearly erroneous” standard if the record was insufficient to support the sentence. Blakely, 542 U.S. at 299-300.

35. In the federal scheme, a statute establishes the absolute maximum punishment. See 18 U.S.C. § 3551. However, the sentencing guidelines normally cap the available punishment at a lower plateau. The court is limited to the lower punishment unless the judge finds specified facts that increase the punishment ceiling. In that case, the court is required to impose the higher sentence unless a “departure,” also strictly controlled and fact-based, applies. Booker, 543 U.S. at 234-35.

36. In the California scheme, “[t]he statute defining the offense prescribes three precise terms of imprisonment—a lower, middle, and upper term sentence.” Cunningham, 127 S. Ct. at 861. The court was required to impose the middle sentence unless aggravating or mitigating circumstances justified a higher or lower sentence. The law provided illustrative circumstances. The judge determined the existence of such circumstances by finding facts under a "preponderance of evidence” standard. Id. at 862-63.

37. Blakely, 542 U.S. 296; Booker, 543 U.S. 220; Cunningham, 127 S. Ct. 856.


39. See supra note 25.

40. See supra note 26.

41. See Apprendi, 530 U.S. at 481 (emphasizing the historical pedigree of judicial exercise of discretion within the range set by the legislature); Blakely, 542 U.S. at 305 (distinguishing indeterminate sentencing from Washington's scheme on the ground that the former allowed, but did not compel, a judge to rely on facts outside the trial record in determining the sentence); Booker, 543 U.S. at 232 (noting the importance in Blakely of the requirement that judges find additional facts to impose a higher sentence); id. at 233-34 (noting the importance of the mandatory nature of the sentencing rules in the Court’s reasoning); Cunningham, 127 S. Ct. at 859 (emphasizing that California's system is not advisory because judges are not free to exercise their discretion to choose a sentence within the statutory range).

42. Booker, 543 U.S. at 233 (citing Apprendi and Williams).
Approval of judicial sentencing—even within the range set by the legislature—is puzzling given the Court's reliance on the Sixth Amendment right to jury trial. Although it is true that the verdict sets the absolute maximum sentence, this determination is irrelevant to most defendants in an indeterminate or advisory sentencing situation. Consider a first offender convicted of a crime that carries a maximum penalty of twenty years in prison. Unless that penalty is mandatory, it is highly unlikely that the defendant will be sentenced to twenty years. What really matters is whether the judge will choose, say, probation, five years in prison, or ten years in prison. The judge is likely to base this choice at least in part on facts that emerge during sentencing but not at trial.

The Court's explanation for allowing judges to base this relevant decision on sentencing factors is straightforward: "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." This declaration, however, begs the question. Why should a defendant have no right to a jury determination of one of the most important issues in the case? Part of the answer involves the Court's vision of the jury's role:

Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended. . . . The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.

This passage reveals not only the Court's understanding of the jury's role, but also its assumption that the role is fulfilled once the jury has authorized the maximum possible sentence.

However, this assumption does not resolve the dilemma. Why should the jury's role end there? Isn't a "circuitbreaker" needed to affect the decision whether a person will spend no time in prison or twenty years in prison? The

43. Id. (explaining why the federal system would have been constitutional if the guidelines had not been binding on judges).
44. Blakely, 542 U.S. at 306-07 (emphasis in original).
45. Cf. Apprendi, 530 U.S. at 495 (noting, in the context of the absolute maximum sentence, that "it can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect"). The Court noted that "when a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" Id. (citing McMillan v. Pennsylvania, 447 U.S. 79, 88 (1986)).
jury rarely knows the maximum sentence its verdict authorizes, and the judge, after all, is a government employee who appears to be part of the "State's machinery of justice." More to the point, in the advisory guideline system, "the crime the State actually seeks to punish" is likely to be the crime described by the guideline factors. If judges automatically follow advisory guidelines—or, in an indeterminate system, the prosecutor's sentencing recommendation—the legislative and executive branches are in control almost as much as they were in the systems found to be unconstitutional. On the other hand, the Court's conclusion that defendants have no right to jury determination of sentencing factors makes sense if the judge is also a circuitbreaker who stands between the legislature and prosecutor, on one hand, and the individual defendant, on the other.

In this regard, it is instructive to note that the metaphor of circuitbreaker does fit the common law judge in various ways. Consider first the apparent anomaly of a defendant who pleads guilty or tries the case to the court. This defendant will never have a jury circuitbreaker at all. The Court purports to address this dilemma by noting that Sixth Amendment protections are not for those who waive them. However, this dismissal is misleading. After all, similar to juries, judges in bench trials can hand down unreviewable acquittals on the merits. Moreover, the Sixth Amendment-based sentencing dynamics continue to apply; whether a defendant is convicted after a jury trial, a bench trial, or a guilty

46. See, e.g., FLA. R. CRIM. P. 3.390(a) ("Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial."). Cf. Máximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 AM. J. CRIM. L. 223, 284 (2006) [hereinafter Langer, Plea Bargaining] (suggesting as a reform that juries be instructed on the potential sentence).

47. See Apprendi, 530 U.S. at 498 (Scalia, J., concurring) (noting that judges are government employees).

48. Prosecutors can calculate probable guideline sentences prior to bringing charges, and can base charging decisions on such calculations. The mandatory guideline system gave prosecutors enormous powers to affect sentencing through their discretion regarding crimes to choose and factors, such as substantial assistance, to raise at sentencing. See, e.g., Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 STAN. L. REV. 1211, 1252-53 (2004).

49. In this regard, it is important to note that facts (and, in the federal system, the guideline analysis) are provided in "a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." Blakely, 542 U.S. at 312. Although compliance with the guidelines has decreased since Booker, as of May, 2006, 62.8% of federal sentences were still within the guideline range. E.g., Gilles R. Bissonnette, Comment, "Consulting" the Federal Sentencing Guidelines After Booker, 53 UCLA L. REV. 1497, 1532 (2006) (citing U.S. Sentencing Commission statistics).

50. See, e.g., Blakely, 542 U.S. at 311 (noting the prosecutor's "power to affect sentences by making (even nonbinding) sentencing recommendations").

51. Thus, it may be important that compliance with the guidelines has decreased since Booker. Bissonnette, supra note 49, at 1532. As judges become less socialized to conforming with the guidelines, increased independence may develop.

52. Blakely, 542 U.S. at 312 ("T]he Sixth Amendment was not written for the benefit of those who choose to forgo its protection.").

53. See infra note 156.

54. E.g., United States v. Milam, 443 F.3d 382, 385-86 (4th Cir. 2006); State v. Suleiman, 158 Wash. 2d
plea, the sentence is still restricted to the maximum set by the elements of the crime.

However, the image of judges as circuitbreakers emerges most clearly in the Court’s treatment of appellate review of sentences. When Congress enacted the Sentencing Reform Act, it provided for appeal of sentences by either party but did not articulate a standard of review. De novo review would arguably chill a trial court’s willingness to exercise discretion, while an abuse of discretion standard would nurture it. In Koon v. United States, a unanimous Court opted for the abuse of discretion standard to review a trial judge’s decision to depart from the mandatory guideline sentencing range. In response, seeking to limit trial court discretion, Congress changed the standard to de novo review. However, this de novo standard was one of the provisions the Booker Court excised in order to fix the Sixth Amendment problems presented by the federal sentencing guidelines. In its place, the Court found that the statute implicitly set forth an unreasonableness standard of review.

In three cases decided in 2007, the Court clarified the notion of “unreasonableness” for reviewing federal advisory guideline sentences, highlighting the importance of the trial judge’s discretion. First, it held that appellate courts are not required to apply a presumption of reasonableness to sentences that reflect proper application of the guidelines, although they may do so if they choose. More significantly, a sentence that does not reflect proper guideline application is not per se unreasonable; indeed, a non-guideline sentence


55. See Blakely, 542 U.S. at 303-04 (equating “the facts ... admitted by the defendant” with the facts found by the jury).

56. 18 U.S.C. § 3742(a)-(b) (2000) (providing both the defendant and the government with the right to an appeal); see Booker, 543 U.S. at 259 (noting that these provisions survive the Court’s rewriting of the Sentencing Reform Act).


58. Id. at 91, 96-97 (concluding that in mandating appellate review of sentencing Congress intended “that district courts retain much of their traditional sentencing discretion”).


60. 543 U.S. at 261.

61. Id. at 260.

62. Rita v. United States, 127 S. Ct. 2456 (2007); see also id. at 2466-67 (holding that the appellate presumption does not violate the Sixth Amendment right to jury trial). Justices Stevens and Ginsburg would afford the same appellate deference to sentences outside the advisory Guideline range as well. 127 S. Ct. at 2470 (Stevens, J., concurring, joined by Justice Ginsburg) (pointing out that the reasonableness review mandated by Booker is the equivalent of review for abuse of discretion). Justice Souter would afford no presumption of reasonableness to any sentence. Id. 2488 (Souter, J., dissenting).
can be based upon either specific facts about the defendant or a policy disagreement with the guidelines themselves. As the Court pointed out, a *per se* unreasonableness approach would make the guidelines effectively mandatory. Thus, even sentences outside the guidelines' range must be reviewed "under a deferential abuse-of-discretion standard." This means that it is error for the appellate court to require extraordinary circumstances, rigid mathematical formulas, or even proportional justifications for non-guideline sentences. The result of all of these cases is an advisory guideline system that approaches indeterminate sentencing: under a seemingly broad sense of reasonableness, judges are virtually free to ignore advisory guidelines at will.

These sentencing review cases confirm judicial power to refuse to apply seemingly unjust legislative mandates; in other words, they confirm that judges can be circuitbreakers. Importantly, the Court’s reasoning in these recent holdings continued the focus on the Sixth Amendment right to jury trial, an approach that caused Justice Alito to remark that the "yawning gap between the Sixth Amendment and the Court's opinion [in *Kimbrough*] should be enough to show that the Blakely-Booker line of cases has gone astray." Justice Alito’s concern is understandable. Nevertheless, the remainder of this article suggests that in restoring discretion to judicial sentencing the Court has moved the criminal justice system closer to the type of jury trial the Framers had

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63. *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007). The trial court departed from the guidelines range because it disagreed with the sentencing disparity between crack and powder cocaine the guidelines reflected. Id. at 565. It is perhaps noteworthy that the government argued “that the Guidelines adopting the 100-to-1 ratio are an exception to the ‘general freedom that sentencing courts have to apply the § 3553(a) factors . . . because the ratio is a specific policy determination that Congress has directed sentencing courts to observe.” Id. at 570 (quoting the government’s brief).

64. Id. at 564.


66. Id. at 594-95.

67. Id. at 595 (rejecting “the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence”).

68. Id. at 591. The appellate court had required a justification that “is proportional to the extent of the difference between the advisory range and the sentence imposed.” Id. at 594. The Court rejected this requirement but did note that “the extent of the difference . . . is surely relevant” to the reasonableness of the sentence. Id. at 591.

69. A sentence may, however, be reversed as unreasonable in an extreme case. *See*, e.g., *United States v. Levinson*, No. 07-1544, 2008 WL 4251501, at *8 (3d Cir. Sept. 18, 2008) (finding the trial court’s explanation for departing from the guideline sentence insufficient for failure to explain an apparent policy disagreement with the guidelines).

70. *See Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). (indicating need to be true to *Booker’s* Sixth Amendment holding); *Gall*, 128 S. Ct. at 594 (grounding the reasoning in the *Booker* holding); *Rita v. United States*, 127 S. Ct. 2456, 2465-67 (2007) (finding that the presumption of reasonableness comports with the Sixth Amendment); *see also Kimbrough*, 128 S. Ct. at 578-79 (Alito, J., dissenting) (acknowledging Sixth Amendment basis for Court’s holding); *Rita*, 127 S. Ct. at 2475-77 (Scalia, J., concurring) (suggesting that the Sixth Amendment allows review of sentences only for procedural error).

71. *Gall*, 128 S. Ct. at 605-06 (Alito, J., dissenting) (noting that the issue of competence to set sentencing policy has nothing to do with juries or fact finding).
in mind—one in which the trial court as a unit, consisting of both judge and jury, functioned as a circuitbreaker to implement individualized justice.

III. THE PROMINENCE OF DISCRETIONARY JUSTICE IN THE COMMON LAW TRADITION

A. Trial Court Discretion to Avoid Harsh Penalties

Before the American Revolution, English judges had broad sentencing discretion in misdemeanors, but felonies were capital crimes for which the law prescribed even the manner of death.72 Similarly, after the American Revolution, there were mandatory penalties in the U.S. for some crimes73 and discretionary penalties for others.74 However, even where penalties were ostensibly mandatory, trial courts had discretionary mechanisms to avoid imposing sanctions that seemed unjust in the individual case. One mechanism was jury nullification, the others were judicial: development and use of legal technicalities, benefit of clergy, suspended execution of sentences, and judicial initiation of a virtually automatic pardon process.

The common law criminal jury has long had the power of nullification, or “pious perjury,” allowing it to acquit (or to convict of a lesser crime) despite the prosecutor having proved the elements beyond a reasonable doubt.75 This power


73. A mandatory death penalty existed at common law, including, in the earliest days, at federal common law. Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 FORDHAM URBAN L.J. 347, 361-63 (1999). Some early statutes also mandated capital punishment. For example, an Act for the Punishment of certain Crimes against the United States, 1 Stat. 112 (Apr. 30, 1790) set mandatory death penalties for treason (§ 1, 1 Stat. 112), willful murder (§ 3, 1 Stat 113), piracy (§ 8, 1 Stat. 113-114; § 9, 1 Stat. 114, § 10, 1 Stat. 115), and forgery or counterfeiting of “any certificate, indent, or other public security of the United States” (§ 14, 1 Stat. 115). The mandate sometimes included the manner of execution. For example, the 1790 federal statute specified that death would be carried out “by hanging the person convicted by the neck until dead.” (§ 33, 1 Stat. 119). Other statutes mandated specific prison terms or other punishments. For example, in a 1790 federal statute a mandatory part of the sentence for perjury required the convict to “stand in the pillory for one hour . . . .” § 18, 1 Stat. 116. See generally Sheldon Gubeck, Principles of a Rational Penal Code, 41 HARV. L. REV. 453, 462-63 (1928); George Lardner, Jr. & Margaret Colgate Love, Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850, 16 FED. SENT. R. 212 (2004); David J. Rothman, Sentencing Reforms in Historical Perspective, 29 CRIME & DELINQUENCY 631, 633 (1983). Mandatory minimums were also popular with Congress in the early years of the Republic. See, e.g., Lardner & Love, supra, at 212-13.

74. Lardner & Love, supra note 73, at 212 (noting that some statutes fixed the type of punishment but gave freedom to set the amount within a legislatively determined range and some early statutes gave judges discretion to choose both the type and the amount of punishment).

75. E.g., J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 591 (3d ed. 1990) (noting that partial verdicts “smacking” of pious perjury are found in court records as early as the fourteenth century, were common in the seventeenth, and were most frequent in the eighteenth, “when the number of non-clergiable capital offenses was increased by legislation”); Baker, supra note 72, at 23-24 (noting that “pious perjury” was an important and frequent exercise of discretion despite attempts by Tudor and Stuart kings in the sixteenth and
was crucial to individualized justice. Felonies carried mandatory punishments, and these were generally known to the public, including the jurors. As most accused persons lacked any defense on the merits, "the English criminal jury trial of the later eighteenth century . . . was primarily a sentencing proceeding" in which a jury's decision on conviction might be based on the justice of the accompanying sentence as opposed to technical proof of the crime.\textsuperscript{76} Juries today still have the power of nullification.

Independently of juries, judges also engaged in their own sort of nullification. English judges used their common law powers to create technical rules and complex procedures, which they then applied to avert the conviction of persons they did not wish to punish.\textsuperscript{77} Similar practices existed in the United States, where courts relied upon rules "as an ad hoc means of saving defendants from punishments approved of neither by them nor by their contemporaries" even after "punishments for crime had been brought into line with community opinion, and defendants had secured the legal rights necessary for an adequate defense."\textsuperscript{78} Today in the United States, factually guilty defendants may be acquitted through the offspring of these judicially created technical rules. Jury nullification and legal technicalities allowed trial courts to avoid harsh sentences by avoiding conviction itself. Other mechanisms also existed, however, that focused on the sentencing phase.\textsuperscript{79}

One such device available to judges who wanted to avoid imposing a mandatory death penalty\textsuperscript{80} was benefit of clergy, used for centuries prior to the

\textsuperscript{76} Langbein, supra note 75, at 37.

\textsuperscript{77} Baker, supra note 72, at 47 (discussing use of special verdicts combined with submission of the case to a panel of judges where the trial judge had pre-conviction doubts about the law); id. (discussing the writ of \textit{venire de novo}, used to stop or set aside a trial for irregularities, similar to a modern mistrial); HOLDsworth, supra note 72, at 559 (discussing use of precise, technical rules of pleading to quash indictments for technical flaws); Langbein, \textit{Eve, supra} note 75, at 35 (discussing directed verdicts); Lester B. Orfield, \textit{History of Criminal Appeal in England}, 1 MO. L. REV. 326, 328 (1936) (noting that judges could grant new trials in misdemeanor cases "for errors in the admission or exclusion of evidence . . . or where it appeared that a new trial would further the ends of justice"); id. at 329-30 (discussing defendant's demurrer to evidence as a way to withdraw a case from the jury). \textit{But see id.} at 328 (asserting that special verdicts were little used in criminal cases).

\textsuperscript{78} Sam B. Warner & Henry B. Cabot, \textit{Changes in the Administration of Criminal Justice During the Past Fifty Years}, 50 HARV. L. REV. 583, 587 (1937).

\textsuperscript{79} Sentencing is an integral part of the trial process in civil law countries, not a separate proceeding. In addition, because the sentence is an integral part of the verdict, appeal and review of sentences function identically to appeal and review of other factual or legal issues. Frederic R. Coudert, \textit{French Criminal Procedure}, 19 YALE L.J. 326, 336-37 (1910). Thus, a comparison of civil law approaches on these topics is covered in Part III.B.

\textsuperscript{80} See, e.g., John H. Langbein, \textit{Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder
American Revolution to eliminate capital punishment for defendants who ostensibly could read. Benefit of clergy also existed in the eighteenth-century American colonies. In the United States, although Congress prohibited benefit of clergy for federal statutory crimes in 1790, it still existed in many states at the time the Sixth Amendment was ratified and continued as an institution in some states until after the Civil War.

Another practice used to avoid harsh mandatory sentences was to suspend their imposition. Although judges in England and the early United States lacked power to suspend a sentence for leniency, they could do so to allow defendants to take various procedural steps. Such delays were common until the end of the eighteenth century, and a suspension could go on indefinitely. In addition, although they lacked formal power to do so, some judges in the American colonies suspended sentences to allow for rehabilitation. Eventually this

Sources, 50 U. CHI. L. REV. 1, 37-41 (1983) (indicating that those eligible for the benefit were given alternative sentences to death).

81. Little, supra note 73, at 365. The benefit of clergy dates from well before the fourteenth century in England. At first it benefited only clergymen. Eventually it was extended to anyone who actually could read. In England it ultimately became available to anyone who could pretend to read by memorizing the standard psalter verse judges used to “test” literacy; where even memorization did not work, judges might help prisoners read the passage. See generally, e.g., Baker, supra note 72, at 41; BAKER, supra note 75, at 586-88; SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL IV at ch. 28; HOLDWORTH, supra note 77, at 561-62; Langbein, supra note 81, at 37-41. In 1706, in response to the fictionalization of the benefit, Parliament abolished the reading test and extended the benefit to the “invincibly illiterate.” Baker, supra note 72, at 41. English judges continued to have the power to confer the benefit until 1837. BAKER, supra note 75, at 589.

82. WHITMAN, supra note 75, at 169.

83. Act of April 30, 1790, § 31, 1 Stat. 112, 119 (“The benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is or shall be declared to be death.”).

84. GEORGE W. DALZELL, BENEFIT OF CLERGY IN AMERICA AND RELATED MATTERS (1955). Dalzell reports that the benefit was abolished in Virginia in 1796 (id. at 248-50); Kentucky in 1800 (id. at 251-52); Maryland in 1810 (id. at 252); Delaware in 1826 (id. at 253); Pennsylvania in 1794 (id. at 253); New Jersey in 1796 (id. at 253); Rhode Island in 1798 (id. at 256); and Georgia in 1834 (id. at 268). (However, the book is not conventionally notated due to the author’s death before it was completed.)

85. Id. at 257-66 (discussing North Carolina and South Carolina). The institution died out in the United States when penitentiaries took the place of the death penalty for most crimes. Id. at 248-68.

86. Baker, supra note 72, at 40; James D. Barnett, Executive, Legislature, and Judiciary in Pardon, 49 AM. L. REV. 684, 705-09 (1915) (labeling practices that occurred before conviction as “judicial pardons”); BLACKSTONE, supra note 81, at ch. 31 (noting that the device was used “as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal’s character, in order to give room to apply to the crown for either an absolute or conditional pardon”); Warner & Cabot, supra note 78, at 598 (“It became settled doctrine that neither the English nor the colonial courts had common law power to suspend sentence in order to give the defendant a chance to mend his ways” although courts could suspend sentence briefly “to permit a new trial or the exercise of some other legal right . . . .”).

87. Baker, supra note 72, at 41. In the late eighteenth century, judges began the practice of imposing judgment immediately. Id.

88. Barnett, supra note 86, at 709-13; Orfield, supra note 77, at 331.

89. Warner & Cabot, supra note 78, at 598 (noting that in the first half of the seventeenth-century courts in the Massachusetts colony could suspend imposition and execution of sentence and occasionally did so, sometimes “in connection with probation”); id. at 598-99 (noting examples of probation in first half of the
practice became legitimate: by the late 1840s judges in Boston could suspend sentences in the context of a supervised probation system. 90 Acceptance of judicial power to suspend sentences grew over the course of the nineteenth century. 91 By the middle of the twentieth century, suspended sentences combined with probation were commonplace in the United States. 92

The last mechanism of interest is the executive pardon, which at first does not appear to involve discretionary judicial power. However, pardons once functioned quite differently than they do today. Historically in England, although the King formally granted the pardon, 93 "he invariably deferred to the recommendation of the trial judge," 94 who acted "because of doubts as to the propriety of the conviction, on the recommendation of the jury, or because of influence . . . ." 95 Indeed, "the process of granting pardons had come under the routine control of trial judges, who reported at the end of every circuit to the secretary of state with their recommendations for mercy." 96 In addition, judges had "wide discretion" to grant formal reprieves in situations in which they had "recommended or otherwise expected that the convict should receive a pardon." 97 By the time the Sixth Amendment was adopted in the United States, this system was widespread in England. 98

Given the prominence of pardons in England, it is no surprise that they also played a big role in British America. Pardons were very common in the colonial era 99 and were an accepted part of the criminal justice system in the nineteenth century); see also STITH & CABRANES, supra note 19, at 11 (stating that even with mandatory minimums, federal judges had discretion to suspend prison or delay imposition of sentence). But see Lardner & Love, supra note 73, at 212 (asserting that it is clear from the pardon files that federal judges in the first half of the nineteenth century did not believe they possessed the power to remit a fine or suspend a sentence for anything but a short period of time, pending a clemency request for example).

90. Warner & Cabot, supra note 78, at 599.

91. See AUSTIN ABBOTT, A BRIEF FOR THE TRIAL OF CRIMINAL CASES § 861, at 24 (1892) (indicating that states gave judges the power to suspend sentences "in their discretion when the interests of justice appear to demand it"); Warner & Cabot, supra note 78, at 599 (noting supervised probation systems or the equivalent in Baltimore (1894), Minnesota (1897), Vermont (1898), and Rhode Island (1899)).

92. Rothman, supra note 73, at 640-41.

93. The power of the King to issue pardons goes back to Anglo-Saxon times (i.e. before 1066). BLACKSTONE, supra note 81, at ch. 31 (outlining statutory limitations on pardons and technicalities associated with their use). See generally BAKER, supra note 75, at 589-90; Orfield, supra note 77, at 331, 335.

94. Langbein, Eve, supra note 75, at 36.

95. Baker, supra note 72, at 44 (discussing unconditional pardons). Baker notes that judges could not actually give pardons, as they required "the Great Seal on the authority of the secretary of state or the Privy Council." Id.; see also BAKER, supra note 75, at 589-90 (noting that application for an unconditional pardon was an informal appeal mechanism).

96. BAKER, supra note 75, at 589-90 ("[S]entences of death were pronounced in many instances where there was no intention of carrying out the judgment.").

97. Baker, supra note 72, at 44.

98. WHITMAN, supra note 75, at 164 (noting that pardoning was widespread in eighteenth-century England, was "fully routinized" by the third quarter of the eighteenth, and continued to soften the impact of the criminal law into the early nineteenth").

99. Id. at 169 (giving example of colonial New York between 1691 and 1776, where at least 51.7% of
Revolutionary period and in the early years of the United States,\textsuperscript{100} at both the federal\textsuperscript{101} and state levels.\textsuperscript{102} As English judges had done, American judges faced with mandatory penalties that seemed unjust sought executive pardons as a way to get relief for defendants.\textsuperscript{103} Federal judges, for example, often recommended pardons and even lobbied the President to grant them,\textsuperscript{104} and the executive branch frequently asked sentencing judges for their opinions on pardon petitions.\textsuperscript{105} Nineteenth-century Presidents often, although not inevitably, acceded to the petitions.\textsuperscript{106} Commentators have concluded that pardons—in which discretionary judicial input played a prominent role—introduced a needed safety-valve into an otherwise rigid system.\textsuperscript{107} However, at least at the federal level, the situation had changed by the middle of the twentieth century. While political pardons continued,\textsuperscript{108} the rate of other pardons dropped sharply as parole came to be used to relieve the pressure of long prison terms.\textsuperscript{109}
This brief review has noted a number of mechanisms, traditional in the common law criminal system, to get around ostensibly mandatory sentences that seemed harsh in individual cases. Importantly, only one of these mechanisms resided with the jury while the others were judicial in nature. Combined, these tools allowed the trial court as a unit to avoid the mandates of the law when justice so required. With the rise of indeterminate sentencing in the twentieth century, broad discretion allowed judges to individualize justice as a matter of course. The sentencing decision became the focus for individualized justice in punishment, and the mechanisms that had been vital under mandatory sentencing atrophied. As a result, when legislatures abolished indeterminate sentencing, little discretion to individualize punishment remained.

B. Discretionary versus Uniform Justice: A Comparison with the Civil Law Tradition

1. Why Comparative Law is Relevant

The sentencing cases represent a dramatic affirmation of the jury trial system in criminal procedure. The Court disallowed sentencing schemes that threatened the right to jury trial by shifting to a judge the power to find facts determining the maximum allowable sentence. These schemes made sentencing more efficient and furthered predictability and uniformity of outcome. However, although these advantages did not make a constitutional difference, they did play a role in the Court’s deliberations.

The point emerged most strongly in a debate between Justices Scalia and Breyer that began in Apprendi. Justice Breyer, supporting a structured system, rejected the notion of jury sentencing, seeing it as a “procedural ideal . . . [that] the real world of criminal justice cannot hope to meet . . . .”\(^{110}\) Judicial sentencing, on the other hand, fulfills the real world's “administrative need for procedural compromise.”\(^{111}\) Justice Scalia retorted that Breyer’s system would be a “bureaucratic realm of perfect equity,” one “designed for a society that is prepared to leave criminal justice to the State . . . [but rejected by the] founders of the American Republic [who] were not prepared to leave it to the State . . . .”\(^{112}\) Developing this point further in Blakely, Scalia admitted that “leaving justice entirely in the hands of professionals” might be more efficient and fair,\(^{113}\) but concluded that those values are not decisive.

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111. Id. at 556-57 (emphasis in original).
112. Id. at 498 (Scalia, J., concurring).
113. It is debatable whether civil law systems, at least as practiced today, are more efficient than those of the common law tradition. For example, the common law system that developed in Germany was inefficient, which caused adoption of civil law type mechanisms such as plea bargaining. See, e.g., Jenia Iontcheva Turner, Judicial Participation in Plea Negotiations: A Comparative View, 54 AM. J. COMP. L. 199, 226 (2006). On the other hand, the criminal justice system appears to have become less efficient when Italy adopted common law
[M]any nations of the world, particularly those following the civil law traditions, [leave justice entirely in the hands of professionals]. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil law ideal of administrative perfection, but the common law ideal of limited state power accomplished by the strict division of authority between judge and jury.114

A notable aspect of this exchange—and of the sentencing cases generally—is that the Court does not compare the precise sentencing practices used in the United States and elsewhere at the time the Sixth Amendment was adopted. Instead, the Court evaluates the challenged sentencing schemes against the backdrop of the common law tradition generally.115 As noted by Justice Scalia, this tradition contrasts with the civil law paradigm. The Court does not want sentencing to mirror the precise procedures in place when the Sixth Amendment was adopted. Its concern is to prevent our criminal justice system from sliding into the civil law mold.

For this reason, it is important to view the structured sentencing schemes in the context of the broad traditions of common law versus civil law. In this regard, we must acknowledge that jury trials have not been entirely absent from the civil law world. It is true that Continental systems did not use juries at the time the Sixth Amendment was adopted.116 However, even before the American Revolution, many people in France wanted to emulate the British jury trial in criminal cases,117 and France adopted jury trials after its own revolution.118 Germany also has a tradition of involving ordinary citizens in judging some criminal cases.119 What is important is not whether a criminal justice system involves juries in some manner. On the contrary, it is the way the two traditions use juries and judges that makes the difference. Thus, the autonomy enjoyed by juries in the common law tradition must be viewed as part of a broader dynamic system in which judges have also enjoyed significant independence from the


115. This general approach is reflected in Justice Scalia’s focus on “paradigms” and “traditions” and in his use of the present tense. See id.
117. See, e.g., id. (“[T]he English jury had been vaunted by Montesquieu . . . and was further popularized amongst lawyers and intellectuals before and after the Revolution . . . .”).
118. See infra notes 136-41.
legislative and executive branches of government. However, as this section will explore, such independence has not been the case for civil law judges.

Of course, common law and civil law systems also differ importantly in their approaches to the investigation of crime and in the amount of control the parties have over the proceedings. However, these are not the dimensions that are most relevant to whether common law judges function as circuitbreakers to moderate legislative mandates. To explore that issue we need to focus on differences in the amount of autonomy given to trial level decision-makers in developing and applying the law.

Thus, this section will examine how the two systems differ in tolerating criminal trial court independence. Subsection 2 will review trial court discretion in fact finding. Subsection 3 will look at judicial independence in matters of law, and Subsection 4 will examine judicial role expectations. This survey will reveal that in the civil law tradition trial level decision-makers have little, if any, autonomy in developing or applying the law. On the other hand, the common law model assumes that the criminal trial court—the judge, the jury, or


121. This difference has contributed to the common use of the labels “inquisitorial” and “adversarial.” E.g., M. Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 HARV. INT’L L.J. 1, 3 (2004) [hereinafter Langer, Transplants]; Langer, Plea Bargaining, supra note 46, at 226; William T. Pizzi & Mariangela Montagna, The Battle to Establish an Adversarial Trial System in Italy, 25 Mich. J. INT’L L. 429, 430 (2004). William Pizzi has focused on the issue of judge versus party control and observes that the sentencing phase of trials in the United States is more inquisitorial than adversarial. See Pizzi, supra note 10, at 23-29. However, as this article suggests, the division of labor between the parties is not the only, or even best, focus of the comparison.

122. An examination of whether criminal trial courts also mitigate overreaching by prosecutors is beyond the scope of this article. However, it might be noted that in the common law tradition trial judges and prosecutors have, from time to time, collaborated in resisting legislative mandates. Lardner & Love, supra note 73, at 212-14. On the other hand, in some civil law systems such as France, prosecutors and judges are part of the same government bureaucracy. See, e.g., John D. Jackson, The Effect of Legal Culture and Proof in Decisions to Prosecute, 3 LAW, PROBABILITY & RISK 109, 113 (2004); Renée Lettow Lerner, The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’Assises, 2001 U. ILL. L. REV. 791, 809 (2001); William Savitt, Note, Villainous Verdicts? Rethinking the Nineteenth-Century French Jury, 96 COLUM. L. REV. 1019, 1019 n.6 (1996).

123. For heuristic models contrasting the common law and civil law traditions, see generally, for example, Mirjan Damaška, supra note 120; Mirjan Damaška, Structures of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480 (1985) [hereinafter Damaška, Structures]; Langer, Transplants, supra note 121.
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a combination of the two—will have considerable independence in both areas. The striking autonomy of common law trial courts allows them to function as a structural “circuitbreaker in the State’s machinery of justice” that can mitigate any harshness or overreaching on the part of the legislature. By rejecting such autonomy, the civil law systems have declined to use trial courts in this manner. The difference in trial judge autonomy seen in the two traditions is relevant to the Supreme Court’s sentencing cases. By severely restricting the trial judge’s sentencing discretion, structured sentencing schemes moved out of the common law and into the civil law mold.

It is beyond the scope of this article to review every variation of the common law and civil law traditions. Our look at the common law will focus on England, where it was first developed, and on the United States, the source of the problem under examination. Our look at the civil law tradition will focus on the modern French system established under Napoleon, because it has provided the prototype for systems in the other civil law countries and has changed little since the early nineteenth century.

2. Trial Court Discretion in Fact Finding

Control of fact finding is crucial to trial court independence: trial courts that are free to find the facts as they please can avoid legislative mandates by concluding that the proof is insufficient for conviction. In this regard, the common law and civil law traditions differ significantly. The common law tradition embraces the notion of truly independent lay fact finders; based on this model, it has crafted a trial court system that allows trial judges to be equally independent when juries are waived. The civil law tradition, on the other hand, only grudgingly uses lay fact finders and controls them narrowly. It also ensures that judicial fact finding does not frustrate legislative mandates.

As noted earlier, juries in common law countries have the power of nullification; the power to acquit against the evidence. Juries have this power because they return a general verdict—guilty or not guilty—that need not be explained; indeed, a verdict of acquittal cannot be reversed on appeal. The use

125. The system was embodied in the Code d’instruction criminelle (Code of Criminal Procedure) (1808) and the Code pénal (Criminal Code) (1810), which took effect at the same time in January, 1811. Savitt, supra note 122, at 1031.
126. See A. Esmein, History of Continental Criminal Procedure with Special Reference to France 571 (1913) (noting that the Napoleonic era codes served as a model for other Continental systems).
128. See supra note 75.
129. See, e.g., Barkow, supra note 8, at 36-37 (discussing the jury’s “safety-valve” function); Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 Wits. L. Rev. 377, 385-86 (1999); Colleen
The right to jury trial was an important issue at the time of the American Revolution, and it was incorporated into the constitutions of all of the original states. It continues to be the norm in criminal cases in England, the United States, and other common law countries, despite occasional criticism and suggestions for change. The right to a jury trial, with all that it implies regarding potential nullification of legislative mandates, "is fundamental to the American scheme of justice" and is thus required to be available to all defendants charged with non-petty crimes.

France, on the other hand, made limited use of lay fact finders and gave them less power than common law juries. France adopted the jury system in criminal cases after the French Revolution in an unabashed imitation of the English model. In the ensuing years, some observers became disillusioned with juries, but the institution of jury trial survived the Napoleonic reforms. Nevertheless, the jury's power was restricted in a number of ways. These included the inability to return a general verdict, the absence of a unanimity requirement, and a

P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723, 769-70 (1993) (discussing the American criminal jury's "absolute authority to acquit"); see also infra note 156.

130. See, e.g., Harrington, supra note 129, at 385-86; Murphy, supra note 129, at 770; see also Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (discussing jury trial generally as a protection against government oppression). Cf. Langbein, Eve, supra note 75, at 36 (noting that historically English judges might pressure juries to reconsider guilty verdicts with which they disagreed and that juries rarely convicted against the will of the judge, as they knew judges would merely seek pardons).


132. Id. at 153.

133. See, e.g., Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 65 U. CHI. L. REV. 433, 435-38 (1998) (discussing the various methods prosecutors and judges use to prevent nullification and concluding that they are constitutional). For a more in-depth discussion of jury nullification, see supra notes 73-74.

134. Duncan, 391 U.S. at 149.

135. Id. at 156-61 (indicating that crimes carrying up to six months incarceration, for example, need not be tried to a jury "if they otherwise qualify as petty offenses").

136. See, e.g., Langbein, supra note 72, at 13; Munday, supra note 116, at 205-06.

137. E.g., ESMEIN, supra note 126, at 495-98; Munday, supra note 136, at 207-08; Morris Ploscowe, Development of Inquisitorial and Accusatorial Elements in French Procedure, 23 AM. INST. CRIM. L. & CRIMINOLOGY 372, 389 (1932); Savitt, supra note 122, at 1031.

138. E.g., Ploscowe, supra note 137, at 390-91 (comparing the French practice to special verdicts). Following the French Revolution, the Code of 1791 instituted a verdict consisting of a series of yes-no questions, posed by the presiding judge, covering all major issues in the case. See, e.g., ESMEIN, supra note 126, at 416; Ploscowe, supra note 137, at 390; Savitt, supra note 122, at 1025. This approach was retained in modified form in the Napoleonic Code d'Instruction Criminelle of 1808. See, e.g., Savitt, supra note 122, at 1031-34. It still exists in the French Code of Criminal Procedure today. CODE DE PROCÉDURE PÉNAL [C. PR. PÉN.] art. 348 (Fr.). In a complex case, these questions can be quite detailed. The president must pose the "principal question"—"Is the accused guilty of having committed the act"—as to "each act specified in the body of the decree of remand." Id. art. 349 [1] & [2]. In addition, Art. 349 requires the court to pose a separate question as to each "aggravating circumstance" and, if appropriate, "each excuse invoked." Art. 350 makes this true for both aggravating circumstances that appear in the decree of remand and those that "appear during the trial." Finally, Art. 351 requires the president to pose questions as to "legal qualifications" that arise during trial.
structure that allowed professional judges to intimidate jurors and even overrule jury decisions.\textsuperscript{140} Indeed, the “French rules [were] too obviously directed towards obtaining a pliant tribunal of fact,”\textsuperscript{141} not a fact-finding body that could protect citizens from government overreaching. In addition, this weak form of jury trial was available only for cases tried in the cour d’assises,\textsuperscript{142} and beginning in the early nineteenth century, distrust of juries led judges, prosecutors, and legislatures to bring about a “deliberate and progressive reduction of the range of offenses that are subject to the jurisdiction” of that court.\textsuperscript{143} The preceding discussion has revealed that the common law jury had more power than the French jury to thwart legislative mandates regarding criminality. However, more importantly for the theme of this article, perhaps, is the fact that common law trial judges also had more fact-finding independence than the judges in French trial courts. The role of judicial fact finders is crucial in France, as most cases are tried by judges alone,\textsuperscript{144} a practice that goes as far back as the seventeenth century.\textsuperscript{145} As far back as the seventeenth century, French judges were restricted in their fact finding by the system of legal proof.\textsuperscript{146} Even today, judges lack

\textsuperscript{139} E.g., Munday, supra note 136, at 208-09; Ploscowe, supra note 137, at 390.

\textsuperscript{140} E.g., ESMEIN, supra note 126, at 513-14; Munday, supra note 136, at 208-09; Ploscowe, supra note 137, at 387-90; Savitt, supra note 122, at 1031-33. Even today in the French Cour d’Assises, the President reads in open court the questions required for the special verdict (C. PR. PÉN. Arts. 348-51 (Fr.)), and the professional and lay judges retire together to deliberate and reach the results. C. PR. PÉN. Arts. 355-65 (Fr.); see also Valérie Dervieux et al., The French System, in EUROPEAN CRIMINAL PROCEDURES 218, 231 (2002); Frase, supra note 127, at 25-26.

\textsuperscript{141} Munday, supra note 136, at 209. However, there is evidence that French juries in the early nineteenth century also practiced nullification in the face of harsh mandatory punishments. Savitt, supra note 122, at 1024-30, 1035-36 (reviewing nineteenth-century concerns); id. at 1037-39 (reviewing historical commentary on the subject); Edward A. Tomlinson, Introduction, in THE FRENCH PENAL CODE OF 1994, at 9 (Edward A. Tomlinson trans., F.B. Rothman 1999) (indicating that mixed panels "often refused to convict when they believed the mandatory punishment which followed was unconscionably harsh, given the defendant’s circumstances"). However, there is some reason to believe that in at least some cases lenient jury verdicts reflected the state of the evidence, not acquittal against the evidence. Savitt, supra note 122, at 1044-46 (analyzing case files from the Côte d’Or Assises between 1810 and 1865). Nevertheless, it is interesting to note that in response to the perception or reality of nullification of harsh laws, in 1832 the French Parliament adopted laws regarding mitigating circumstances. Id.

\textsuperscript{142} Munday, supra note 136, at 213-14.

\textsuperscript{143} Id.

\textsuperscript{144} The lowest trial-level court, which tries petty or summary offenses, is the tribunal de police, consisting of a single professional judge. The next level, trying délits, is normally composed of three professional judges. E.g., Dervieux, supra note 140, at 230. These two courts try the largest percentage of cases in the criminal justice system. Frase, supra note 127, at 3.

\textsuperscript{145} Judicial determination of facts was the rule in France under the Ordinance of 1670. E.g., Ploscowe, supra note 137, at 384-85 (noting, in addition, that under the Ordinance of 1670 the trial was secret and conducted on the basis of a written dossier). This was also the procedure used for petty offenses, serious misdemeanors, and minor felonies under the 1808 Napoleonic Code of Criminal Instruction. Id. at 385-86 (noting that contraventions were tried before one justice of the peace, while délits were tried before a panel of three judges).

\textsuperscript{146} E.g., Ploscowe, supra note 137, at 384-85 (describing the French trial system under the Ordinance of 1670, which governed until the French Revolution). Ploscowe notes, "[i]f the dossier fulfilled the conditions for a complete proof under the system of legal proof, then the Court was compelled to pronounce the
discretion to find facts freely in that they are required to explain in detail what factual issues arose, how they were resolved, and what support for the resolution exists in the record. In addition, except in the lowest court, French trial judges sit in panels, a dynamic that discourages creativity in fact finding. For example, even if a trial judge felt inclined to skew the facts a certain way to avoid conviction for a crime with a harsh sentence, these structural devices would make such behavior difficult.

Bench trials are less common in the United States, as virtually all criminal defendants can have jury trials. Nevertheless, defendants who waive that right and try their cases to a judge continue to encounter a factfinder with substantial autonomy. Thus, similar to juries, judges have substantial freedom as factfinders. Judges in criminal trials sit alone, as opposed to in panels, use general verdicts, and have broad discretion as to what types of explanations to give in support of their decisions.

The final difference in the independence of factfinders between the two traditions involves review of the verdict, in particular a verdict of acquittal. As is true in the civil law tradition generally, France utilizes true appeals in the sense of de novo review of both the factual record and legal conclusions with a possible substitution of a different verdict. Such appeals have long been available for all conviction, no matter what its personal appraisal of the value of the evidence might have been." Id. at 385.

147. In most countries this involves submitting a "justified" decision that follows a systematized template. See generally Mirjan Damaška, Of Hearsay and Its Analogues, 76 MINN. L. REV. 425, 448-49 (1992) (discussing "the requirement that continental judges specify their factual findings and justify their reliance on particular informational sources in reasoned opinions."). Damaška notes that there is some resistance to the notion of justified verdicts in France resulting from the survival of revolutionary ideals. Id. at 448-49. However, candidates for French judgeships are tested on, among other things, how they draft decisions. Luis Muñiz-Argüelles & Migdalia Fraticelli-Torres, Selection and Training of Judges in Spain, France, West Germany, and England, 8 B.C. INT'L & COMP. L. REV. 1, 20 (1985); see also, e.g., William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, 32 STAN. J. INT'L L. 37, 49-51 (1996) (discussing German trial requirement that verdicts be explained and justified). Cf. Jean Louis Goutal, Characteristics of Judicial Style in France, Britain and the U.S.A., 24 AM. J. COMP. L. 43 (1976) (discussing appellate opinions); F.H. Lawson, Comparative Judicial Style, 25 AM. J. COMP. L. 364, 366 (1977) (commenting on Goutal).

148. See Dervieux, supra note 140, at 230.

149. French judges are unlikely to feel so inclined, however. See infra Part III.B.4.

150. See supra note 135.

151. In the late 1990s, something in the neighborhood of five percent of criminal defendants had bench trials compared to fewer than four percent who had jury trials and ninety-one percent who pleaded guilty. Stephanos Bibas, Judicial Fact-finding and Sentence Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097, 1150 (2001).

152. Langbein, Eve, supra note 75, at 18 (noting that this was historically the case in England).

153. Technically, appeal means a de novo review of both the facts and the law of the case, where the second court completely substitutes its views for that of the first court. J. A. Jolowicz, Appeal and Review in Comparative Law: Similarities, Differences and Purposes, 15 MELB. U. L. REV. 618, 619-20 (1986). Although appeal "serves the 'private' interests of the parties to the litigation in the actual outcome of their case" as opposed to a societal interest in uniformity of the law (id. at 620), it is logical to assume that higher courts with appeal powers can better ensure that trial courts obey legislative mandates, as they can counter both creative lawmaking and nullifying fact finding.
petty offenses and misdemeanors, at the behest of either party and as a matter of right, and France now makes them available even for the most serious offenses. In the common law tradition, on the other hand, the prosecution cannot request a higher court to review an acquittal on the merits, whether it was handed down by a jury or a judge. While defendants have occasionally had the right to request a *de novo* trial, this practice has been a footnote to the common law system. The bottom line is that true appeals, “through which a higher court reviews the entire case developed at the trial level and has the power to render a judgment based on an overall assessment of the quality of the verdict, [are] not a focal part of the common law tradition.”

As noted above, one way a trial court can avoid legislative mandates is to conclude that the facts do not fall within them. In this regard, common law trial courts have much more discretion than do their civil law counterparts. Juries are given broad discretion to acquit against the facts. Furthermore, when judges act as fact finders, they have equally broad discretion. Finally, acquittals on the merits cannot be reversed on appeal, and *de novo* reconsideration of convictions


155. Since 2000, however, the losing party at the *cour d’assises* has an appeal on the merits to a “*cour d’assises* from a different area, composed of three professional judges and twelve jurors.” Dervieux, *supra* note 140, at 232.

156. See *Langbein, Eve, supra* note 75, at 37 (noting that by “the later eighteenth century the rule was already ancient that no appeal lay to reverse a verdict of acquittal). In the United States, this bar comes from double jeopardy protections. U.S. CONST. amend. V. See generally, *e.g.*, Forrest G. Alogna, *Note, Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 Cornell L. Rev. 1131, 1132-33 (2001).

157. Review of convictions “played an inconsequential role in English criminal procedure until well into the nineteenth century.” *Langbein, Eve, supra* note 75, at 37-38. In the United States, on the other hand, even in the early years a number of jurisdictions provided a statutory right to *de novo* trials in misdemeanors. *See, e.g.*, David Rossman, “*Were There No Appeal*: The History of Review in American Criminal Courts”, 81 J. Crim. L. & Criminology 518, 528 (1990) (noting that in the Revolutionary era United States, “[a] number of states allowed convicted defendants to appeal their cases and to receive trials *de novo* at a higher level in the court system”); *id.* at 539 (“All of the New England states as well as North Carolina provided defendants convicted before a lower court the right to obtain this form of review.”). In Massachusetts, which established the model, appeal to the next tier of the court system was available as a matter of right; a defendant who started at the lowest rung might get a third *de novo* trial, with a completely new jury, before the Supreme Judicial Court. *Id.* at 539-40. This right continues to exist by statute in some states today for minor crimes. *E.g.*, O.R.S. § 138.057.

158. Rossman, *supra* note 157, at 525; *see also* Orfield, *supra* note 77, at 327-28 (noting that *attaint* (subjecting a jury’s verdict to review by a second jury) was rarely used in criminal cases by the eighteenth century). Note however, that the common law did have a mechanism through which an expanded trial court could provide a completely new trial. In England, “new trials were permitted in *misdemeanor* cases tried by the Court of King’s Bench . . . for errors in the admission or exclusion of evidence, or where it appeared that a new trial would further the ends of justice.” *Id.* at 328 (emphasis supplied) (noting that this was the case beginning in 1673). The defendant applied to the Kings Bench *en banc* as opposed to the trial judges, “thus giving the proceedings somewhat of an appellate character.” *Id.* at 329. The King’s Bench continued to have the power to grant new trials until it was abolished by the Criminal Appeal Act. *Id.* The Criminal Appeal Act was adopted in 1907. *Id.* at 336.
is rare. The civil law model lies toward the opposite end of the spectrum in all regards.

3. Judicial Independence in Matters of Law

The structure of the system affects legal decision-making by trial judges. How many opportunities does that structure create for a judge to exercise legal independence and creativity? How broad is the opportunity for higher court review of a trial court’s legal decisions? A system with few opportunities for legal creativity and a wide door to review tends to stifle or discourage legal decision-making by trial courts. In this regard, common law judges have a freedom to determine the law that is unknown in the civil law tradition.

It is important to note, however, that reality has long differed from the models in both systems; the purity of the common law model has been altered by an increase in legislation (including the existence of comprehensive codes). In civil law nations, the model is undermined by ad hoc amendments to codes and other changes in the nature of legislation that increase the need for judicial gap-filling.

Nevertheless, the traditional systems have developed—and judges and practitioners have internalized—certain expectations about the role of judges in creating law. This section will explore these differences in three contexts. Subsection a. looks at the power of ordinary courts to interpret and invalidate statutes. Subsection b. addresses the opportunities afforded trial judges to fill holes in the coverage of penal legislation. Subsection c. covers the role played by appellate courts to discourage or enable creativity in legal decision-making.

a. Power to Interpret and Invalidate Statutes

A comparison of trial courts in the two systems reveals one dramatic difference in the capacity to affect the law. In the United States, even a judge in a limited-jurisdiction municipal court can declare a legislative act unconstitutional. This power may reflect a deeper tradition in which, even after increased legislation reduced opportunities for judicial law creation, some legal thinkers believed that judges had a residual common law power to refuse to give

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159. There is some evidence that “both before the Framing and for a time thereafter, juries were deciding questions of law.” Barkow, supra note 8, at 66. See generally Harrington, supra note 129. However, this type of legal decision-making is more properly evaluated in conjunction with jury nullification.


effect to statutes that violated the "law of nature." In the civil law tradition, on the other hand, no ordinary court, at any level, can declare an act of the legislature unconstitutional. This power to invalidate statutes cannot help but give trial court judges in the United States a sense of independence that carries over to other activities such as statutory interpretation; conversely, the lack of such power contributes to civil law judges’ different perception of their role.

Of course, courts rarely declare statutes unconstitutional in the United States, so the more important question involves the judicial power to interpret legislation. Judges in all systems must engage in some interpretation, if only to decide which of two possible statutes fits a given set of facts. Today the two systems share many approaches to statutory interpretation, at least on the surface. However, historical and philosophical differences in the civil and common law traditions affect how closely judges believe they must adhere to statutory language. Not surprisingly, perhaps, civil law judges feel more constrained to follow the letter of the law, while common law judges tend to see themselves more as partners in the job of lawmaking.

Prior to 1791, judges had more discretionary power in France. For example, all crimes were based on common law. Pressure for statutory law developed in

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164. In France, that function is reserved for the Constitutional Council and is exercised during the legislative process, outside the context of a particular case. See generally, e.g., Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 6-7; Roger Pinto, Elisabeth Zoller, Henri Ader, & Wallace Baker, A Primer on French Constitutional Law and the French Court System, 5 TUL. J. INT’L & COMP. L. 365, 371-72 (1997). Even this form of constitutional review was not added in France until 1958. Id. at 372. In some countries, however, a constitutional question can be referred to the special council or constitutional court during the pendency of a specific case using an interlocutory process. See, e.g., Antonio Baldassarre, Structure and Organization of the Constitutional Court of Italy, 40 ST. LOUIS U. L.J. 649 (1996); Daniel S. Dengler, Comment, The Italian Constitutional Court: Safeguard of the Constitution, 19 DICK. J. INT’L L. 363, 370-71 (2001).

165. For example, “[s]ince Marbury v. Madison, over a 197 year span, 154 laws have been declared unconstitutional.” Leon Friedman, The Federalism Cases, 17 TOURO L. REV. 271, 284 (2000). However, since 1994 the Supreme Court has dramatically increased the number of federal statutes it has declared unconstitutional. E.g., id. at 284-85; L.A. Poe, Jr., The Not-So-Brave New Constitutional Order, 117 HARV. L. REV. 647, 674 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)). Nevertheless, the number is still small. For example, the Court declined approximately 29 statutes unconstitutional between 1994 and 2001. Id. at 674. However, in that same time period Congress enacted over 1300 new laws, and that activity was not significantly different from previous years. See The Library of Congress, http://thomas.loc.gov/bss/dll0/d110d110laws.html (last visited May 24, 2008) (providing a forum to look up each law passed by Congress in any given year). For some indication of the situation regarding Supreme Court invalidation of state statutes, see Frank B. Cross & Stefanie Lindquist, Doctrinal and Strategic Influences of the Chief Justice, 154 U. PENN. L. REV. 1665, 1705 (2006).

166. See infra note 184.


168. This partnership is well illustrated, in fact, by the Supreme Court’s re-writing of the U.S. Sentencing Guidelines to make them advisory in nature. See United States v. Booker, 543 U.S. 220, 246 (2006) (admitting that the remedy adopted “significantly alter[s] the system that Congress designed”).


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reaction to perceived judicial abuse of that system. As one commentator notes, "[t]he French Revolution adopted measures to subjugate the judiciary... French courts were even required to address questions of interpretive doubt to the legislature, reflecting the ideology that courts lacked any lawmaking discretion."

In England, on the other hand, common law crimes and statutory crimes co-existed for centuries, with a tradition of a judicially active, even aggressive, approach to statutory interpretation. The predominant theory of natural law supported the notion that both judges and legislatures were merely discovering true legal principles that existed apart from either institution and were thus engaged in "a shared responsibility to determine the law."

The American Revolution did not break this common law tradition. Although there was ambivalence toward judicial authority to interpret statutes,
the American Revolution was not the French Revolution. . . . [T]he French dichotomy between legislating and judging persisted with an intensity foreign to the American tradition, which never completely lost contact with the notion that both legislation and judge-made law were derived from a common source.178

Thus, at the time the Constitution was adopted, judicial discretion was more constrained than it had been in England,179 but it was not prohibited by any clear notion of separation of powers.180 During the nineteenth century, although legislatures were increasingly active in adopting statutes, “the practicing bar was reluctant to accept legislation as a significant source of law.”181 Bench and bar resistance mounted, culminating in judicial hostility to legislation around the time of the Civil War.182 Judges increasingly declared statutes to be unconstitutional and engaged in “aggressive application of the canon that statutes in derogation of the common law be narrowly construed.”183

Today, common law and civil law judges are probably more alike than they used to be as regards freedom to interpret statutes.184 Nevertheless, significant differences remain. Common law judges have more latitude to interpret statutes to deal with the problems raised by specific cases; civil law legal discourse, on the other hand, tends to move on a more abstract level, aiming for broad logical consistency while relying on “relatively rigid methods of analysis” and seeking the one right solution to the problem at hand.185

interpretation, per se, was not a big issue, and at best the role of judges was ambiguous. Id. at 34-35.
178. Id. at 33-34.
179. Id. at 44. Popkin notes the existence of pressure on judges “to be selective in the way that they aggressively interacted with legislation in light of the reality of popular sovereignty and a growing sense of legislative competence.” Id. at 45.
180. Id. at 37-38 (noting that none of the classic views of separation of powers “has clear implications for statutory interpretation”).
181. Id. at 59.
182. Id. at 59-60.
183. Id. at 60 (noting, however, that the rhetoric was more hostile than the actual practice).
184. Currently viewed, civil law principles give judges some leeway to interpret statutes. Today’s civil law judges use interpretive methods that include the text, legislative history, context, and the purpose of the provision, with the latter normally tipping the balance. Carl Baudenbacher, Some Remarks on the Method of Civil Law, 34 Tex. Int’l L.J. 333, 345 (1999). Modern “courts tend to take into account the social reality at the time of the application of the law” and consider both the “micro-consequences” and the “macro-consequences” of judicial decisions. Id. at 346.
185. Miran Damaška, A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment, 116 U. Pa. L. Rev. 1363, 1374-75 (1968) [hereafter Damaška, Law School]; Nollent, supra note 167, at 297. The French students with whom Nollent worked perceived that “[t]he law is not a set of tools to be stretched according to the parties’ needs, but the expression of the true, adequate response to a problem.” Id. at 287.
b. Existence of Holes to Fill: Codes versus Statutes

Comprehensive codes have long been a feature of the civil law landscape. A code leaves relatively few opportunities for judicial law creation because it is more than just a group of statutes.

The continental concept of code is composed of three basic ideas. First, the code is the complete body of law within the jurisdiction. Second, the code is the voice of the sovereign and must be enacted by the sovereign. Third, the code is an ordering, simplifying and systematizing of the authoritative legal materials so that they may be retrieved easily.

Legislators achieve comprehensiveness by creating the code in an *a priori*, logical fashion. Each statutory compartment reflects a set of general principles that guide a judge, whose goal is certainty and uniformity in applying these principles, even if individual justice might be sacrificed. Under the traditional approach, “the right result of interpretation [could] be deduced from the written

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186. France adopted a procedural code in the seventeenth century. Edward M. Wise, Editor's Preface, The French Code of Criminal Procedure, Revised Ed. xv (Fred B. Rothman & Co. 1988) (discussing the Ordinance of 1670). Later, under the influence of late eighteenth-century philosophers, written, statutory law came to be seen as a part of the social contract, expressing the popular will, and thus as the only source of law. Ancel, supra note 171, at 2. The French Penal Code of 1791 and the Napoleonic era codes of 1808 (Code d'Instruction Criminelle) and 1810 (Code Pénal) are manifestations of that philosophical tradition. This principle of codification remained entrenched in France and spread to civil law countries generally. Gerhard O.W. Mueller, Foreword, in The French Penal Code xiii (Jean F. Moreau & Gerhard O.W. Mueller trans., F.B. Rothman 1960) (“The Criminal Law of practically all Civil Law countries rests on codes.... France is the motherland of modern codification, and the Napoleonic Code Pénal is the most widely followed penal code in the world.”); see also, Ancel, supra note 169, at 10-12 (tracing the spread of the codification movement in other European countries). However, “[t]he assumption of a complete—and therefore self-sufficient—code... is at best an historical footnote today...” and most modern civil law countries acknowledge the need for some judge-made law. Baudenbacher, supra note 184, at 336-37.

187. Shapiro, supra note 161, at 429.

188. Ancel, supra note 169, at 5 (noting that the Napoleonic era codes were not merely compilations of statutes, they were intellectually rigorous organizations of a particular area of law). Ancel points out that the Penal Code of 1810 is “drafted with great clarity and the various provisions are presented systematically and methodically” such that “[c]rimes of the same generic type are gathered in neighboring Articles, even though they may vary as to their gravity or sanction.” Id. (describing the basic framework). This framework was modified slightly in 1958 to account for administratively created petty offenses. Id. at 5-6; see also id. at 6-7 (describing the basic scheme in more detail); Nollent, supra note 167, at 284 (contrasting the French penchant for universally valid precepts with the English goal of providing solutions to individual disputes). The new Penal Code adopted in 1992 retained the basic structure of the Napoleonic era Code. Tomlinson, supra note 141, at 2.

189. In France, the definitions of specific offenses contained in the Code were quite broad. Tomlinson, supra note 141, at 19-20 (discussing the 1992 Code and noting that the approach “reflects continuity with the past”). Historically, Parliament “found it desirable to employ open-ended definitions so that the judges would have at their disposal an adequate legal arsenal for responding to antisocial conduct.” Id. at 20.

190. Damaska, Structures, supra note 123, at 483 (noting that the civil law places cases in fixed categories and is satisfied with a fit that is close enough in the individual case; it aspires to certainty and uniformity even at the sacrifice of individual “justice”).
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...law by way of mechanical application of a certain method,”91 and thus a judge had few opportunities to do anything but analyze whether a set of facts fits within one code section versus another.92 While modern commentators point out that judges bring their own preconceptions to the task of applying the law and thus leave personal marks on interpretation,93 judges continue to be restrained from activism “by the traditional rule, supported by all the doctrinal writers, that courts should interpret penal statutes strictly.”94 The common law tradition is different. In England, the judge-created common law was never completely superseded by statutes, let alone codes.95 Over the centuries, various attempts to enact Continental-style codes failed,96 at least in part because the proposals seemed an attack on the common law itself.97 In England, criminal law and procedure largely remained the creation of judges up to and after the time of the American Revolution.98

This attitude toward the source of criminal law carried over to the United States. At the time the Sixth Amendment was adopted, judges still had the power

191. Baudenbacher, supra note 184, at 348.
192. Under the French Penal Code of 1791, a judge “was to apply the written legal provision without any discretion at interpretation.” Ancel, supra note 169, at 2. In the Penal Code of 1810, each offense had to be “strictly defined by the law,” which resulted in statutes that contained detailed distinctions among various ways of committing offenses. Id. at 8 (referring to “the casuistry of the Special Part”). Article 408 of the Code is an example of such detailed definitions. See The Napoleon Series, France: Penal French Penal Code of 1810, http://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html (last visited June 5, 2008) (on file with the McGeorge Law Review).
193. Baudenbacher, supra note 184, at 348 (noting that since the 1970s, scholars influenced by modern hermeneutics no longer believe that legal interpretation by civilian judges is mechanical).
194. Tomlinson, supra note 141, at 20 (“[T]he courts’ adherence to that rule sometimes is rather shaky.”); see also id. at 3-4 (noting that the traditional approach continues today, although the modern code leaves room for some judicial gap filling).
195. See generally, e.g., Glendon, supra note 161, at 664-65 (noting, however, the discrepancy between theory and reality in both systems); Nollent, supra note 167, at 284 (explaining why it is difficult for systematic rules to emerge from the common law method); POPKIN, supra note 172, at 13 (noting that in sixteenth- and seventeenth-century England “[s]tatutes were understood to provide partial rather than comprehensive solutions”). But see Shapiro, supra note 161, at 429 (noting the debunking of the “old myth that continental judges decided cases solely by reference to the code and common law judges solely by stare decisis”).
196. See generally Shapiro, supra note 161, at 431-62 (tracing various failed attempts between the fifteenth- and early eighteenth-centuries). Shapiro concludes that the failure was mainly due to “general weaknesses in English constitutional arrangements” (id. at 463) and to recurrent patterns in English political life pitting conservative and moderate against “more radical” forces. Id. at 464.
197. Shapiro explains that conservative and moderate urges to “winnow[] and systematiz[e]” existing statutes led to codification proposals. However, [o]nce the subject of codification was broached in Parliament . . . more radical forces raised the issue of codification of the common law, and this almost inevitably led to, or was perceived as, a radical attack on the common law itself. At that point moderate support for any kind of codification disappeared. Id. at 464.
198. See generally, e.g., ROLLIN M. PERKINS, CRIMINAL LAW 24-25 (2d ed. 1969) (discussing the development of common law and its relation to statutes); PAUL H. ROBINSON, CRIMINAL LAW 66-67 (1997) (noting that “[t]wo hundred years ago English criminal law generally was uncodified,” being “embodied in judicial opinions”).
to define new crimes. The Supreme Court removed that power from federal judges in 1816, but did not alter their common law power to recognize and modify—and perhaps to create—substantive criminal defenses. In the states, where legislation was sparse, the power of judges to create law was essential to the operation of government in the early Republic and into the nineteenth century. As recently as 1984, state judges have used common law powers to define new crimes. In addition, even when crimes are defined by statute, judges still turn to the common law to refine and flesh out the statutory base.

While both traditions have admitted that trial judges sometimes have to create law to fill the holes left by the legislature, the civil law tradition leaves fewer holes to fill and more effectively restrains judicial exuberance in doing so.

c. The Role of Higher Courts

Both France and the majority of United States jurisdictions have two layers of courts above the trial level. However, the higher courts function quite differently in the two systems, both in terms of the powers they exercise and the judges' perceptions of their roles. First, higher courts in the two systems have


200. The federal courts have long recognized self-defense despite the lack of a general statute defining it. E.g., Starr v. United States, 153 U.S. 614 (1894); United States v. Nevels, 490 F.3d 800, 805 (10th Cir. 2007). Entrapment is another example of federal judges using common law powers to create a defense, although cloaked in the thin disguise of effecting legislative intent. E.g., Jacobson v. United States, 503 U.S. 540, 548-49 (1992); Sorrells v. United States, 287 U.S. 435, 441-42, 445-46 (1932). But see United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (noting that the necessity defense was controversial even at common law and questioning, but not deciding, whether federal courts have the power to recognize a necessity defense not provided by statute).

201. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 95-96 (National Conference of Judicial Councils 1944). Haynes notes that at the beginning of the nineteenth century in the U.S. there was "no considerable body of statute law [at the state level], and very little local precedent, and the courts of necessity acted frequently without the aid of controlling authority of any kind." Id. at 95-106. Courts were to some extent "thought of as entrusted with powers which we should now regard as purely legislative..." Id. at 96. Nevertheless, there was widespread popular hostility towards the common law and a longing for statutes that would eliminate the need for it. Id.


203. E.g., Morissette v. United States, 342 U.S. 246, 250-51 (1952) (interpreting statute as adopting the analogous common law mens rea); see also Liparota v. United States, 471 U.S. 419, 426 (1985) (using the common law to interpret a regulatory crime); FRIEDMAN, A HISTORY OF AMERICAN LAW 290 (3d ed. 2005) (noting that nineteenth-century codification meant that "judges lost the power to invent new crimes; but the common law still defined the precise meaning and application of old crimes, like rape or theft"). In addition, some states continue to recognize common law crimes but do not allow the creation of new ones; leave to the common law the definition of entire statutory crimes or isolated terms; allow the common law to fill gaps in statutory coverage; or permit judges to expand common law definitions to cover new situations. See John T. Parry, The Virtue of Necessity: Reshaping Culpability and the Rule of Law, 36 HOUS. L. REV. 397, 449 (1999).
different powers. As noted above, French intermediate courts have true appeal powers, and so they reconsider both the factual and the legal decisions of the trial court. This contrasts with intermediate appellate courts in the United States, which review only questions of law in criminal cases. In this sense, intermediate appellate courts and supreme courts in the United States are similar to one another. They are also similar to France’s highest court—the Cour de Cassation. In contrast to the intermediate courts in France, all of these courts have only the power of review: the power to evaluate legal, but not factual rulings.

The courts with review power are the bodies that ultimately can rein in any creativity shown by lower-court judges in making legal decisions. Thus, it is telling that the nature of the review power is different in the two countries. First, courts in the United States lack true review power in that they can, at times, substitute their own decision for that of the lower court. More importantly, however, is the different role that the review power plays in the two countries. The review power “serves primarily the ‘public’ interest in upholding and protecting the legal order itself.” However, the two traditions instill different notions of what it means to uphold and protect the legal order, that is, different notions of the judicial relationship toward legislation.

In the common law tradition, “upholding and protecting the legal order” has had more to do with ensuring uniformity in application of rules and less to do with adherence to a legislative mandate per se. However, the common law tradition has never taken the goal of uniformity that seriously. There was a marked lack of appellate institutions in England, and careful review of criminal

204. See supra note 153.
205. See generally, e.g., Dervieux, supra note 140, at 230-32; Frase, supra note 127, at 2-3; Sofie M.F. Geeroms, Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not be Translated . . ., 50 AM. J. COMP. L. 201 (2002); Nicolas Marie Kubicki, An Overview of the French Legal System from an American Perspective, 12 B.U. INT’L L. REV. 57 (1994); Patey, supra note 154, at 385-86; Wise, supra note 186.
206. Jolowicz, supra note 153, at 620 (noting that in a true review dynamic, the higher court looks only at alleged procedural and substantive legal errors and can only affirm the original decision or quash it and remand the case for further proceedings).
207. Id.
208. Id. In contrast, appeal serves the private interests of the parties in the outcome of the cases. See id.
209. Geeroms, supra note 205, at 219-33 (discussing the present and historical English systems). In common law countries today, whatever uniformity exists in judge-made law is achieved largely through the principle of stare decisis. E.g., LIEF H. CARTER, REASON IN LAW 37-39 (1979); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 47-50 (1988); see also GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 80-82 (2005) (explaining various principles of stare decisis and the nature of uniformity achieved through those principles); CARTER, supra, at 109-10 (noting that reliance on precedent, as opposed to natural law principles, is a relatively recent development in the common law); FLETCHER & SHEPPARD, supra, at 35 (noting same). However, for the proposition that uniformity was hard-won in the English law, see The Rule of Precedent in the Criminal Courts, 5 J. CRIM. L. 242 (1941).
210. Many of the appellate-level institutions that developed in England came after the American Revolution. For example, the Court of Crown Cases Reserved was created in 1848, and major advances in criminal appeals did not occur until the Criminal Appeal Act of 1907. See generally Orfield, supra note 77, at
convictions was not the norm in the early years of the United States.\textsuperscript{211} Indeed, the Supreme Court has frequently indicated that there is no constitutional right to appellate review of criminal convictions.\textsuperscript{212} Even today, where appellate review is widely available in the United States, the goal of uniformity is thwarted by the bar on review of acquittals,\textsuperscript{213} the fact that high courts typically have discretion not to review the legal decisions of intermediate courts,\textsuperscript{214} and a variety of requirements that limit review jurisdiction at both the intermediate and high court levels.\textsuperscript{215} On the other hand, when an appellate court does hear a case, it acts as if it were a partner to the legislature in the task of making law; for example, appellate courts in common law countries can—and do—create generally binding rules which have the power of law.\textsuperscript{216}

335-36; Geeroms, supra note 205, at 224 (noting lack of an appellate system in colonies). Writs of error, more modest reviews of a trial-court record, were not generally available in criminal cases prior to 1700; after that, they were available to misdemeanants but felons needed approval of the Attorney General to seek the writ. Rossman, supra note 157, at 525.

211. For example, federal circuit courts lacked the power to review criminal cases until 1879. Rossman, supra note 157, at 521. Supreme Court review of criminal cases was also spotty. Id. at 521-24. State courts employed writs of error, which involved very limited, even mechanical, evaluation of the face of the trial court record. Id. at 525.

212. Id. at 521 n.4 (collecting cases).

213. This situation results from the double-jeopardy bar on appeal of acquittals. See supra note 156.


215. See generally, e.g., Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure 1289-98 (4th ed. 2004) (summarizing criminal procedure rules regarding mootness, concurrent sentences, waiver or forfeiture of appeal rights, and plain error); id. at 1298-310 (discussing harmless error).

216. This power results from the practice of courts to follow relevant precedent set by higher courts in the appropriate judicial hierarchy and from stare decisis (the practice of appellate courts to adhere to their own precedent unless it is formally distinguished or overruled). See generally William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361 (1988) ("[T]oday an American court does not consider itself 'inexorably bound by its own precedents, but, in the interest of uniformity of treatment to litigants, and of stability and certainty in the law . . . . will follow the rule of law which it has established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions and that more good than harm would come by departing from precedent.'" (quoting James Wm. Moore & Robert Stephen Oglebay, The Supreme Court, Stare Decisis and the Law of the Case, 21 Tex. L. Rev. 514, 539-40 (1943))); Glendon, supra note 161, at 673-74 ("[T]he judicial function in the civil law systems has traditionally been regarded as limited to deciding particular cases, while common law courts are not only supposed to settle disputes between the parties before the court but also to give guidance as to how similar disputes should be handled in the future."); id. at 674-75 (noting that the role of common law judges includes using precedent to "lay[] down and develop[ ] broad principles" while civil law courts leave it to legislatures to "lay[] down broad rules," focusing instead on just resolving disputes); see also Eskridge, supra, at 1362 (noting that regarding stare decisis common law precedents have the strongest presumption of correctness, constitutional precedents a weaker presumption, and "statutory precedents . . . often enjoy a super-strong presumption of correctness"); Glendon, supra note 161, at 677 (discussing how stare decisis differs from judicial consideration of the "intrins[ic] merits" of case law); Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 662, 664-66 (1999) (observing that the Framers of the United States Constitution expected that federal judges would be subject to some notion of binding precedent ranging from a strict notion of stare decisis to flexibility to "correct errors in previous declarations"). But see id. at 659-60 (observing that "the doctrine of stare decisis is of relatively recent origin," in that Hale, writing in 1713, could assert that judicial pronouncements had the force of law only between the parties to the case giving rise to the rule). Lee notes that this approach resulted from the notion that
The role of review in the civil law tradition is quite different. "Upholding and protecting the legal order" has more to do with ensuring that trial judges adhere as precisely as possible to the outcome-determining standards set by the legislature. The Cour de Cassation, is required to hear all cases brought at the behest of either party. However, when it does so, the Cour de Cassation does not act as a partner to the legislature. Not only does it lack the power to issue generally binding rules of law, it is difficult for the Cour de Cassation to issue a binding rule even in the case under consideration. In fact, in its original, pure form, the French Cour de Cassation was meant "as a means for controlling the judges and preventing them from trespassing on the prerogatives of the legislature: decisions which went beyond the strict confines of written law must be annulled." In short, the role of the civil law judge is not to create new law but to "implement existing law."

Thus, the two traditions differ in the extent to which reviewing courts can and will rein in trial judges who stray from strict adherence to legislative mandates. In the civil law tradition, review functions to ensure trial court compliance with legislative mandates. While this may also happen in the common law tradition, it is just as likely that the higher court will collaborate in the process of independently interpreting and invalidating statutes and in the process of judicial law creation.

a judicial decision was regarded merely as evidence of the law, not as the law itself; this "declaratory theory" saw the judicial function as declaring the law, not making it. Id. While it is unclear exactly when stare decisis came to be accepted in English common law, most historians agree that it was in the eighteenth and early nineteenth centuries. Id. at 661. But see Baudenbacher, supra note 184, at 349-51 (noting that strict reliance on precedent by the high courts in common law countries has not been the case in recent years); Glendon, supra note 161, at 673-74 (indicating that the differences in traditions may be breaking down in modern times as common law judges focus more on individualized justice than on broad principles and so behave more like civil law courts).

217. Damaška, Structures, supra note 123, at 484; Geeroms, supra note 205, at 205. Geeroms notes that the Cour de Cassation "was established to ensure the correct application of the legislation in force, and to preserve its uniformity." Id. But see id. at 206 (noting that the Cour de Cassation today has an expanded role that includes ensuring uniformity in case law).

218. C. PR. PÉN. §§ 546-547 (regarding appeals from police court); id. §§ 496-497 (regarding appeals from correctional court); id. § 567 (regarding review by the cassation court). See generally Geeroms, supra note 205, at 204-08 (regarding the history of the cassation court).

219. The opinions of the Cour de Cassation are technically advisory. On remand to a different panel of the lower court, that court is free to disregard the advice. Originally, the decision of the remand court was final as to the parties to the case. Since 1837, however, if the remand court disagrees with the cassation panel, the case goes up to the Cour de Cassation again, where a full court considers the legal issues. It is not bound by the decision of the earlier cassation panel. The full panel may either remand the case yet again or make a final decision that is binding on the lower courts considering that case. See, e.g., Baudenbacher, supra note 184, at 350-51; Kubicki, supra note 205, at 63-68; Jolowicz, supra note 153, at 621-22.

220. Jolowicz, supra note 153, at 621.

221. Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 6. But see Baudenbacher, supra note 184, at 349-51 (noting that courts in civil law countries increasingly rely on precedent, but admitting that the traditions continue to deal with precedent differently).
4. Socialization of Judges

The material presented in Subsection 3 seems to support the stereotype that common law judges are problem-solving law creators and civil law judges are technocrats applying legislative mandates. However, such rigid notions may now be out of date. In France, for example, judges have some power to create interstitial rules, and the United States has moved from a context in which judges were the main source of substantive criminal law rules to one in which legislation largely occupies the field. Thus, it is more interesting to ask how active and imaginative judges tend to be in exercising their power to interpret or create rules, as opposed to being strongly deferential to legislative goals and policies.

The answer to this question has much to do with expectations— influenced by tradition and stereotypes—regarding the judicial role. To the extent that judges are seen—and see themselves—as legitimate sources of legal rules, trial judges are more likely to take advantage of whatever opportunities their system provides for interpreting and creating law. In addition, appellate judges are more likely to tolerate, if not encourage, trial judges in taking such steps. On the other hand, if judges are trained to see their role as merely applying legislative mandates, appellate judges will police deviations from those mandates, and trial judges are less likely to risk such deviations. Thus, it probably is not surprising that the two traditions differ in the socialization of their judges. The divergence results from significant differences in both basic legal training and the career path to judgeship.

The formation of the judge’s basic role expectations, and training in legal techniques to fulfill those expectations, normally begins in law school. Law students in the United States focus on case law rather than statutes or academic commentary. Memorization of legal rules and development of overarching logical structures play a small part in an American law student’s preparation. Instead, students practice manipulating rules of law in the context of ever-changing factual hypotheticals. Students quickly learn that there is not normally one “right” answer to the legal problem presented by a set of facts. The goal is to convince the court to find the most just solution for the facts of the case at hand.

222. E.g., Damaška, Structures, supra note 123, at 486 (noting that civil law judges must be technical experts who have mastered bureaucratic skills); id. at 507, 521-23 (discussing behavior expectations); id. at 509-11 (contrasting the problem-solving role and the technical role); John Henry Merryman, Legal Education There and Here: A Comparison, 27 STAN. L. REV. 859, 866-67 (1975) (noting that “[i]n the United States, the practicing lawyer or judge is seen as a sort of social engineer, as a person specially equipped to perceive and attempt to solve social problems” and that a civil law judge “is seen as a technician, as the operator of a machine designed and built by others”).

223. See generally Muñiz-Argüelles & Fraticelli-Torres, supra note 147.

224. However, the common law tradition has long tolerated non-legally trained judges at the lower court levels. See, e.g., Adrian Vermeule, Should We Have Lay Justices?, 59 STAN. L. REV. 1569, 1573 (2007) (“In the United States, lay judges of various sorts sit in some forty states, although usually on low-stakes matters, and in some cases subject to de novo review by a lawyer-judge.”). The English tradition of lay judges is even more widespread. See, e.g., id.
Thus, professors push students to critique the wisdom of particular statutes and judicial decisions and to be prepared to use the resulting insights to make arguments in practice. Notably, this basic legal education, leading to a Juris Doctor degree, is the only training formally required for a common law judge.225

However, few graduates become judges immediately upon leaving law school. Instead, most judges in common law systems begin their careers practicing law. They do not become judges until they have demonstrated their skills as practitioners, their dedication to community service, and, in some places, their political acumen effectively enough to be appointed by a political body or elected by the public.226 Once on the bench, they can be voted out of office or removed for cause.227 Although their legal decisions can be reversed on appeal, the competence of their work is not evaluated by higher-ups in a bureaucracy.228

The story is completely different for judges in the civil law tradition. At school, law students focus on abstract rules and principles,229 which they memorize along with the statutes reflecting them.230 They place these concepts into a comprehensive tree-like diagram of the law as a whole—a “legal grammar”—supported by an understanding of the jurisprudence behind the structure.231 Students learn to test both legal analysis and potential changes in the


228. Holland & Gray, supra note 227, at 128.

229. See, e.g., Nollent, supra note 167, at 287 (noting that French students learn a set of rules and principles, while English students learn a skill); see also Damaška, Law School, supra note 184, at 1365 (noting that law students in civil law countries are trained to use both legal concepts that are more rigorous, or less amorphous than those used in the United States and also concepts that are “more general, sometimes almost cathedral-like”).

230. This observation is based on the author’s work with law students in Venezuela, Mexico, Spain, and Italy.

231. Damaška, Law School, supra note 185, at 1365-68 (discussing the development of “[t]he [g]rammar of [l]aw”); see also id. at 1365 (noting that law students in civil law countries are trained to use legal concepts that are more rigorous, or less amorphous than those used in the United States; at the same time, they would also learn about “more general, sometimes almost cathedral-like concepts”). For an example of a civil law legal tree diagram, see MARY ANN GLENDON, PAOLO G. CAROZZA, & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS 139 (Thomson/West 3d ed. 2007).
law by the logic that flows from the legal grammar. They are taught to assume a relatively closed, orderly system displaying "logical consistency over relatively wide areas." This approach results in "norm saturation" and an unbending attitude toward the norms. Professors help students see how the codes and statutes fit into this structure, but they do not encourage students to use the law creatively to resolve factual problems. Indeed, facts are rarely, if ever, mentioned. This may be because, in practice, facts will not drive the analysis. The goal will be to figure out the proper statutory and conceptual category for the case at hand and fit the facts into it. This approach prevails even if the fit does not serve nuanced individualized justice, as certainty and uniformity are higher goals. Thus, the best student will not be the creative problem solver, but rather the one who finds "the 'right' answer to the problem at hand."

The differences in training continue after law school in the career path to the bench. Becoming a judge in the civil law tradition involves merit-based competition, rigid training, and a bureaucratic approach to advancement. In

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233. Id. at 1370.
234. See Damaška, Structures, supra note 123, at 505-09.
235. Damaška, Law School, supra note 185, at 1367-68 ("Statutory or code provisions are systematically presented on a level which seems to provide only vague guidelines for the solution of actual cases."); id. at 1368 (observing that the student sees little attention paid to the practical operation of legal rules, including "the influence of procedural considerations on substantive issues" and that students are not generally taught to engage in problem solving); Nollent, supra note 167, at 287 (indicating that even when presented with a problem, students learn to explore only one or two avenues of resolution).
236. Damaška, Law School, supra note 185, at 1368 (noting that if the professor refers to specific cases at all, it will be "as illustrations of how the court evolved legal rules, adapted to the solution of the case, from the more general ones found in the code or statute").
237. Baudenbacher, supra note 184, at 352 (remarking on the "grudging manner in which the facts of the case are treated in continental judgments" and noting that "[t]he French Cour de Cassation often only makes allusions to the facts" (quoting Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (Tony Weir trans., 3d ed. 1998))).
238. Id. at 336. Nollent, supra note 167, at 283 (noting that French lawyers have a conceptual, abstract view of law as a series of fundamental principles, not as a mechanism to resolve disputes).
239. Damaška, Structures, supra note 123, at 483 ("[T]he hierarchical model is characterized by the high premium placed on certainty of decisionmaking."). According to Damaška, "[w]henever the consideration of individualized circumstances prevents the conversion of the bases of the particular decision into a general, certain formula, such consideration must be forgone." Id.; see also Damaška, Law School, supra note 185, at 1370 (noting that the graduate of civil law training "will believe that legal discourse of real importance proceeds on the level of rules he is familiar with, and that emphasis on factual questions and too much concern about justice in a given case betray a non-technical, layman's approach . . .").
240. Damaška, Law School, supra note 185, at 1369 (noting that the pedagogy stresses "[l]ogical consistency within the array" of rules, principles, and legal grammar, and little argument about what might be the best rule or argument from a policy standpoint).
241. See generally Damaška, Structures, supra note 123, at 486. See also Haynes, supra note 201, at 100-01 (noting that despite the democratic revolutions of the mid-nineteenth century, European countries "preserved the idea that judges should be competently selected, and free of political pressure" and contrasting the situation with that in the United States). France experimented with the common law approach to judicial selection in the 1790s, but concluded that unsuitable people were made judges. Id. at 158 (noting the election of painters, store clerks, and a gardener). The Constitution of 1799 made judges appointive, "as they have
France, for example, law students who want to enter the judiciary take an exam at the completion of their studies for the basic law degree. The judicial exam is comprehensive and competitive, and only those with the best results will be asked to join the government bureaucracy for judges. This selection process reflects "the idea that judges should be competently selected, and free of political pressure." Once selected, the new judge will undergo rigorous specialized judicial training and will then become a career civil servant in a hierarchical bureaucracy. Although promotion through the ranks of this bureaucracy can be based on politics, it is mainly based on competence in following role expectations.

We have briefly explored the training, selection, and advancement of judges because such factors influence a judge's sense of independence. Judges in the United States—including at the trial level—are apt to feel freer to depart from

remained ever since.” Id. at 158-59 (noting that judges were also “made irremovable, except for misconduct”).

242. "The French system of judicial organization (as finally evolved), and of judicial selection and tenure, have been copied with more or less exactness by most of Europe excepting England." Id. at 161; see also Damaška, Structures, supra note 123, at 486 (describing recruitment and training in the civil law tradition generally); Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 9-11 (noting nature of differences in Spain and Germany).

243. Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 11-17 (describing France and Spain); Haynes, supra note 201, at 163. But see Muñiz-Argüelles & Fraticelli-Torres, supra note 140, at 13-14 (describing alternate route used by some French judges); see also Haynes, supra note 201, at 164 (writing in the 1930s and describing this alternate approach).

244. In France, this bureaucracy, the Magistrature, includes both judges and prosecutors and has done so as far back as 1809 if not before. Coudert, supra note 79, at 330-32. "The magistrature consists not only of judges in our sense but of government attorneys (called collectively the parquet), resembling somewhat our public prosecutors. The members of the magistrature pass freely from the bench to the parquet and back again to the bench.” Haynes, supra note 201, at 164.

245. Haynes, supra note 201, at 100-01 (noting that this approach survived the democratic revolutions of the mid-nineteenth century and contrasting the situation with that in the United States); see also id. at 158-61 (tracing the fate of the Revolutionary-era French experiment in elected judges and the rejection of a proposal to elect judges in the 1880s).

246. David Applebaum, Cogestion and Beyond: Change and Continuity in Modern French Legal Education—A Design for U.S. Law Schools, 10 NOVA L.J. 297 (1985-1986) (focusing on post-graduate education of magistrates); Damaška, Structures, supra note 123, at 486; Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 10, 17-20. But see Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 11, 22-25 (explaining that in Germany prospective judges receive specialized training during law-school and mandatory internships).

247. E.g., Haynes, supra note 201, at 163. Haynes notes that, [judges] enter upon their judicial duties generally at the age of about 25. They spend their lives in public service, starting in the smaller courts at very low salaries with the prospect of promotion, as the years go by, from rank to rank; and the very remote possibility of eventually reaching the apex of the whole judicial structure, the Court of Cassation.

Id.

248. “[P]romotion is the very life blood of a French judge; and until very recently he was largely dependent for promotion on the good will of a political officer, namely the Minister of Justice.” Id. at 164. Haynes traces the system at id. at 164-65. Political pressure was a part of the system and influenced judicial behavior until changes in 1934. Id. at 165-67.

249. Id. at 167-68 (noting that the French system as of 1934 takes politics out of the picture); see also Damaška, Structures, supra note 123, at 486 (noting that promotion depends upon evaluations by supervisors).
strict legislative mandates than their civil law counterparts because the system trains and supports judges in creative problem solving. As one commentary has noted, in civil law systems,

it is felt that courts in general and trial courts in particular, should shy away from exercising a lawmaking function. Education, history, recruitment at an early age, and the fact that career advancement depends upon the views of others who may frown on judicial lawmaking inhibit the European judge far more than the fear of reversal on review in the United States, where judges are sometimes appointed precisely because of their judicial activism.250

IV. RETURN TO THE COMMON LAW TRADITION

There is a remarkable similarity between the goals of criminal adjudication in the civil law tradition and the goals of the structured guideline schemes thrown out by the Supreme Court.251 Those guideline schemes were meant to achieve predictability and uniformity in sentencing. Only some facts about the situation or the defendant were deemed relevant. Otherwise, "[w]henever the consideration of individualized circumstances prevents the conversion of the bases of the particular decision into a general, certain formula, such consideration must be forgone."252 Although this statement fits the structured-guideline philosophy, its author was describing the civil law approach.

The survey undertaken in Section III showed that the structure, norms, and training of the civil law tradition work together to support the goals of predictable, uniform, but not necessarily individualized justice. This result is achieved in large part through close adherence to comprehensive rules and categories established by legislative mandates.253 The model involves narrowly controlled fact finding at the trial level, regardless of who the fact finder is.254 Judges lack broad powers—or even many opportunities—to interpret statutes,255 let alone declare them invalid,256 and high courts focus on ensuring adherence to legislative mandates.257 Not surprisingly, the training, selection, and advancement of judges reinforce these norms and role expectations.258

The mechanisms adopted by many of the structured sentencing schemes echoed the practices of the civil law tradition. The United States Sentencing

250. Muñiz-Argüelles & Fraticelli-Torres, supra note 147, at 7.
251. See supra notes 18-23.
252. Damaška, Structures, supra note 123, at 483.
253. See supra notes 186-94.
254. See supra Part III.B.2.
255. See supra Parts III.B.3.a and b.
256. See supra note 164.
257. See supra note 219.
258. See supra Part III.B.4.
Guidelines, for example, were a comprehensive, code-like structure complete with specific application rules. Fact finding was narrowly controlled by requiring judges to explain their decisions and by allowing de novo review. Judges who felt that the mandatory sentences frustrated the goal of individualized justice could do nothing about that result.

On the other hand, one system of judicial sentencing validated by the Court is fully in line with the common law tradition of relative judicial independence to administer individualized justice. This system—true indeterminate sentencing—involves no legislative mandates and thus maximizes the common law tradition of a judiciary that can act as a circuitbreaker in the machinery of justice. The other alternative approved by the Court is advisory guidelines. The ability—and willingness—of judges to be circuitbreakers in this system is less clear. Under the federal advisory guideline approach, for example, the judge must calculate the guideline sentence and explain on the record the factual and legal reasons for following it or not. In addition, both the prosecution and the defense can seek review of the resulting sentence. If varying from the guidelines is presumed to be “unreasonable,” leading to a reversal of the trial judge’s sentence, advisory guidelines closely resemble the civil law approach. That is why it is important that the Supreme Court rejected such an approach. Under the emerging doctrine, the nature of the review for reasonableness brings this advisory system firmly back into the common law camp, as the guidelines no longer restrict the judge’s ability to decide which factors are relevant to sentencing or how to weigh them, and the judge can even disagree with legislative policy decisions. While this is not indeterminate sentencing, it is mighty close. It puts the judge back into the problem-solver mode, consistent with tradition and training.

Although the shift to advisory guidelines may return sentencing to the common law tradition, has something been lost in the process? Legislatures adopted structured sentencing to further uniformity and predictability and because of disillusionment with the goal of rehabilitation. Advisory guidelines allow judges to focus on rehabilitation, and they certainly threaten a reduction in uniformity and predictability. The criminal justice system generally may suffer

259. See, e.g., UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL.
260. This requirement was similar to civil law “justified” verdicts. See supra note 147.
261. See supra note 59.
262. See generally supra notes 8-13 and accompanying text.
263. See supra note 20.
265. See supra notes 62-68.
266. See supra note 61.
267. Courts merely have to attend to broad sentencing goals. See Booker, 543 U.S. at 259-60.
269. See supra notes 16-17.
270. Booker, 543 U.S. at 263 (admitting that reasonableness review will not “produce the uniformity
from such a reduction, and individualized sentencing does not necessarily help defendants either. However, it remains to be seen whether judges, socialized into a guidelines approach and subject to reasonableness review, actually produce great disparities. In addition, the Court has emphasized that advisory guidelines are not the only mechanisms available to legislatures. Jury determination of the sentencing facts might increase the likelihood (although not completely ensure) that legislative mandates would be followed. Neither of these models is as efficient or uniform as mandatory, determinate sentencing. However, if the Sixth Amendment right to jury trial really does include the right to a trial court reflecting the common law tradition, legislatures may have to settle for whichever of these models seems to minimize its concerns.

V. CONCLUSION

The legislatively mandated determinate sentencing systems adopted in the late twentieth century represented a move toward the civil law tradition of courts as mere conduits for the implementation of legislative will. As such, they were out of step with the common law tradition of trial court discretion that had operated to allow judges and juries to apply individualized justice even when doing so would thwart legislative mandates. Historically, that discretion lay in the hands of both juries and judges, and it operated at both the adjudication and sentencing phases of trial. The Supreme Court reinstated that tradition by requiring sentencing to be done by a jury or by a judge with substantial discretion. The history and comparative study of discretion in the criminal justice system resolve the puzzle of why the latter option—sentencing by a judge—satisfies the Sixth Amendment right to jury trial.

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271. Judges with discretion can, of course, impose a sentence higher than the one advised by the guidelines. This may be a real danger for some types of defendants, especially in jurisdictions where judges are elected and therefore more subject to political pressure.

272. Jury nullification would presumably still operate. See supra notes 75-78 and accompanying text; supra Part III.B.2.