

# **Sentencing Law and Policy**

## **Cases, Statutes & Guidelines**

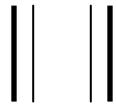
***2005 Interim Supplement:  
The Blakely/Booker Revolution***

January 24, 2005

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**2005 Interim Supplement for**  
**Sentencing Law and Policy**  
**Cases, Statutes, and Guidelines**

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## A. The Jury as Sentencing Fact Finder

June 24, 2004 witnessed a revolution in the law of sentencing. The name of the revolution was *Blakely* v. Washington. Whether that revolution will topple old sentencing regimes, restructure them, or simply change daily life under them remains to be seen.

These materials introduce *Blakely* and its aftermath, including the Supreme Court's decision applying *Blakely* to the federal sentencing guidelines in United States v. Booker in January 2005. As you read *Blakely* and the subsequent materials, consider at each step the most expansive and the narrowest possible reading of the cases, and the corresponding implications for sentencing law and practice.

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### RALPH HOWARD BLAKELY, JR. v. WASHINGTON 124 S. Ct. 2531 (2004)

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SCALIA, J.

Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." We consider whether this violated petitioner's Sixth Amendment right to trial by jury.

#### I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping. Upon

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reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use of a firearm. Petitioner entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

The case then proceeded to sentencing. In Washington, second-degree kidnaping is a class B felony. State law provides that [a person convicted of a class B felony faces a maximum punishment of ten years confinement]. Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive.... When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. A reviewing court will reverse the sentence if it finds that under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.

Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases.

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, [and] adhered to his initial determination of deliberate cruelty. Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

## **II**

This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "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." This rule reflects two longstanding tenets of

common-law criminal jurisprudence: that the “truth of every accusation” against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,” 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that “an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing....

*Apprendi* involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed “with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” In *Ring v. Arizona*, 536 U.S. 584, 592-593, and n. 1 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant’s constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.

In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with “deliberate cruelty.” The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant “statutory maximum” is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account

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factors other than those which are used in computing the standard range sentence for the offense,” State v. Gore, 21 P.3d 262, 277 (Wash. 2001), which in this case included the elements of second-degree kidnaping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The “maximum sentence” is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

The State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Williams v. New York*, 337 U.S. 241 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. We specifically noted that the statute “does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense.” 477 U.S. at 82. *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. The judge could have sentenced the defendant to death giving no reason at all. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring* ), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.<sup>8</sup> Because the State’s sentencing procedure did not comply with the Sixth Amendment, petitioner’s sentence is invalid.<sup>9</sup>

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<sup>8</sup> Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

<sup>9</sup> The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington’s sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.

### III

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. 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.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. The jury could not function as circuit-breaker 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.

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a “tail which wags the dog of the substantive offense.” *McMillan*, 477 U.S., at 88. What this means in operation is that the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. Petitioner's 90-month sentence exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Whether the Sixth Amendment incorporates this manipulable

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standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

### IV

By reversing the judgment below, we are not ... finding determinate sentencing schemes unconstitutional. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. Nothing we have said impugns those salutary objectives.

Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial infringement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* deserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate

judicial-factfinding schemes would do, given the choice between the two alternatives. Justice O'Connor simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State v. Gould*, 23 P.3d 801, 809-814 (Kan. 2001), the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. The result was less, not more, judicial power.

Justice Breyer argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. But nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Nor do we see any merit to Justice Breyer's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal.

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as

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much as life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A), (D),<sup>13</sup> based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice Breyer identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

The implausibility of Justice Breyer's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side....

Justice Breyer also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining) is that the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place....

Justice Breyer's more general argument—that *Apprendi* undermines alternatives to adversarial factfinding—is not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "non-adversarial" truth-seeking processes supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury....

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that

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<sup>13</sup> To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

course. 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 strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter....

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State. The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

O'CONNOR, J., dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional; for, as residents of "*Apprendi-land*" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dissent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal Government,

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employed an indeterminate sentencing scheme.... This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of making the criminal justice system “accountable to the public,” and ensuring that “the punishment for a criminal offense is proportionate to the seriousness of the offense [and] commensurate with the punishment imposed on others committing similar offenses.” Wash. Rev. Code Ann. § 9.94A.010. The Act neither increased any of the statutory sentencing ranges for the three types of felonies ... nor reclassified any substantive offenses. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise labyrinthine sentencing and corrections system that lacked any principle except unguided discretion.

## **II**

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington’s reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation. The ultimate sentencing determination could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant’s crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions. Washington’s move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in

sentencing across the State.

[Extension] of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range....

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury....

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings.

### III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a

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nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints—what the majority calls the “the law must not go too far” approach. If indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former....

### IV

The consequences of today’s decision will be as far reaching as they are disturbing. Washington’s sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. Today’s decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.<sup>2</sup>

The practical consequences for trial courts, starting today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

[The] “extraordinary sentence” provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State’s “real facts” doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. If the Washington scheme does not

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<sup>2</sup> The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant’s sentence was at issue. Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of the Court’s case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra*. Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

comport with the Constitution, it is hard to imagine a guidelines scheme that would.... What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. I respectfully dissent.

KENNEDY, J., dissenting.

... The Court, in my respectful submission, disregards the fundamental principle under our constitutional system that different branches of government converse with each other on matters of vital common interest.... Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.

Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system, including judges, pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems....

To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution. [The] case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience. It does so under a faintly disguised distrust of judges and their purported usurpation of the jury's function in criminal trials.

[Because] the Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government that has marked sentencing reform on both the state and the federal levels for more than 20 years, I dissent.

BREYER, J., dissenting.

The Court makes clear that it means what it said in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In its view, ... a jury must find, not

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only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime.

It is not difficult to understand the impulse that produced this holding. Imagine a classic example—a statute (or mandatory sentencing guideline) that provides a 10-year sentence for ordinary bank robbery, but a 15-year sentence for bank robbery committed with a gun. One might ask why it should matter for jury trial purposes whether the statute (or guideline) labels the gun’s presence (a) a *sentencing fact* about the way in which the offender carried out the *lesser* crime of ordinary bank robbery, or (b) a factual *element* of the *greater* crime of bank robbery with a gun? If the Sixth Amendment requires a jury finding about the gun in the latter circumstance, why should it not also require a jury to find the same fact in the former circumstance?

[The] difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the Sixth Amendment always requires identical treatment of the two scenarios. That jump is fraught with consequences that threaten the fairness of our traditional criminal justice system; it distorts historical sentencing or criminal trial practices; and it upsets settled law on which legislatures have relied in designing punishment systems....

### I

... As a result of the majority’s rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority’s Sixth Amendment interpretation cannot be right.

### A

A first option for legislators is to create a simple, pure or nearly pure “charge offense” or “determinate” sentencing system. In such a system, an indictment would charge a few facts which, taken together, constitute a crime, such as robbery. Robbery would carry a single sentence, say, five years’ imprisonment....

Such a system assures uniformity, but at intolerable costs. First, simple determinate sentencing systems impose identical punishments on people who committed their crimes in very different ways. When dramatically different conduct ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently....

Second, in a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi*, to the extent it results in a return to determinate sentencing, threatens serious unfairness.

**B**

A second option for legislators is to return to a system of indeterminate sentencing.... When such systems were in vogue, they were criticized, and rightly so, for producing unfair disparities, including race-based disparities, in the punishment of similarly situated defendants. The length of time a person spent in prison appeared to depend on “what the judge ate for breakfast” on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence. And under such a system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime—findings that might not have been made by a “preponderance of the evidence,” much less “beyond a reasonable doubt.”

Returning to such a system would diminish the “reason” the majority claims it is trying to uphold. It also would do little to ensure the control of what the majority calls “the people,” *i.e.*, the jury, “in the judiciary,” since “the people” would only decide the defendant’s guilt, a finding with no effect on the duration of the sentence. While “the judge’s authority to sentence” would formally derive from the jury’s verdict, the jury would exercise little or no control over the sentence itself. It is difficult to see how such an outcome protects the structural safeguards the majority claims to be defending.

**C**

A third option is that which the Court seems to believe legislators will in fact take. That is the option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi*’s dictates. Judges would be able to depart *downward* from presumptive sentences upon finding that mitigating factors were present, but would not be able to depart *upward* unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. The majority argues, based

on the single example of Kansas, that most legislatures will enact amendments along these lines in the face of the oncoming *Apprendi* train. It is therefore worth exploring how this option could work in practice, as well as the assumptions on which it depends.

1

This option can be implemented in one of two ways. The first way would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type of victim, presence of violence, degree of injury, use of gun, and so on. A legislature, for example, might enact a robbery statute, modeled on robbery sentencing guidelines, that increases punishment depending upon (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc. Cf. United States Sentencing Commission, Guidelines Manual § 2B3.1.

This possibility is, of course, merely a highly calibrated form of the “pure charge” system discussed in Part I-A, *supra*. And it suffers from some of the same defects. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct. The artificial (and consequently unfair) nature of the resulting sentence is aggravated by the fact that prosecutors must charge all relevant facts about the way the crime was committed before a presentence investigation examines the criminal conduct, perhaps before the trial itself, *i.e.*, before many of the facts relevant to punishment are known.

This “complex charge offense” system also prejudices defendants who seek trial, for it can put them in the untenable position of contesting material aggravating facts in the guilt phases of their trials. Consider a defendant who is charged, not with mere possession of cocaine, but with the specific offense of possession of more than 500 grams of cocaine. Or consider a defendant charged, not with murder, but with the new crime of murder using a machete. Or consider a defendant whom the prosecution wants to claim was a “supervisor,” rather than an ordinary gang member. How can a Constitution that guarantees due process put these defendants, as a matter of course, in the position of arguing, “I did not sell drugs, and if I did, I did not sell more than 500 grams” or, “I did not kill him, and if I did, I did not use a machete,” or “I did not engage in gang activity, and

certainly not as a supervisor” to a single jury? The system can tolerate this kind of problem up to a point (consider the defendant who wants to argue innocence, and, in the alternative, second-degree, not first-degree, murder). But a rereading of the many distinctions made in a typical robbery guideline, suggests that an effort to incorporate any real set of guidelines in a complex statute would reach well beyond that point.

The majority announces that there really is no problem here because “States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty” and defendants may stipulate to the relevant facts or consent to judicial factfinding. [The] fairness problem arises because States may very well decide that they will *not* permit defendants to carve subsets of facts out of the new, *Apprendi*-required 17-element robbery crime, seeking a judicial determination as to some of those facts and a jury determination as to others. Instead, States may simply require defendants to plead guilty to all 17 elements or proceed with a (likely prejudicial) trial on all 17 elements....

## 2

The second way to make sentencing guidelines *Apprendi*-compliant would be to require at least two juries for each defendant whenever aggravating facts are present: one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence. Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources. In the context of noncapital crimes, the potential need for a second indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay. Indeed, cost and delay could lead legislatures to revert to the complex charge offense system....

The majority ... suggests that a two-jury system has proved workable in Kansas. And that may be so. But in all likelihood, any such workability reflects an uncomfortable fact, ... called “plea bargaining.” The Court can announce that the Constitution requires at least two jury trials for each criminal defendant—one for guilt, another for sentencing—but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.

What will be the consequences of the Court’s holding for the 90% of defendants who do not go to trial? The truthful answer is that we do not know. Some defendants may receive bargaining advantages if the increased cost of the “double jury trial” guarantee makes prosecutors

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more willing to cede certain sentencing issues to the defense. Other defendants may be hurt if a “single-jury-decides-all” approach makes them more reluctant to risk a trial—perhaps because they want to argue that they did not know what was in the cocaine bag, that it was a small amount regardless, that they were unaware a confederate had a gun, etc.

At the least, the greater expense attached to trials and their greater complexity, taken together in the context of an overworked criminal justice system, will likely mean, other things being equal, fewer trials and a greater reliance upon plea bargaining—a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints. At the same time, the greater power of the prosecutor to control the punishment through the charge would likely weaken the relation between real conduct and real punishment as well.... The majority’s only response is to state that “bargaining over elements ... probably favors the defendant,” adding that many criminal defense lawyers favor its position. But the basic problem is not one of “fairness” to defendants or, for that matter, “fairness” to prosecutors. Rather, it concerns the greater fairness of a sentencing system that a more uniform correspondence between real criminal conduct and real punishment helps to create. At a minimum, a two-jury system, by preventing a judge from taking account of an aggravating fact without the prosecutor’s acquiescence, would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments reflect a convicted offender’s real criminal conduct, rather than that portion of the offender’s conduct that a prosecutor decides to charge and prove.

Efforts to tie real punishment to real conduct are not new.... For more than a century, questions of *punishment* (not those of guilt or innocence) have reflected determinations made, not only by juries, but also by judges, probation officers, and executive parole boards. Such truth-seeking determinations have rested upon both adversarial and non-adversarial processes. The Court’s holding undermines efforts to reform these processes, for it means that legislatures cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform....

### **D**

Is there a fourth option? Perhaps. Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts. But political impediments to legislative action make such rewrites difficult to achieve; and it is difficult to see why the Sixth Amendment would require legislatures to undertake them.

It may also prove possible to find combinations of, or variations upon, my first three options. But I am unaware of any variation that does not involve (a) the shift of power to the prosecutor (weakening the connection between real conduct and real punishment) inherent in any charge offense system, (b) the lack of uniformity inherent in any system of pure judicial discretion, or (c) the complexity, expense, and increased reliance on plea bargains involved in a “two-jury” system. The simple fact is that the design of any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority’s reading of the Sixth Amendment makes the effort to find those compromises—already difficult—virtually impossible....

#### IV

Now, let us return to the question I posed at the outset. Why does the Sixth Amendment permit a jury trial right (in respect to a particular fact) to depend upon a legislative labeling decision, namely, the legislative decision to label the fact a *sentencing fact*, instead of an *element of the crime*? The answer is that the fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depends upon the legislature’s possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature’s power in this respect, as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution’s greater fairness goals.

To say this is not simply to express concerns about fairness to defendants. It is also to express concerns about the serious practical (or impractical) changes that the Court’s decision seems likely to impose upon the criminal process; about the tendency of the Court’s decision to embed further plea bargaining processes that lack transparency and too often mean non-uniform, sometimes arbitrary, sentencing practices; about the obstacles the Court’s decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures’ ability to make democratic legislative decisions. Whatever the faults of guidelines systems—and there are many—they are more likely to find their cure in legislation emerging from the experience of, and discussion among, all elements of the criminal justice community, than in a virtually unchangeable constitutional decision of this Court....

## Notes

1) *Breadth of the holding.* The decision in *Blakely* is so consequential not only because it defines (or perhaps redefines) the reach of *Apprendi*, but also because the opinion's sweeping dicta suggests that many traditionally judge-centered sentencing procedures may now be constitutionally suspect. The *Blakely* decision has already disrupted and required modification of some sentencing guideline systems that rely on judicial fact-finding, as is discussed in more detail in Section III of this supplement. Justice Scalia's breathtakingly bold assertion that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment" could ultimately prove to be even more far-reaching. Restitution orders, revocation of probation and parole, and a host of other punishment decisions that rest on non-jury fact-finding may be subject to constitutional challenge.

Do you think lower courts should try to read *Blakely* narrowly to limit its impact on existing sentencing structures? Notably, most lower federal and state courts interpreted *Apprendi* narrowly, see Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. Crim. L. & Criminology 1 (2003). Should the broad and powerful dicta in *Blakely* be viewed as a message to lower courts to interpret the Sixth Amendment more broadly?

2) *Prior criminal record exception.* As a result of the decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a "prior conviction" exception has been built into the Sixth Amendment's application in *Apprendi* and *Blakely*. Both *Apprendi* and *Blakely* state that its rule requiring sentence-enhancing facts to be proven to a jury beyond a reasonable doubt or admitted by the defendant only applies to facts "other than the fact of a prior conviction."

The theoretical soundness of this exception has been widely questioned. See Kyron Huigens & Danielle Chinea, "Three Strikes" Laws and *Apprendi*'s Irrational, Inequitable Exception for Recidivism, 37 Crim. L. Bull. 575 (2001). And Justice Thomas' own comments about *Almendarez-Torres* in his *Apprendi* concurrence suggest that there are no longer five votes on the High Court in support of this exception. Justice Scalia's opinion for the *Blakely* Court did not even deign to mention *Almendarez-Torres*. Nevertheless, the exception persists.

In the wake of *Blakely*, lower state and federal courts have split over the scope and application of the prior conviction exception, debating whether only the fact of a prior conviction or other related facts (such as a defendant's status on probation) fall within the exception. These issues are covered in more detail in a state case at the end of this supplement.

3) *Minimum sentences, discretionary sentencing and mitigating adjustments.* Despite the breadth of *Blakely*'s holding and dicta, the ruling still allows judicial fact-finding in an array of sentencing settings. The *Blakely* decision formally distinguished United States v. Harris, 536 U.S. 545 (2002), which permits judges to find those facts which increase *minimum* sentences. The *Blakely* decision also formally distinguished Williams v. New York, 337 U.S. 241 (1949), which permits judge to find facts in the course of making discretionary sentencing determinations. In addition, the *Apprendi* and *Blakely* rulings apply only to those facts that increase sentences; judges may still find those facts which the law provides as the basis for decreasing sentences.

Could a jurisdiction, drawing on these gaps in the reach of the *Blakely* rule, construct a sound sentencing system which is still administered principally through judicial fact-finding? Should a jurisdiction aspire to do so?

4) *The nature of Blakely admissions.* Recall that Justice Scalia's opinion in *Blakely* speaks of judges having authority to enhance available sentences based only on "the facts reflected in the jury verdict or admitted by the defendant." The *Blakely* Court does not elaborate on what qualifies as a sufficient factual "admission" by a defendant to allow for an enhanced sentence. In United States v. Thomas, 389 F.3d 424, 426 (3d Cir. Nov. 26, 2004), the Third Circuit detailed the ambiguities in the Supreme Court's opaque account of this key issue concerning *Blakely*'s limits:

There are at least four possible interpretations of the language "facts ... admitted by the defendant." First, that language could refer to facts set forth in the indictment to which the defendant pled guilty. Second, it could refer to facts set forth in the written plea agreement entered into by the defendant. Third, it could be limited to the facts necessary to prove a violation of the offense charged in the indictment. Fourth, it could refer to facts admitted in the colloquy with the District Court.

Based on the facts before it, the *Thomas* court was able to avoid resolving this matter. But in a number of state and federal decisions since *Blakely*, lower courts have given various interpretations as to what sorts of admissions are constitutionally sufficient for *Blakely* purposes.

5) *Retroactivity and Blakely's impact on past cases.* An extremely consequential and complicated question is whether *Blakely* might apply to cases in which a sentence was imposed before the decision was rendered. In Teague v. Lane, 489 U.S. 288 (1989), the

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Supreme Court set out the modern ground-rules for the retroactive application of its constitutional pronouncements. Reduced to its essence, *Teague* entails that *Blakely* is clearly applicable to all cases that were not yet “final” (meaning that direct appeals were still pending) on the date the decision was rendered (June 24, 2004), but *Blakely* likely will not be applicable to any cases that were final on that date.

Many lower courts have already declared that *Blakely* is not to be applied to cases that became final before June 24, 2004; in these rulings, courts have often relied heavily on the Supreme Court’s ruling in *Schrivo v. Summerlein*, 124 S. Ct. 2519 (2004). Decided on the same day as *Blakely*, *Schrivo* held that the Supreme Court’s decision in *Ring*, which extended *Apprendi* to the death penalty context, was not to be applied retroactively. However, for a variety of doctrinal reasons, *Schrivo* does not conclusively foreclose retroactive application of *Blakely*. Recall that Justice O’Connor stated in her *Blakely* dissent that “all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.”

Despite viable arguments about *Blakely*’s retroactivity, most commentators take the (slightly cynical) view that courts will seek to limit retroactivity simply because the consequences of giving *Blakely* retroactive effect could be so extreme. (Justice O’Connor’s dissent in *Blakely* suggested, in a footnote, that well over 200,000 cases in the federal system alone could be impacted if *Blakely* was made retroactive to the date *Apprendi* was decided in 2000.) Taking a legal realist perspective, it seems quite sensible to assume that courts, worried about a flood of habeas petitions, will try to limit the retroactive reach of *Blakely* so as not to upset past sentences unduly.

Assuming courts do not provide for retroactive application of *Blakely* to final convictions, do other branches of government bear some responsibility for devising a remedy for those prisoners who may be serving decades of additional jail-time based on a judicial fact-finding that the Supreme Court has now deemed unconstitutional? Should the clemency power be reinvigorated to address this situation?

6) *Principle versus pragmatism.* Do the *Blakely* dissenters provide any strong constitutional arguments against the majority’s interpretation of the Sixth Amendment, or might it be fair to characterize their complaints as providing only quite powerful (though ultimately unsuccessful) pragmatic arguments against the Court’s holding? An old Roman maxim, which states “let justice be done though the heavens fall,” is meant to suggest that the prospect of a decision’s adverse practical consequences should not keep a court from rendering justice. Can this maxim, though an inspiring aspiration, really be followed?

Should it be? Consider particularly the retroactivity issues noted above when thinking through whether courts should keep an eye on practical consequences when defining the reach of justice.

7) *Translation of jury functions to a new context.* For a judge who interprets the constitution in light of the historical meaning of the text and historical practices, the right to a jury trial in criminal cases presents several challenges. The criminal system changed enormously between the eighteenth and twenty-first centuries. Among other things, ponder the increased role of guilty pleas and the enormous innovations in sentencing rules. How can courts in the twenty-first century give meaning to the constitutional vision of a criminal adjudication process that is bounded by the views of juries about reasonable application of the criminal law?

Judge Jack Weinstein offered the following long-term historical perspective on the subject:

Approach to the topic must begin with the humble acknowledgment that the founders, if they could at all understand our current bloated federal criminal law and the labyrinthian structure of the Guidelines, would be appalled or bemused....

[In the eighteenth century,] the discretionary function in sentencing was shared by judge and jury.... Juries decided questions of law and fact in criminal and civil cases.... The authors known to the founders had a high respect for the wide powers of the jury over law, fact and punishment. In a sense, the jury was, and remains, the direct voice of the sovereign, in a collaborative effort with the judge. It expresses the view of a sometimes compassionate free people faced with an individual miscreant in all of his or her tainted humanity, as opposed to the abstract cruelties of a more theoretical and doctrinaire distant representative government.... Mitigation by jury was recognized.... Discretion of the magistrate in sentencing was broad. Clemency was widespread. The jury could exercise its charity....

James Madison's fear of majoritarian abuse, particularly by the legislature, and of the lack of power and will of judges to protect minorities against maltreatment was partly ameliorated by the jury. "When the people are the sovereign and, one way or another, are the source of all the branches' power, an agency of government that attempts to mete out justice against the will of the people does so at its peril." James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 Colum. L. Rev. 837, 935 (2004) (paraphrasing Madison)....

No suggestion is made that a late colonial court would have used an advisory jury or a post-guilt finding jury trial in determining a guidelines sentence. Such sentences were unknown. Nonetheless, the practice cannot be said to be out of character for a colonial judge faced with the kind of sentencing dilemmas a federal judge now confronts

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under the Guidelines. It is not aberrational to suggest that use of a jury on sentencing issues of fact—and perhaps on severity—is consistent with history, practice and the inherent role of federal courts and juries. Reliance on the jury represents a reflection of our government’s dependence on the ultimate and residual sovereignty of the people. That foundation for all power—executive, legislative and judicial—is reflected in the preamble to the Constitution beginning, “We the People ... do ordain and establish this Constitution.”

United States v. Khan, 325 F. Supp. 2d 218 (E.D.N.Y. 2004).

8) *Different possible structures for jury involvement in sentencing.* Despite its broad language, *Blakely* technically only mandates that juries have a role in fact-finding to support sentence enhancements. Especially in light of Judge Weinstein’s comments in *Khan* noted above, we might want to think more dynamically about how to construct a new sentencing world with significant jury participation. Consider just some of the ways juries might be involved in sentencing decision-making that go beyond *Blakely*’s mandate:

- **Juries as comprehensive fact-finders:** We might require juries to be the finders of all (or at least all significant) sentencing facts. Notably, *Blakely* only requires juries to be finders of aggravating facts, allowing judges still to find mitigating facts. But though the Constitution apparently permits this distinction, we might still think a sounder system would have juries decide all these facts.
- **Juries as fact-finders and sentence advisors:** We might want juries not only to find facts, but also to advise judges about appropriate punishments. Though the Constitution may not require juries to do anything more than find (aggravating) sentencing facts, we might still think a sounder system would have juries also recommend sentences based on these facts.
- **Juries as fact-finders and sentencers:** We might want juries not only to find facts, but also to impose specific punishments. Again, though the Constitution may not require juries to do anything more than find (aggravating) sentencing facts, we might still think a sounder system would have juries impose specific sentences based on these facts.

In this context, it is worth remembering that jury participation in death penalty sentencing is the norm; in that setting, juries typically find and weigh aggravating and mitigating facts and also recommend or impose the ultimate sentence. In addition, as noted in the main text, there are currently six states that allow jury sentencing in noncapital cases. In foreign countries professional judges often sit with lay jurors, and decide together on guilt and the appropriate sentence.

## B. Federal Responses to *Blakely*

*Blakely* was, of course, a state case, and its federal constitutional principles – whatever they may exactly be – apply to both state and federal systems. In the federal system, speculation and litigation began immediately after *Blakely* to determine whether the federal sentencing guidelines could possibly stand after the Court’s decision. The Supreme Court gave its answer in January 2005.

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**UNITED STATES v. FREDDIE J. BOOKER**  
**2005 U.S. LEXIS 628 (Jan. 12, 2005)**

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STEVENS, J., delivered the opinion of the Court in part.\*

The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment.... In both cases the courts rejected, on the basis of our decision in *Blakely v. Washington*, 542 U.S. \_\_\_\_ (2004), the Government’s recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines. In a separate opinion authored by Justice Breyer, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.

### I

Respondent Booker was charged with possession with intent to distribute at least 50 grams of cocaine base (crack).... Based upon Booker’s criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a “base” sentence of not less than 210 nor more than 262 months in prison. See USSG §§ 2D1.1(c)(4), 4A1.1. The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings mandated that the judge select a sentence between 360 months and life imprisonment; the judge imposed a sentence at the low end of the range.

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\* Justices Scalia, Souter, Thomas, and Ginsburg join this opinion.

## **Sentencing Law and Policy**

Thus, instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30-year sentence....

Respondent Ducan Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii). [After the jury convicted Fanfan], the trial judge conducted a sentencing hearing at which he found additional facts that, under the Guidelines, would have authorized a sentence in the 188-to-235 month range. Specifically, he found that respondent Fanfan was responsible for 2.5 kilograms of cocaine powder, and 261.6 grams of crack. He also concluded that respondent had been an organizer, leader, manager, or supervisor in the criminal activity. Both findings were made by a preponderance of the evidence. Under the Guidelines, these additional findings would have required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone. [The] judge concluded that he could not follow the particular provisions of the Sentencing Guidelines “which involve drug quantity and role enhancement.”....

## **II**

It has been settled throughout our history that the Constitution protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. It is equally clear that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures....

In Blakely v. Washington, 542 U.S. \_\_\_\_ (2004), we dealt with a determinate sentencing scheme similar to the Federal Sentencing Guidelines. There the defendant pleaded guilty to kidnaping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a “standard” sentence of 49-to-53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with “deliberate cruelty” and sentenced him to 90 months....

The application of Washington’s sentencing scheme violated the defendant’s right to have the jury find the existence of “any particular fact” that the law makes essential to his punishment. That right is

implicated whenever a judge seeks to impose a sentence that is not solely based on “facts reflected in the jury verdict or admitted by the defendant.”... The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely’s Sixth Amendment rights.

[There] is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.

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 implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. See *Williams v. New York*, 337 U.S. 241, 246 (1949).... For 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.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. [Subsection (b) of § 3553] directs that the court “shall impose a sentence of the kind, and within the range” established by the Guidelines, subject to departures in specific, limited cases.... The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge “finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b)(1). [Departures, however,] are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range....

Booker’s case illustrates the mandatory nature of the Guidelines. The jury convicted him of possessing at least 50 grams of crack in violation of 21 U.S.C. § 841(b)(1)(A)(iii) based on evidence that he had 92.5 grams of crack in his duffel bag. Under these facts, the Guidelines specified an offense level of 32, which, given the defendant’s criminal

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history category, authorized a sentence of 210-to-262 months. See USSG § 2D1.1(c)(4). Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range....

In his dissent, Justice Breyer argues on historical grounds that the Guidelines scheme is constitutional across the board. He points to traditional judicial authority to increase sentences to take account of any unusual blameworthiness in the manner employed in committing a crime, an authority that the Guidelines require to be exercised consistently throughout the system. This tradition, however, does not provide a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world.

It is quite true that once determinate sentencing had fallen from favor, American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted.... It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance. As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed.

As it thus became clear that sentencing was no longer taking place in the tradition that Justice Breyer invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances.... And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer ... developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

### III

The Government advances three arguments in support of its submission that we should not apply our reasoning in *Blakely* to the Federal Sentencing Guidelines. It contends that *Blakely* is distinguishable because the Guidelines were promulgated by a commission rather than the Legislature; that principles of stare decisis require us to follow four earlier decisions that are arguably inconsistent with *Blakely*; and that the application of *Blakely* to the Guidelines would conflict with separation of powers principles reflected in *Mistretta v. United States*, 488 U.S. 361 (1989). These arguments are unpersuasive.

*Commission vs. Legislature*

In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance.... As far as the defendants are concerned, they face significantly higher sentences – in Booker’s case almost 10 years higher – because a judge found true by a preponderance of the evidence a fact that was never submitted to the jury. Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, “the Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours,’ rather than a lone employee of the State.” *Blakely*, 542 U.S., at \_\_\_\_.

*Stare Decisis*

The Government next argues that ... recent cases preclude our application of *Blakely* to the Sentencing Guidelines. We disagree. In *United States v. Dunnigan*, 507 U.S. 87 (1993), we held that the provisions of the Guidelines that require a sentence enhancement if the judge determines that the defendant committed perjury do not violate the privilege of the accused to testify on her own behalf. There was no contention that the enhancement was invalid because it resulted in a more severe sentence than the jury verdict had authorized. [There] are many situations in which the district judge might find that the enhancement is warranted, yet still sentence the defendant within the range authorized by the jury. Thus, while the reach of *Dunnigan* may be limited, we need not overrule it.

[In] *Edwards v. United States*, 523 U.S. 511 (1998), the Court held that a jury’s general verdict finding the defendants guilty of a conspiracy involving either cocaine or crack supported a sentence based on their involvement with both drugs. Even though the indictment had charged that their conspiracy embraced both, they argued on appeal that the verdict limited the judge’s sentencing authority. We recognized that the defendants’ statutory and constitutional claims might have had merit if it had been possible to argue that their crack-related activities were not part of the same conspiracy as their cocaine activities. But they failed to make that argument, and, based on our review of the record which showed “a series of interrelated drug transactions involving both cocaine and crack,” we concluded that no such claim could succeed.

None of our prior cases is inconsistent with today’s decision. Stare decisis does not compel us to limit *Blakely*’s holding.

*Separation of Powers*

Finally, the Government and, to a lesser extent, Justice Breyer's dissent, argue that any holding that would require Guidelines sentencing factors to be proved to a jury beyond a reasonable doubt would effectively transform them into a code defining elements of criminal offenses. The result, according to the Government, would be an unconstitutional grant to the Sentencing Commission of the inherently legislative power to define criminal elements.

There is no merit to this argument because the Commission's authority to identify the facts relevant to sentencing decisions and to determine the impact of such facts on federal sentences is precisely the same whether one labels such facts "sentencing factors" or "elements" of crimes. Our decision in *Mistretta*, upholding the validity of the delegation of that authority, is unaffected by the characterization of such facts, or by the procedures used to find such facts in particular sentencing proceedings....

The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof....

**IV**

All of the foregoing support our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We recognize ... that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly. As Blackstone put it:

However convenient these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns. 4 *Commentaries on the Laws of England* 343-344 (1769).

Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

BREYER, J., delivered the opinion of the Court in part.\*

... We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e), which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.

## I

We answer the remedial question by looking to legislative intent. We seek to determine what "Congress would have intended" in light of the Court's constitutional holding. In this instance, we must determine which of the two following remedial approaches is the more compatible with the legislature's intent as embodied in the 1984 Sentencing Act.

One approach, that of Justice Stevens' dissent, would retain the Sentencing Act (and the Guidelines) as written, but would engraft onto the existing system today's Sixth Amendment "jury trial" requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).

The other approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve....

In today's context – a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change – we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible.... It is, of course, true that the

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\* Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg join this opinion.

## **Sentencing Law and Policy**

numbers show that the constitutional jury trial requirement would lead to additional decisionmaking by juries in only a minority of cases. Prosecutors and defense attorneys would still resolve the lion's share of criminal matters through plea bargaining, and plea bargaining takes place without a jury. Many of the rest involve only simple issues calling for no upward Guidelines adjustment. And in at least some of the remainder, a judge may find adequate room to adjust a sentence within the single Guidelines range to which the jury verdict points, or within the overlap between that range and the next highest.

But the constitutional jury trial requirement would nonetheless affect every case. It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing. Thus we must determine likely intent not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement in light of the Act's language, its history, and its basic purposes. While reasonable minds can, and do, differ about the outcome, we conclude that the constitutional jury trial requirement is not compatible with the Act as written and that some severance and excision are necessary.

## **II**

Several considerations convince us that, were the Court's constitutional requirement added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand. First, the statute's text states that "the court" when sentencing will consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In context, the words "the court" mean "the judge without the jury," not "the judge working together with the jury." The Act's history confirms it. See, e.g., S. Rep. No. 98-225, p. 51 (1983) (the Guidelines system "will guide the judge in making" sentencing decisions)....

This provision makes it difficult to justify Justice Stevens' approach, for that approach requires reading the words "the court" as if they meant "the judge working together with the jury." Unlike Justice Stevens, we do not believe we can interpret the statute's language to save its constitutionality, because we believe that any such reinterpretation, even if limited to instances in which a Sixth Amendment problem arises, would be plainly contrary to the intent of Congress....

Second, Congress' basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the real conduct that underlies the crime of conviction. That determination is particularly important in

the federal system where crimes defined as, for example, “obstructing, delaying, or affecting commerce or the movement of any article or commodity in commerce, by . . . extortion,” 18 U.S.C. § 1951(a), or, say, using the mail “for the purpose of executing” a “scheme or artifice to defraud,” § 1341, can encompass a vast range of very different kinds of underlying conduct. But it is also important even in respect to ordinary crimes, such as robbery, where an act that meets the statutory definition can be committed in a host of different ways. Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until after the trial) relevant to the manner in which the convicted offender committed the crime of conviction....

To engraft the Court’s constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender’s real conduct. It would thereby undermine the sentencing statute’s basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

[An example can] illustrate the point. Imagine Smith and Jones, each of whom violates the Hobbs Act in very different ways. See 18 U.S.C. § 1951(a) (forbidding “obstructing, delaying, or affecting commerce or the movement of any article or commodity in commerce, by . . . extortion”). Smith threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company’s till; Jones, after similarly threatening the co-worker, causes far more harm by seeking far more money, by making certain that the co-worker’s family is aware of the threat, by arranging for deliveries of dead animals to the co-worker’s home to show he is serious, and so forth. The offenders’ behavior is very different; the known harmful consequences of their actions are different; their punishments both before, and after, the Guidelines would have been different. But, under the dissenters’ approach, unless prosecutors decide to charge more than the elements of the crime, the judge would have to impose similar punishments....

This point is critically important. Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. See 28 U.S.C. § 991(b)(1)(B); see also § 994(f). That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute – a uniformity consistent with the dissenters’ remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress’ sentencing statutes helped to advance and that Justice

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Stevens' approach would undermine. In significant part, it is the weakening of this real-conduct/uniformity-in-sentencing relationship ... that leads us to conclude that Congress would have preferred no mandatory system to the system the dissenters envisage.

Third, the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended. How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager, or supervisor in a robbery gang? See USSG §§ 2B3.1, 3B1.1. If so, how could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime?... How would the court take account, for punishment purposes, of a defendant's contemptuous behavior at trial – a matter that the Government could not have charged in the indictment? § 3C1.1.

Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines. Rather, plea bargaining would make matters worse. Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing, i.e., to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences. The statutes reasonably assume that their efforts to move the trial-based sentencing process in the direction of greater sentencing uniformity would have a similar positive impact upon plea-bargained sentences, for plea bargaining takes place in the shadow of (i.e., with an eye towards the hypothetical result of) a potential trial....

The Court's constitutional jury trial requirement, however, if patched onto the present Sentencing Act, would move the system backwards in respect both to tried and to plea-bargained cases. In respect to tried cases, it would effectively deprive the judge of the ability to use post-verdict-acquired real-conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest. The sentence that would emerge in a case tried under such a

system would likely reflect real conduct less completely, less accurately, and less often than did a pre-Guidelines, as well as a Guidelines, trial.

Because plea bargaining inevitably reflects estimates of what would happen at trial, plea bargaining too under such a system would move in the wrong direction. That is to say, in a sentencing system modified by the Court's constitutional requirement, plea bargaining would likely lead to sentences that gave greater weight, not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Compared to pre-Guidelines plea bargaining, plea bargaining of this kind would necessarily move federal sentencing in the direction of diminished, not increased, uniformity in sentencing. It would tend to defeat, not to further, Congress' basic statutory goal.

Such a system would have particularly troubling consequences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.

In respondent Booker's case, for example, the jury heard evidence that the crime had involved 92.5 grams of crack cocaine, and convicted Booker of possessing more than 50 grams. But the judge, at sentencing, found that the crime had involved an additional 566 grams, for a total of 658.5 grams. A system that would require the jury, not the judge, to make the additional "566 grams" finding is a system in which the prosecutor, not the judge, would control the sentence. That is because it is the prosecutor who would have to decide what drug amount to charge. He could choose to charge 658.5 grams, or 92.5, or less. It is the prosecutor who, through such a charging decision, would control the sentencing range....

Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences upward than to adjust them downward.... Such a one-way lever would be grossly at odds with Congress's intent. Yet that is the system that the dissenters' remedy would create.

For all these reasons, Congress, had it been faced with the constitutional jury trial requirement, likely would not have passed the same Sentencing Act. It likely would have found the requirement incompatible with the Act as written. Hence the Act cannot remain valid in its entirety. Severance and excision are necessary.

### III

We now turn to the question of which portions of the sentencing statute we must sever and excise as inconsistent with the Court's constitutional requirement. [We] do not believe that the entire statute must be invalidated. Most of the statute is perfectly valid. See, e.g., 18 U.S.C. § 3551 (describing authorized sentences as probation, fine, or imprisonment); § 3552 (presentence reports); § 3554 (forfeiture); § 3555 (notification to the victims); § 3583 (supervised release). And we must refrain from invalidating more of the statute than is necessary.

[We] must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e). With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements.

As the Court today recognizes in its first opinion in these cases, the existence of § 3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision – namely the provision that makes “the relevant sentencing rules … mandatory and imposes binding requirements on all sentencing judges” – the statute falls outside the scope of *Apprendi*'s requirement.

The remainder of the Act functions independently. Without the “mandatory” provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. See 18 U.S.C. § 3553(a). The Act nonetheless requires judges to consider the Guidelines “sentencing range established for … the applicable category of offense committed by the applicable category of defendant,” § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2).

Moreover, despite the absence of § 3553(b)(1), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a)). See § 3742(a)

(appeal by defendant); § 3742(b) (appeal by Government). We concede that the excision of § 3553(b)(1) requires the excision of a different, appeals-related section, namely § 3742(e), which sets forth standards of review on appeal. That section contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons.

Excision of § 3742(e), however, does not pose a critical problem for the handling of appeals. That is because ... a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly. We infer appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for “unreasonableness.” 18 U.S.C. § 3742(e)(3).

Until 2003, § 3742(e) explicitly set forth that standard. In 2003, Congress modified the pre-existing text, adding a de novo standard of review for departures.... Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 401(d)(1), 117 Stat. 670. In light of today’s holding, the reasons for these revisions – to make Guidelines sentencing even more mandatory than it had been – have ceased to be relevant. [The text of 3742(e)(3) in effect before 2003 directed appellate courts to review sentences outside the guidelines range to determine whether the sentence was] “unreasonable, having regard for ... the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)].” Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable....

Nor do we share the dissenters’ doubts about the practicality of a “unreasonableness” standard of review. “Reasonableness” standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances – both on review of departures, see 18 U.S.C. § 3742(e)(3), and on review of sentences imposed where there was no applicable Guideline, see §§ 3742(a)(4), (b)(4), (e)(4). Together, these cases account for about 16.7% of sentencing appeals. That is why we think it fair ... to assume judicial familiarity with a “unreasonableness” standard. And that is why we believe that appellate judges will prove capable of ... applying such a standard across the board.

[The] remedial question we must ask here (as we did in respect to § 3553(b)(1)) is, which alternative adheres more closely to Congress’ original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions? The former, by

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providing appellate review, would tend to iron out sentencing differences; the latter would not. Hence we believe Congress would have preferred the former to the latter – even if the former means that some provisions will apply differently from the way Congress had originally expected.

[The] Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. See 28 U.S.C. § 994. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. See 18 U.S.C. §§ 3553(a)(4), (5). The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary. We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives. Under these circumstances, why would Congress not have preferred excision of the “mandatory” provision to a system that engrafts today’s constitutional requirement onto the unchanged pre-existing statute – a system that, in terms of Congress’ basic objectives, is counterproductive? ...

Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

## **IV**

... The Government would render the Guidelines advisory in “any case in which the Constitution prohibits” judicial factfinding. But it apparently would leave them as binding in all other cases. [We] do not see how it is possible to leave the Guidelines as binding in other cases. For one thing, the Government’s proposal would impose mandatory Guidelines-type limits upon a judge’s ability to reduce sentences, but it would not impose those limits upon a judge’s ability to increase sentences. We do not believe that such “one-way levers” are compatible with Congress’ intent. For another, we believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create. Such a two-system proposal seems unlikely to further Congress’ basic objective of promoting uniformity in sentencing....

V

... As these dispositions indicate, we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine....

STEVENS, J., dissenting in part.\*

[Neither] 18 U.S.C. § 3553(b)(1), which makes application of the Guidelines mandatory, nor § 3742(e), which authorizes appellate review of departures from the Guidelines, is even arguably unconstitutional. Neither the Government, nor the respondents, nor any of the numerous amici has suggested that there is any need to invalidate either provision in order to avoid violations of the Sixth Amendment in the administration of the Guidelines.... While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf....

When one pauses to note that over 95% of all federal criminal prosecutions are terminated by a plea bargain, and the further fact that in almost half of the cases that go to trial there are no sentencing enhancements, the extraordinary overbreadth of the Court's unprecedented remedy is manifest.... In my judgment, it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power.

I

It is a fundamental premise of judicial review that all Acts of Congress are presumptively valid.... There are two narrow exceptions to this general rule. A facial challenge may succeed if a legislative scheme

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\* Justice Souter joins this opinion, and Justice Scalia joins except for Part III and footnote 17.

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is unconstitutional in all or nearly all of its applications. That is certainly not true in these cases, however, because most applications of the Guidelines are unquestionably valid. A second exception involves cases in which an invalid provision or application cannot be severed from the remainder of the statute. That exception is inapplicable because there is no statutory or Guidelines provision that is invalid.

[It] is abundantly clear that the fact that a statute, or any provision of a statute, is unconstitutional in a portion of its applications does not render the statute or provision invalid, and no party suggests otherwise. The Government conceded at oral argument that 45% of federal sentences involve no enhancements. And, according to two U.S. Sentencing Commissioners who testified before Congress shortly after we handed down our decision in *Blakely*, the number of enhancements that would actually implicate a defendant's Sixth Amendment rights is even smaller. Simply stated, the Government's submissions to this Court and to Congress demonstrate that the Guidelines could be constitutionally applied in their entirety, without any modifications, in the majority of the cases sentenced under the federal guidelines. On the basis of these submissions alone, this Court should have declined to find the Guidelines, or any particular provisions of the Guidelines, facially invalid.

Accordingly, the majority's claim that a jury factfinding requirement would "destroy the system," would at most apply to a minority of sentences imposed under the Guidelines. In reality, given that the Government and judges have been apprised of the requirements of the Sixth Amendment, the number of unconstitutional applications would have been even smaller had we allowed them the opportunity to comply with our constitutional holding. This is so for several reasons.

First, it is axiomatic that a defendant may waive his Sixth Amendment right to trial by jury. In *Blakely* we explained that "when a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Such reasoning applies with equal force to sentences imposed under the Guidelines....

Second, ... prosecutors could avoid an *Apprendi* problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence.... Third, even in those trials in which the Guidelines require the finding of facts not alleged in the indictment, such factfinding by a judge is not unconstitutional per se. [Judicial] factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant....

Consider, for instance, a case in which the defendant's initial sentencing range under the Guidelines is 130-to-162 months, calculated by combining a base offense level of 28 and a criminal history category of V.... If the defendant described above also possessed a firearm, the Guidelines would direct the judge to apply a two-level enhancement under § 2D1.1, which would raise the defendant's total offense level from 28 to 30. That, in turn, would raise the defendant's eligible sentencing range to 151-to-188 months. That act of judicial factfinding would comply with the Guidelines and the Sixth Amendment so long as the sentencing judge then selected a sentence between 151-to-162 months.... This type of overlap between sentencing ranges is the rule, not the exception, in the Guidelines as currently constituted....

The majority concludes that our constitutional holding requires the invalidation of §§ 3553(b)(1) and 3742(e). The first of these sections uses the word "shall" to make the substantive provisions of the Guidelines mandatory. The second authorizes *de novo* review of sentencing judges' applications of relevant Guidelines provisions. Neither section is unconstitutional. While these provisions can in certain cases, when combined with other statutory and Guidelines provisions, result in a violation of the Sixth Amendment, they are plainly constitutional on their faces.

Rather than rely on traditional principles of facial invalidity or severability, the majority creates a new category of cases in which this Court may invalidate any part or parts of a statute (and add others) when it concludes that Congress would have preferred a modified system to administering the statute in compliance with the Constitution. This is entirely new law. Usually the Court first declares unconstitutional a particular provision of law, and only then does it inquire whether the remainder of the statute can be saved. Review in this manner limits judicial power by minimizing the damage done to the statute by judicial fiat....

Most importantly, the Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an "act of the legislature" must be "repugnant to the constitution" in order to be void. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). When a provision of a statute is unconstitutional, that provision is void, and the Judiciary is therefore not bound by it in a particular case. Here, however, the provisions the majority has excised from the statute are perfectly valid: Congress could pass the identical statute tomorrow and it would be binding on this Court so long as it were administered in compliance with the Sixth Amendment. Because the statute itself is not repugnant to the Constitution and can by its terms

## Sentencing Law and Policy

comport with the Sixth Amendment, the Court does not have the constitutional authority to invalidate it....

### II

Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely* – prove any fact that is required to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt. [A] requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases.

Indeed, this already appears to be the case. The Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely* infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements. Given this experience, I think the Court dramatically overstates the difficulty of implementing this solution....

The majority advances five reasons why the remedy that is already in place will not work. First, the majority points to the statutory text referring to “the court” in arguing that jury factfinding is impermissible.... As a textual matter, the word “court” can certainly be read to include a judge’s selection of a sentence as supported by a jury verdict – this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance. Ordinarily, where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter....

Second, the Court argues that simply applying *Blakely* to the Guidelines would make “real conduct” sentencing more difficult. While that is perhaps true in some cases, judges could always consider relevant conduct obtained from a presentence report pursuant to 18 U.S.C. § 3661 and USSG § 6A1.1 in selecting a sentence within a Guidelines range, and of course would be free to consider any such circumstances in cases in which the defendant pleads guilty and waives his *Blakely* rights. Further, in many cases the Government could simply prove additional facts to a jury beyond a reasonable doubt – as it has been doing in some cases since *Apprendi* – or, the court could use bifurcated proceedings in which the relevant conduct is proved to a jury after it has convicted the defendant of the underlying crime.

The majority is correct, however, that my preferred holding would undoubtedly affect “real conduct” sentencing in certain cases. This is so

because the goal of such sentencing – increasing a defendant’s sentence on the basis of conduct not proved at trial – is contrary to the very core of *Apprendi*....

Further, the Court does not explain how its proposed remedy will ensure that judges take real conduct into account. While judges certainly may do so in their discretion under § 3553(a), there is no indication as to how much or to what extent “relevant conduct” should matter under the majority’s regime. Nor is there any meaningful standard by which appellate courts may review a sentencing judge’s “relevant conduct” determination – only a general “reasonableness” inquiry that may discourage sentencing judges from considering such conduct altogether....

Third, the majority argues that my remedy would make sentencing proceedings far too complex. But of the very small number of cases in which a Guidelines sentence would implicate the Sixth Amendment, most involve drug quantity determinations, firearm enhancements, and other factual findings that can readily be made by juries.... I am confident that federal trial judges, assisted by capable prosecutors and defense attorneys, could have devised appropriate procedures to impose the sentences the Guidelines envision in a manner that is consistent with the Sixth Amendment....

Fourth, the majority assails my reliance on plea bargaining. The Court claims that I cannot discount the effect that applying *Blakely* to the Guidelines would have on plea-bargained cases, since the specter of *Blakely* will affect those cases. However, the majority’s decision suffers from the same problem to a much greater degree. Prior to the Court’s decision to strike the mandatory feature of the Guidelines, prosecutors and defendants alike could bargain from a position of reasonable confidence with respect to the sentencing range into which a defendant would likely fall. The majority, however, has eliminated the certainty of expectations in the plea process. And, unlike my proposed remedy, which would potentially affect only a fraction of plea bargains, the uncertainty resulting from the Court’s regime change will infect the entire universe of guilty pleas which occur in 97% of all federal prosecutions. [Furthermore,] a prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining power than if required to prove the same fact beyond a reasonable doubt.

Finally, the majority argues that my solution would require a different burden of proof for enhancements above the maximum authorized by the jury verdict and for reductions. This is true because the requirement that guilt be established by proof beyond a reasonable doubt is a constitutional mandate. However, given the relatively few reductions available in the Guidelines and the availability of judicial discretion

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within the applicable range, this is unlikely to have more than a minimal effect....

### **III**

[To] justify “excising” 18 U.S.C. §§ 3553(b)(1) and 3742(e), the Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to any available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law. The Court cannot meet this burden because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges’ ability to reduce disparities in federal sentencing....

In the mid-1970’s, Congress began to study the numerous problems attendant to indeterminate sentencing in the federal criminal justice system. After nearly a decade of review, Congress in 1984 decided that the system needed a comprehensive overhaul. The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress’ principal aim. As Senator Hatch, a central participant in the reform effort, has explained: “The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was at the heart of sentencing disparity.” *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 187 (1993).

Consequently, Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses. One example of such legislation was the bill introduced in 1977 by Senators Kennedy and McClellan, S. 1437, 95th Cong., 1st Sess., which allowed judges to impose sentences based on the characteristics of the individual defendant and granted judges substantial discretion to depart from recommended guidelines sentences. That bill never became law and was refined several times between 1977 and 1984: Each of those refinements made the regime more, not less, restrictive on trial judges’ discretion in sentencing....

The notion that Congress had any confidence that judges would reduce sentencing disparities by considering relevant conduct – an idea that is championed by the Court – either ignores or misreads the political environment in which the SRA passed. It is true that the SRA instructs sentencing judges to consider real offense and offender characteristics,

28 U.S.C. § 994, but Congress only wanted judges to consider those characteristics within the limits of a mandatory system. The Senate Report on which the Court relies clearly concluded that the existence of sentencing disparities “can be traced directly to the unfettered discretion the law confers on those judges … responsible for imposing and implementing the sentence.” S. Rep. No. 98-225, p. 38....

Congress has not wavered in its commitment to a binding system of Sentencing Guidelines. In fact, Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options. Most recently, Congress’ passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, 117 Stat. 650, reinforced the mandatory nature of the Guidelines by expanding de novo review of sentences to include all departures from the Guidelines and by directing the Commission to limit the number of available departures.... Even a cursory reading of the legislative history of the PROTECT Act reveals the absurdity of the claim that Congress would find acceptable, under any circumstances, the Court’s restoration of judicial discretion through the facial invalidation of §§ 3553(b)(1) and 3742(e). In sum, despite Congress’ unequivocal demand that the Guidelines operate as a binding system, and in the name of avoiding any reduction in the power of the sentencing judge vis-a-vis the jury (a subject to which Congress did not speak), the majority has erased the heart of the SRA and ignored in their entirety all of the Legislative Branch’s post-enactment expressions of how the Guidelines are supposed to operate....

#### IV

As a matter of policy, the differences between the regime enacted by Congress and the system the Court has chosen are stark. Were there any doubts about whether Congress would have preferred the majority’s solution, these are sufficient to dispel them. First, Congress’ stated goal of uniformity is eliminated by the majority’s remedy. True, judges must still consider the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a). The result is certain to be a return to the same type of sentencing disparities Congress sought to eliminate in 1984....

Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had received excessive sentences. Today, the Court

reenacts the discretionary Guidelines system that once existed without providing this crucial safety net.

Other concerns are likely to arise. Congress' demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated – for there can be no “departure” from a mere suggestion. How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for “just punishment” and “adequate deterrence to criminal conduct” simply outweighs the considerations contemplated by the Sentencing Commission? See 18 U.S.C. §§ 3553(a)(2)(A)-(B)....

The majority's remedy was not the inevitable result of the Court's holding that *Blakely* applies to the Guidelines. Neither *Apprendi*, nor *Blakely*, nor these cases made determinate sentencing unconstitutional.<sup>17</sup>... No judicial remedy is proper if it is “not commensurate with the constitutional violation to be repaired.” *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976). The Court's system fails that test, frustrates Congress' principal goal in enacting the SRA, and violates the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes. I respectfully dissent.

SCALIA, J., dissenting in part.

The remedial majority takes as the North Star of its analysis the fact that Congress enacted a “judge-based sentencing system.” That seems to me quite misguided. Congress did indeed expect judges to make the factual determinations to which the Guidelines apply, just as it expected the Guidelines to be mandatory. But which of those expectations was central to the congressional purpose is not hard to determine. No headline describing the Sentencing Reform Act of 1984 would have read “Congress reaffirms judge-based sentencing” rather than “Congress prescribes standardized sentences.” Justice Breyer's opinion for the Court repeatedly acknowledges that the primary objective of the Act was to reduce sentencing disparity. Inexplicably, however, the opinion concludes that the manner of achieving uniform sentences was more

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<sup>17</sup> Moreover, even if the change to an indeterminate system were necessary, the Court could have minimized the consequences to the system by limiting the application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation. *Griffith v. Kentucky*, 479 U.S. 314 (1987), does not require blind application of every part of this Court's holdings to all pending cases, but rather, requires that we apply any new “rule to all similar cases pending on direct review.” *Id.*, at 323. For obvious reasons, not all pending cases are made similar to Booker and Fanfan's merely because they involved an application of the Guidelines.

important to Congress than actually achieving uniformity – that Congress was so attached to having judges determine “real conduct” on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having juries find the facts that expose a defendant to increased prison time. The majority’s remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing....

That is the plain effect of the remedial majority’s decision to excise 18 U.S.C. § 3553(b)(1). District judges will no longer be told they “shall impose a sentence … within the range” established by the Guidelines. § 3553(b)(1). Instead, under § 3553(a), they will need only to “consider” that range as one of many factors, including “the need for the sentence … to provide just punishment for the offense,” § 3553(a)(2)(A), “to afford adequate deterrence to criminal conduct,” § 3553(a)(2)(B), and “to protect the public from the further crimes of the defendant,” § 3553(a)(2)(C). The statute provides no order of priority among all those factors, but since the three just mentioned are the fundamental criteria governing penology, the statute – absent the mandate of § 3553(b)(1) – authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines....

As frustrating as this conclusion is to the Act’s purpose of uniform sentencing, it at least establishes a clear and comprehensible regime – essentially the regime that existed before the Act became effective. That clarity is eliminated, however, by the remedial majority’s surgery on 18 U.S.C. § 3742, the provision governing appellate review of sentences. Even the most casual reading of this section discloses that its purpose – its only purpose – is to enable courts of appeals to enforce conformity with the Guidelines. All of the provisions of that section that impose a review obligation beyond what existed under prior law are related to the district judge’s obligations under the Guidelines. If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative. The Court holds otherwise. Like a black-robed Alexander cutting the Gordian knot, it simply severs the purpose of the review provisions from their text, holding that only subsection (e), which sets forth the determinations that the court of appeals must make, is inoperative, whereas all the rest of § 3742 subsists.... This is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion.

[The Court] announces that the standard of review for all [sentencing] appeals is “unreasonableness.” This conflates different and

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distinct statutory authorizations of appeal and elides crucial differences in the statutory scope of review. Section 3742 specifies four different kinds of appeal,<sup>7</sup> [and it creates] no one-size-fits-all “unreasonableness” review. The power to review a sentence for reasonableness arises only when the sentencing court has departed from “the applicable guideline range.” § 3742(f)(2).

[Thus, we] have before us a statute that does explicitly set forth a standard of review. The question is, when the Court has severed that standard of review (contained in § 3742(e)), does it make any sense to look for some congressional “implication” of a different standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland.... The Court’s need to supplement the text that remains after severance suggests that it is engaged in “redrafting the statute” rather than just implementing the valid portions of it....

The worst feature of the scheme is that no one knows – and perhaps no one is meant to know – how advisory Guidelines and “unreasonableness” review will function in practice.... What I anticipate will happen is that “unreasonableness” review will produce a discordant symphony of different standards, varying from court to court and judge to judge....

THOMAS, J., dissenting in part.

... We have before us only a single unconstitutional application of § 3553(b)(1) (and accompanying parts of the sentencing scheme). In such a case, facial invalidation is unprecedented. It is particularly inappropriate here, where it is evident that § 3553(b)(1) is entirely constitutional in numerous other applications....

Given the significant number of valid applications of all portions of the current sentencing scheme, we should not facially invalidate any particular section of the Federal Rules of Criminal Procedure, the Guidelines, or the SRA. Instead, we should invalidate only [their] application to Booker....

[Even] though we have invalidated the application of these provisions to Booker, may other defendants be sentenced pursuant to them?... Unless the Legislature clearly would not have enacted the

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<sup>7</sup> The four kinds of appeal arise when, respectively, (1) the sentence is “imposed in violation of law,” §§ 3742(a)(1), (b)(1), (e)(1), (f)(1); (2) the sentence is “imposed as a result of an incorrect application of the sentencing guidelines,” §§ 3742(a)(2), (b)(2), (e)(2), (f)(1); (3) the sentence is either above or below “the applicable guideline range,” §§ 3742(a)(3), (b)(3), (e)(3), (f)(2); and (4) no guideline is applicable and the sentence is “plainly unreasonable,” §§ 3742(a)(4), (b)(4), (e)(4), (f)(2).

constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing....

Certainly it is not obvious that Congress would have preferred the entirely discretionary system that the majority fashions. The text and structure of the SRA show that Congress meant the Guidelines to bind judges.... Striking down § 3553(b)(1) and the Guidelines only as applied to Booker (and other defendants who have received unconstitutional enhancements) would leave in place the essential framework of the mandatory system Congress created. Applying the Guidelines in a constitutional fashion affords some uniformity; total discretion, none....

I would hold that § 3553(b)(1), the provisions of the Guidelines discussed above, and Rule 32(c)(1) are unconstitutional as applied to Booker, but that the Government has not overcome the presumption of severability. Accordingly, the unconstitutional application of the scheme in Booker's case is severable from the constitutional applications of the same scheme to other defendants....

BREYER, J., dissenting in part.\*

... I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the manner or way in which the offender carried out the crime of which he was convicted.... I continue to disagree with the constitutional analysis the Court set forth in *Apprendi* and in *Blakely*. But even were I to accept that analysis as valid, I would disagree with the way in which the Court applies it here.

## I

[The] Court's opinion today illustrates the historical mistake upon which its conclusions rest. The Court reiterates its view that the right of "trial by jury has been understood to require" a jury trial for determination of "the truth of every accusation." This claim makes historical sense insofar as an "accusation" encompasses each factual element of the crime of which a defendant is accused. But the key question here is whether that word also encompasses sentencing facts – facts about the offender (say, recidivism) or about the way in which the offender committed the crime (say, the seriousness of the injury or the amount stolen) that help a sentencing judge determine a convicted offender's specific sentence.

History does not support a "right to jury trial" in respect to sentencing facts. Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing.

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\* Chief Justice Rehnquist, and Justices O'Connor and Kennedy join this opinion.

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Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. Traditionally, those familiar with the criminal justice system have found separate, postconviction judge-run sentencing procedures sensible given the difficulty of obtaining relevant sentencing information before the moment of conviction. They have found those proceedings practical given the impracticality of the alternatives, say, two-stage (guilt, sentence) jury procedures. And, despite the absence of jury determinations, they have found those proceedings fair as long as the convicted offender has the opportunity to contest a claimed fact before the judge, and as long as the sentence falls within the maximum of the range that a congressional statute specifically sets forth.

The administrative rules at issue here, Federal Sentencing Guidelines, focus on sentencing facts. They circumscribe a federal judge's sentencing discretion in respect to such facts, but in doing so, they do not change the nature of those facts. The sentencing courts continue to use those facts, not to convict a person of a crime as a statute defines it, but to help determine an appropriate punishment. Thus, the Court cannot ground today's holding in a "constitutional tradition assimilated from the common law" or in the Magna Carta....

[Applied] in the federal context of mandatory guidelines, the Court's Sixth Amendment decision would risk unwieldy trials, a two-tier jury system, a return to judicial sentencing discretion, or the replacement of sentencing ranges with specific mandatory sentences. The decision would pose a serious obstacle to congressional efforts to create a sentencing law that would mandate more similar treatment of like offenders, that would thereby diminish sentencing disparity, and that would consequently help to overcome irrational discrimination (including racial discrimination) in sentencing. These consequences would seem perverse when viewed through the lens of a Constitution that seeks a fair criminal process.

The upshot is that the Court's Sixth Amendment decisions – *Apprendi*, *Blakely*, and today's – deprive Congress and state legislatures of authority that is constitutionally theirs. The sentencing function long has been a peculiarly shared responsibility among the Branches of Government. Congress' share of this joint responsibility has long included not only the power to define crimes (by enacting statutes setting forth their factual elements) but also the power to specify sentences, whether by setting forth a range of individual-crime-related sentences (say, 0 to 10 years' imprisonment for bank robbery) or by identifying sentencing factors that permit or require a judge to impose higher or lower sentences in particular circumstances....

## II

Although the considerations just mentioned did not dissuade the Court from its holdings in *Apprendi* and *Blakely*, I should have hoped they would have dissuaded the Court from extending those holdings to the statute and Guidelines at issue here. Legal logic does not require that extension, for there are key differences.

First, the Federal Guidelines are not statutes. The rules they set forth are administrative, not statutory, in nature. Members, not of Congress, but of a Judicial Branch Commission, wrote those rules. The rules do not establish minimum and maximum penalties for individual crimes, but guide sentencing courts, only to a degree.

[There] is less justification for applying an *Apprendi*-type constitutional rule where administrative guidelines, not statutes, are at issue. The Court applies its constitutional rule to statutes in part to avoid what *Blakely* sees as a serious problem, namely, a legislature's ability to make of a particular fact an "element" of a crime or a sentencing factor, at will. That problem – that legislative temptation – is severely diminished when Commission Guidelines are at issue, for the Commission cannot create "elements" of crimes....

At the same time, to extend *Blakely*'s holding to administratively written sentencing rules risks added legal confusion and uncertainty. Read literally, *Blakely*'s language would include within *Apprendi*'s strictures a host of nonstatutory sentencing determinations, including appellate court decisions delineating the limits of the legally "reasonable." (Imagine an appellate opinion that says a sentence for ordinary robbery greater than five years is unreasonably long unless a special factor, such as possession of a gun, is present.)... Appellate courts' efforts to define the limits of the "reasonable" of course would fall outside *Blakely*'s scope. But they would do so, not because they escape *Blakely*'s literal language, but because they are not legislative efforts to create limits. Neither are the Guidelines legislative efforts.

Second, the sentencing statutes at issue in *Blakely* imposed absolute constraints on a judge's sentencing discretion, while the federal sentencing statutes here at issue do not. As the *Blakely* Court emphasized, the Washington statutes authorized a higher-than-standard sentence on the basis of a factual finding only if the fact in question was a new fact – i.e., a fact that did not constitute an element of the crime of conviction or an element of any more serious or additional crime. A judge applying those statutes could not even consider, much less impose, an exceptional sentence, unless he found facts "other than those which are used in computing the standard range sentence for the offense."

The federal sentencing statutes, however, offer a defendant no such fact-related assurance. As long as "there exists an aggravating or

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mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission,” 18 U.S.C. § 3553(b)(1), they permit a judge to depart from a Guidelines sentence based on facts that constitute elements of the crime (say, a bank robbery involving a threat to use a weapon, where the weapon in question is nerve gas). Whether departure-triggering circumstances exist in a particular case is a matter for a court, not for Congress, to decide. [The] statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by statute – regardless of the applicable Guidelines range. Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely*.

These differences distinguish these cases from *Apprendi* and *Blakely*. They offer a principled basis for refusing to extend *Apprendi*’s rule to these cases....

### Notes

1. *Understanding the Essence of Booker*. The decisions in *Booker* run 118 pages, and the unique “split” majority opinion defies neat summarization. Nevertheless, the holding might be summarized in this way: one group of five Justices – the same five Justices that comprised the majority in *Apprendi* and *Blakely* – declared that the federal sentencing guidelines violate the Sixth Amendment because they rely on judicial fact-finding to enhance sentences; another group of five Justices – the *Apprendi/Blakely* dissenters plus Justice Ginsburg – declared the federal guidelines advisory, and in so doing sought to ensure that the guidelines system would continue to operate in a manner as close to the old system as possible. Particularly notable in this respect is Justice Breyer’s repeated statement that, even though the federal guidelines are now to operate as an advisory system, the Sentencing Reform Act still “requires judges to consider the Guidelines,” and “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”

2. *Applying Blakely to the Federal Sentencing Guidelines*. The first question the Supreme Court faced in *Booker* was *Blakely*’s applicability to the federal sentencing guidelines. In light of the dicta (and the dissents) in *Blakely*, was there any reasonable basis to expect that the Supreme Court would declare that *Blakely* did not apply to the federal sentencing guidelines?

The lower federal courts split over *Blakely*'s applicability to the federal guidelines, with a number of courts particularly emphasizing the Supreme Court's previous decisions upholding the constitutionality of various aspects of the guidelines. What do you think was the Government's (or Justice Breyer's) best argument to keep *Blakely* from being applied to the federal sentencing guidelines?

3. *Defining a remedy after holding the federal sentencing guidelines unconstitutional.* Five Justices of the Supreme Court concluded that the best response to the constitutional problem which flowed from *Blakely*'s application to the federal guidelines would be to make the system advisory. Nevertheless, Justice Breyer stressed that the Sentencing Reform Act still "requires judges to consider the Guidelines," and that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Moreover, the Court stressed that federal judges imposing sentences after *Booker* remain fully bound by the dictates of 18 U.S.C. § 3553(a), which "sets forth numerous factors that guide sentencing," including the need to avoid disparities and traditional purposes of punishment.

Reprinted after these notes are two federal district court opinions providing (distinct) elaborations on the exact meaning and import of Justice Breyer's account of how advisory guidelines are to operate under the terms of 18 U.S.C. § 3553(a).

4. *Rule by judges?* According to the merits majority opinion by Justice Stevens, the *Booker* decision is designed to "preserve Sixth Amendment substance" so as to guarantee "in a meaningful way ... that the jury would still stand between the individual and the power of the government under the new sentencing regime." And yet, because of the remedy crafted by the remedial majority opinion by Justice Breyer, judges may still make all sentencing determinations under the federal sentencing system. How are lower courts to decipher and give effect to a seemingly inconsistent ruling in *Booker* concerning the roles of judges and juries in sentencing fact-finding?

5. *Retroactive application of Booker.* Immediately after the ruling, many wondered whether *Booker* might be given retroactive application to the hundreds of thousands of cases that had been sentenced under federal guidelines now declared unconstitutional. Formally, *Booker* does not speak to the question of retroactivity. Notably, Justice Stevens' opinion for the Court suggests the Court is just "reaffirm[ing] our holding in *Apprendi*" which in turn might suggest *Booker* is retroactive back to 2000. But Justice Breyer's opinion for the Court speaks of

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*Booker* as if it is a “new rule” and as such is only applicable to pending cases. Even if *Booker* is a new rule, a non-frivolous argument can be made that this new rule could fit into one of *Teague*’s exceptions so as to be fully retroactive. Most commentators believe that offenders whose convictions and sentences were final by January 12, 2005 should not find much that is encouraging in *Booker*.

6. *Blakely waivers and indictments in pipeline cases.* Seven months passed between the Court’s decisions in *Blakely* and *Booker*. In the interim many trial and appellate panels struggled with the repercussions of *Blakely* and its possible application to the federal system, reaching different results as to the application of the Sixth Amendment and possible remedies. After the Supreme Court granted the certiorari petitions in *Booker* and *Fanfan*, some circuit courts no longer rendered sentencing decisions, and many district courts postponed sentencings. However, a number of circuits and district court continued to process criminal cases between *Blakely* and *Booker*, and in many jurisdictions prosecutors took steps to “*Blakely-ize*” indictments and/or to obtain so-called “*Blakely* waivers.”

After the *Blakely* decision, the Department of Justice provided guidance to its prosecutors in how to address the possible unconstitutionality of the guidelines. The so-called Comey Memorandum called for “*Blakely-ization*” of indictments: prosecutors were to “include in indictments all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules).... If the defendant objects to the inclusion in the indictment of Guidelines factors, the government should consider offering to strike the allegations if the defendant agrees to waive any *Blakely* objection to the imposition of sentence based on the traditional Guidelines sentencing process, including factfinding on Guidelines factors by the judge, generally under the preponderance standard.” See Memorandum from James Comey, Deputy Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Department Legal Positions and Policies in Light of *Blakely v. Washington*, 16 Fed Sent Rep 357, 358 (2004).

In addition, the Department developed specific terms for *Blakely* waivers:

The agreements should generally include provisions stating that the defendant agrees to have his sentence determined under the Sentencing Guidelines; waives any right to have facts that determine his offense level under the Guidelines (including facts that support any specific offense characteristic or other enhancement or adjustment) alleged in an indictment and found by a jury beyond a reasonable doubt; agrees

that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges to the validity of the Sentencing Guidelines. Prosecutors may agree to modified waivers or conditional plea agreements preserving certain challenges if such concessions are found necessary in a particular case.

*Id.* at 358.

In light of *Booker*'s decision to make the federal guidelines advisory, what should be the status of "*Blakely*-ize" indictments and also plea agreements executed before *Booker* which provided for a defendant to be sentenced pursuant to the guidelines?

7. *Certain uncertainty.* The peculiar, seemingly schizophrenic nature of the *Booker* decision means that the only certainty about the future of federal sentencing after *Booker* is uncertainty. There is uncertainty about how *Booker* will be interpreted and applied, uncertainty about how individuals and courts should react, uncertainty about how Congress and the US Sentencing Commission can and should respond. The following two cases from district courts issued in the immediate wake of *Booker* sought to provide at least a little bit of added clarity.

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**UNITED STATES v. JAMES WILSON  
2005 WL 78552 (D. Utah Jan. 13, 2005)**

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CASSELL, J.

Yesterday the Supreme Court handed down its decision in United States v. Booker, finding certain provisions of the Federal Sentencing Guidelines, promulgated pursuant to the Sentencing Reform Act of 1984, unconstitutional.... In light of the Supreme Court's holding, this court must now consider just how "advisory" the Guidelines are. The court has before it for sentencing defendant James Joseph Wilson, who has pled guilty to armed bank robbery. In view of his lengthy criminal record and his brandishing of a sawed-off shotgun at several tellers, the Guidelines advise a prison sentence of no less than 188 months. What weight should the court give to this recommended sentence?...

Having reviewed the applicable congressional mandates in the Sentencing Reform Act, the court concludes that considerable weight should be given to the Guidelines in determining what sentence to impose. The Sentencing Reform Act requires the court to impose sentences that "reflect the seriousness of the offense, promote respect for

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the law, provide just punishment, afford adequate deterrence, [and] protect the public.” The court must also craft a sentence that “afford[s] adequate deterrence to criminal conduct” and “protect[s] the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(B), (C). Finally, the court should “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6).

Over the last 16 years, the Sentencing Commission has promulgated and honed the Guidelines to achieve these congressional purposes. Congress, too, has approved the Guidelines and indicated its view that Guidelines sentences achieve its purposes. Indeed, with respect to the congressionally-mandated goal of achieving uniformity, the Guidelines are the only way to create consistent sentencing as they are the only uniform standard available to guide the hundreds of district judges around the country. Therefore, in all future sentencings, the court will give heavy weight to the Guidelines in determining an appropriate sentence. In the exercise of its discretion, the court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons. In this particular case, the court will follow the Guidelines and give Wilson a sentence of 188 months....

In imposing sentence, the court is of course circumscribed by any statutory maximum or minimum sentence. In this case, for example, defendant Wilson has pled guilty to armed bank robbery. The statutory maximum for this offense is twenty-five years in prison; there is no mandatory minimum sentence, so the lowest possible sentence is probation, without prison time. The court’s discretion must operate within these statutory boundaries.

This discretion, however, must also be exercised so as to comply with additional congressional mandates. Even as modified by *Booker*, the Sentencing Reform Act continues to direct that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth” in [18 U.S.C. § 3553(a)(2)]. Those purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner....

To determine what particular sentence achieves such things as “just punishment” and “adequate deterrence,” the court has information that

was not available before the passage of the Sentencing Reform Act – specifically, the Sentencing Guidelines. When it passed the Sentencing Reform Act, Congress created the Sentencing Commission. The Commission is an expert agency specifically designed to assist the courts in imposing sentences that achieve the purposes of punishment. Congress gave the Commission significant staff and broad fact-finding powers. In 1987, the Commission promulgated the first comprehensive set of Guidelines. For more than fifteen years, the Commission has refined the Guidelines so that they achieve the congressionally-mandated purposes.... Congress has also had an opportunity to review both the initial Guidelines and all subsequent amendments to insure that they fulfill congressional purposes.... Congress' creation of the Commission and subsequent approval of the Commission's Guidelines provide strong reason for believing that Guidelines sentences satisfy the congressionally-mandated purposes of punishment....

Even apart from congressional approval of the Guidelines, considerable evidence suggests that Guidelines sentences serve the congressionally-mandated purposes of punishment. Congress' first-identified purpose of punishment is for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense." ...

Just punishment means, in essence, that the punishment must fit the crime.... In determining society's views as to the appropriateness of federal sentences, we are fortunate to have very concrete data. In their informative book *Just Punishments: Federal Guidelines and Public Views Compared*, Professors Peter Rossi and Richard Berk systematically compare Guidelines sentences with sentences that the public would impose. By means of national public opinion survey, they studied 89 separate crimes, ranging in seriousness from illegal drug possession to kidnaping, including many of the crimes most frequently prosecuted in federal court.... From their data, Professors Rossi and Berk concluded that the Guidelines generally track public opinion....

It is important to note a few areas of disagreement between the public's views and Guidelines sentences. The public failed to support the Guidelines' differentially harsh treatment of distribution of crack cocaine (as compared to powder cocaine); nor did it support the tough sentences for environmental crimes, violations of civil rights, and certain bribery and extortion crimes. On the other hand, the public supported somewhat longer sentences for marijuana trafficking and for crimes endangering the physical safety of victims and bystanders (e.g., adding poison to over-the-counter drugs). But these disagreements were the exceptions; the rule was that public opinion tracked Guidelines sentences.

[It] is hardly surprising to find that the Guidelines track public

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views on appropriate punishment. The Guidelines were, after all, created through a democratic process. The public's elected representatives – Congress – created the Commission, approved the Guidelines, and then adjusted them over the years in an on-going dialog with the Commission. In light of these facts, it should be generally presumed that the Guidelines reflect the public's views on appropriate punishment....

The court is also required to impose a sentence that serves crime control purposes – e.g., deterrent and incapacitative purposes.... Essentially, these provisions require the court to determine whether a particular sentence is a cost-effective means of preventing crime, either by deterring potential criminals (general deterrence) or incapacitating criminals who would otherwise have committed more crimes (specific deterrence or incapacitation).

It is difficult for an individual judge to make such determinations. Focusing on “adequate deterrence,” for example, the court must assess the potential impact of its sentences on potential offenders. As a starting point, this might require the court to take judicial notice of the fact that crime rates are now at their lowest levels in thirty years.... Statistics reveal that 2002 was not only the year of the lowest victimization rate in recent history, but also the year with the highest prison population. Is this purely a coincidence? Or a consequence?

One recently published study by a well-known social scientist concluded that a significant part of the decline in violent crime is attributable to increased incarceration. Professor Steven Levitt concluded that increases in the size of the prison population, along with increases in the number of police and a few other factors could fully explain the drop in crime in the 1990s.<sup>42</sup> His study is not the only one to point in this direction....

Of particular interest in considering Guidelines sentences may be a recent study assessing the deterrent effect of state truth-in-sentencing laws.<sup>43</sup> Since 1994, Congress has provided some incentive grants to states who can demonstrate that violent offenders serve at least 85% of their sentences. Interestingly, these state truth-in-sentencing laws would track the Guidelines, which demand that prisoners serve 85% of their sentences. A sophisticated regression analysis comparing states with and without such truth-in-sentencing programs found that the laws decreased murders by 16%, aggravated assault by 12%, robberies by 24%, rapes by

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<sup>42</sup> Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Seven That Do Not, 18 J. Econ. Perspectives 163 (2004).

<sup>43</sup> Joanna M. Shepherd, Police, Prosecutors, Criminals and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws, 45 J.L. & Econ. 509 (2002).

12%, and larcenies by 3%. There was a “substitution” by offenders into less risky property crimes: burglaries increased by 20% and auto thefts by 15%. Overall, the net reductions in crime were substantial.

These studies focus on a deterrence effect from criminal penalties. Other studies confirm the obvious point that incarcerating an offender prevents him from repeating his crimes while he is in prison.<sup>44</sup>

More generally, estimates of both a deterrent and an incapacitative effect have suggested that each 1% increase in the prison population produces approximately 0.10% to 0.30% fewer index crimes.<sup>45</sup> ... Renowned criminologist James Q. Wilson, for example, has opined that this “elasticity” of crime with respect to incarceration is between 0.10% and 0.20%.<sup>46</sup> ...

The point of recounting these statistics is not to suggest that the court will make a finding on the elasticity of crime with respect to incarceration before imposing a sentence — far from it. Instead, the point here is that the court is poorly suited to consider elasticities and other factors that would go into a sensible deterrence calculation. On the other hand, the Sentencing Commission with its ability to collect sentencing data, monitor crimes rates, and conduct statistical analyses, is perfectly situated to evaluate deterrence arguments....

The fourth purpose of punishment specified by Congress is “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” This purpose can be generally described as “rehabilitation.” Some might argue that Guidelines sentences are contrary to rehabilitative efforts. But the Commission considered this goal in drafting the Guidelines.<sup>55</sup> More important, it seems clear that in cases such as this one – involving a lengthy prison sentence – rehabilitation is a subordinate consideration to just punishment and crime control. Congress itself directed the Commission to insure that the Guidelines “reflect the

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<sup>44</sup> Peter W. Greenwood et al., Three Strikes and You’re Out: Estimated Benefits and Costs of California’s New Mandatory-Sentencing Law, in *Three Strikes And You’re Out: Vengeance As Public Policy* 543 (David Schichor & Dale K. Sechrest eds. 1996); Joanna M. Shepherd, Fear of the First Strike: The Full Deterrent Effect of California’s Two- and Three-Strikes Legislation, 31 J. Legal Stud. 159 (2002).

<sup>45</sup> Here I draw on the helpful analysis of the studies found in John J. Donohue III & Peter Siegelman, Allocating Resources Among Prisons and Social Programs in the Battle Against Crime, 27 J. Legal Stud. 1, 12-14 (1998).

<sup>46</sup> James Q. Wilson, Prisons in a Free Society, 117 Pub. Interest 37, 38 (Fall 1994).

<sup>55</sup> See U.S.S.G. § 1A1.1 (policy statement). Cf. Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413 (1992) (arguing that Commission should have delineated its analysis further).

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inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocation training, medical care, or other correctional treatment.” ...

Another reason for placing rehabilitation in a secondary position is that the court has no way of determining whether a defendant has been rehabilitated. In this case, for example, the Guidelines call for a sentence of no less than 188 months. The court cannot determine today whether after completing, for example, 100 months of his sentence, defendant Wilson will have rehabilitated himself to the point where he is no longer a threat to society. Nor does any parole mechanism exist under the Sentencing Reform Act to make such a determination. The Sentencing Reform Act not only created the Guidelines but also abolished parole.... Because parole is not a possibility for defendants such as Wilson, the court must follow the Guidelines’ lead in giving rehabilitation a subsidiary role in determining the prison sentence.

One possible reason for avoiding a Guidelines sentence might be the so-called “parsimony provision,” which provides that “the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of punishment] set forth in [the Sentencing Reform Act].” It is possible to argue that this provision requires the courts to impose sentences below the Guidelines range, because Guidelines sentences are not parsimonious.<sup>63</sup> This is an interesting argument worthy of discussion.

Determining what the parsimony provision means is difficult. As Professors Marc Miller and Ronald Wright have noted, “[t]he full history and possible meanings of the parsimony provision, and of all of section 3553(a), have not yet been written.”<sup>64</sup> ...

Professors Miller and Wright concede that the parsimony provision has played “almost no role in caselaw,” but maintain that “the parsimony concept is powerful evidence ... that both the Senate and the House were attempting to pass a statute giving more substantial power to sentencing judges to impose a sentence outside the guidelines range.” This conclusion about legislative history seems debatable. But for present purposes, the critical issue is the meaning of the language Congress ultimately enacted. It requires a court to impose a sentence “sufficient, but not greater than necessary, to comply” with purposes of Sentencing

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<sup>63</sup> See [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy](http://sentencing.typepad.com/sentencing_law_and_policy) (Jan. 12, 2005) (The Power of Parsimony (and Justice Breyer’s Notable Omission)) (Prof. Douglas Berman tentatively advancing this suggestion).

<sup>64</sup> Marc L. Miller & Ronald F. Wright, Your Cheatin’ Heat(land): The Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev. 723, 810 n.57 (1999).

Reform Act. The court must, therefore, first determine what is a “sufficient” sentence. For the reasons given above, the Guidelines ranges are designed to impose sufficient punishment and appear to impose sufficient punishment in most cases.

Moreover, the Commission was itself bound by the parsimony provision. While some have argued that the Commission gave insufficient attention to the provision,<sup>72</sup> the fact remains that the Commission promulgated guidelines that it viewed as parsimonious. If the Commission was mistaken and the ranges were not parsimonious, Congress could have simply rejected them. Congress, of course, did nothing of the sort. To the contrary, in the 15 years since adoption of the Guidelines, the general tenor of Congressional efforts has been to constantly prod the Guidelines upward.

There may be an argument that the parsimony provision generally requires a court to impose a sentence at the low end of any applicable Guidelines range. This is something that judges generally do today; the vast majority of judges sentence at or toward the very bottom of any applicable Guidelines range.<sup>73</sup> [Because the court is inclined to follow the government’s recommendation to sentence Wilson at the low end of the Guidelines range that applies to him], it is enough to conclude that a low-end sentence within a Guidelines range is parsimonious, leaving for another day whether only a sentence at the low end of the range would be parsimonious....

While *Booker* renders the Guidelines advisory, the court is still obligated to consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines....

To be sure, reasonable minds may differ about whether the Guidelines are the best standard against which to measure the fairness of sentences. It is no secret that some judges believe sentences are too harsh, although the degree of judicial dissatisfaction with the Guidelines is easy to overstate. The fundamental fact remains, however, that the Guidelines are the only standard available to all judges around the country today. For that reason alone, the Guidelines should be followed

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<sup>72</sup> See Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1269 n.9 (2004).

<sup>73</sup> See Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L. Rev. 299, 338 (2000) (about 80% of all drug offenders sentenced at or below the Guidelines minimum and about an addition 10% sentenced in the lower half of the range).

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in all but the most exceptional cases.

For all these reasons, the court concludes that in exercising its discretion in imposing sentences, the court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate. The court, in the exercise of its discretion, will only deviate from those Guidelines in unusual cases for clearly identified and persuasive reasons....

In light of these principles, the court is now in a position to determine defendant Wilson's sentence.

The court finds the following facts: defendant Wilson robbed three bank tellers at gunpoint. On October 30, 2003, at approximately 9:00 a.m., Wilson ran into the Intermountain Credit Union in Salt Lake City, Utah. He was wearing a hooded mask, a black fleece shirt, dark pants, and white cross-trainer style shoes. He was brandishing what appeared to be a sawed-off shotgun. Wilson leaped onto the teller counter, then jumped down behind the counter demanding money.... The defendant pointed his weapon at two of the tellers, demanding they open their money drawers.... After obtaining approximately \$13,626, he fled the credit union in a late model 1980s gray or silver sedan....

Two days later, Wilson was arrested by state authorities for Aggravated Assault after a physical altercation with his girlfriend. During this incident, Wilson allegedly held a sawed-off shotgun to his girlfriend's head as he threatened her. As a similar weapon was used in the robbery, Wilson became a suspect in the robbery. [The police eventually] developed compelling evidence of his guilt, including matching his shoeprints with those left on the teller counter. Police also learned that Wilson was a member of the Black Mafia Gangsters.

Wilson ultimately pled guilty to armed bank robbery. The pre-sentence report revealed that Wilson is a five-time felony offender....

As the court understands the parties' positions, both sides agree that the Guidelines range is a level 31. This calculation is derived from a base offense level for robbery of 20, increased by two levels for theft from a financial institution, increased by five levels for brandishing a firearm, and finally increased by one level for loss in excess of \$10,000. Wilson's offense level is then increased a further six levels because he is a career offender in light of his extensive criminal history. From this total level of 34, three levels are subtracted for his acceptance of responsibility. The probation office also calculated that Wilson is in criminal history category VI, the highest category. These calculations produce a sentencing range of 188-235 months in prison. The government is recommending the low end of this range – 188 months – in light of Wilson's guilty plea. Wilson argues for a sentence substantially lower than 188 months.

For the reasons explained above, the court will, in exercising its discretion, give considerable weight to the recommended Guidelines sentence of no less than 188 months. Having considered all of the purposes of punishment – including the need to impose just punishment, to adequately deter future criminal violations, and to avoid unwarranted disparity in sentencing – the court concludes that the advisory Guidelines sentence is appropriate here. Therefore, the court will impose a sentence of 188 months....

It may be appropriate to offer a concluding observation.... The congressional view of how to structure that sentencing system will surely be informed by how judges respond to their newly-granted freedom under the “advisory” Guidelines system. If that discretion is exercised responsibly, Congress may be inclined to give judges greater flexibility under a new sentencing system. On the other hand, if that discretion is abused by sentences that thwart congressional objectives, Congress has ample power to respond with mandatory minimum sentences and the like. The preferable course today is to faithfully implement the congressional purposes underlying the Sentencing Reform Act by following the Guidelines in all but unusual cases....

**UNITED STATES v. MARK RANUM**  
**2005 WL (E.D. Wisc. Jan. 18, 2005)**

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ADELMAN, J.

On January 14, 2005, two days after the Supreme Court decided United States v. Booker, I had occasion to sentence defendant Mark Ranum, a loan officer convicted of misapplying bank funds....

The directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines and, as one court suggested, “only depart ... in unusual cases for clearly identified and persuasive reasons.” United States v. Wilson, 2005 WL 78552, at \*1 (D. Utah Jan. 13, 2005). The approach espoused in *Wilson* is inconsistent with the holdings of the merits majority in *Booker*, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in *Booker*, directing courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore. For example, under § 3553(a)(1) a sentencing court must consider the “history and characteristics of the defendant.” But under the guidelines, courts are generally forbidden to consider the defendant’s age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties

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and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, § 5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history. Thus, in cases in which a defendant's history and character are positive, consideration of all of the § 3553(a) factors might call for a sentence outside the guideline range.

Further, § 3553(a)(2)(D) requires a sentencing court to evaluate the need to provide the defendant with education, training, treatment or medical care in the most effective manner. This directive might conflict with the guidelines, which in most cases offer only prison. See U.S.S.G. § 5C1.1 (describing limited circumstances in which court can impose sentence other than imprisonment). In some cases, a defendant's educational, treatment or medical needs may be better served by a sentence which permits the offender to remain in the community.

In addition, § 3553(a)(7) directs courts to consider "the need to provide restitution to any victims of the offense." In many cases, imposing a sentence of no or only a short period of imprisonment will best accomplish this goal by allowing the defendant to work and pay back the victim. The guidelines do not account for this. In fact, the mandatory guideline regime forbid departures to facilitate restitution. *United States v. Seacott*, 15 F.3d 1380, 1388-89 (7th Cir. 1994).

Finally, in some cases the guidelines will clash with § 3553(a)'s primary directive: to "impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing.<sup>1</sup>

In sum, in every case, courts must now consider all of the § 3553(a) factors, not just the guidelines. And where the guidelines conflict with other factors set forth in § 3553(a), courts will have to resolve the conflicts.

Some have suggested that due to the Commission's expertise and experience developed over the years it is appropriate to afford their work "heavy weight." *Wilson*, 2005 WL 78552, at \*1. I agree that courts must

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<sup>1</sup>Many judges have criticized the guidelines not only for their inflexibility, for also for their unnecessary harshness in many cases. See, e.g., Rhonda McMillion, ABA Supports Push to Restore Judicial Discretion in Sentencing, 90 A.B.A.J. 62 (Jan. 2004) (noting speech by Justice Anthony M. Kennedy stating that "prison sentences are too long, mandatory minimum sentences should be repealed, and sentencing guidelines should be reconsidered"); Gina Holland, "Justice Applauds Bucking Sentencing Law," at <http://news.findlaw.com> (Mar. 17, 2004) (quoting Justice Kennedy's statement that courts should not have to "follow, blindly, these unjust guidelines").

in all cases seriously consider the guidelines. The Commission has collected a great deal of data over the years and studied sentencing practices. Thus, courts not imposing sentences within the advisory guideline range should provide an explanation for their decision. But in so doing courts should not follow the old “departure” methodology. The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the “heartland.” Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as that the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.

Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not as an invitation to do business as unusual.

In the present case, after carefully considering all of the evidence and applying all of the § 3553(a) factors, I declined to follow the guidelines and instead imposed a sentence which was sufficient, but not greater than necessary, to satisfy the purposes of sentencing.

Defendant Ranum held the position of senior loan officer at State Financial Bank. His duties included managing a commercial loan portfolio and evaluating loan applications. He was able to make secured loans of up to \$300,000 on his own authority, but had to obtain the approval of the bank’s credit committee for loans over that amount. He also had to report to the committee any loan he made in excess of \$150,000.

In April of 2000, Barry Craig and Ralph Diehl approached defendant seeking to obtain financing for a business that would operate a cruise ship on the Great Lakes. Craig and Diehl had arranged to lease a ship from a Greek shipping company, Attica, and needed a letter of credit and other funds to start the business and take possession of the ship. After reviewing their business plan and obtaining their personal guarantees and those of several of their relatives, as well as a guarantee from the business – “Great Lakes Cruises” (“GLC”) – defendant agreed to extend credit. He had no prior relationship with Craig or Diehl.

On April 5, 2000, defendant issued a “standby letter of credit”<sup>2</sup> in the amount of \$190,000. Subsequently, he twice increased the amount of

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<sup>2</sup>A standby letter of credit guarantees payment to a third party concerned about the credit worthiness of the party with whom it is doing business. Unless the borrower defaults on its obligations to the third party, the creditor bank does not actually disburse funds.

## **Sentencing Law and Policy**

the letter by \$190,000, making the bank's total obligation \$570,000. The purpose of the letter was to ensure that GLC fulfilled its obligations to Attica under the lease agreement. Defendant did not report issuing the letter of credit to the credit committee or obtain its approval. On October 25, 2000, defendant loaned GLC \$100,000 to cover a cash payment that it owed to Attica. He did not report or obtain approval for this loan although in aggregation with the letter of credit he had exceeded his lending authority to GLC. On November 17, 2000, defendant issued a second letter of credit, this time in the amount of \$340,000, which in January 2001 he increased to \$580,000. This letter, coupled with the previous \$100,000 payment, was needed to enable GLC to take possession of the ship. Again, defendant did not report or obtain approval for the letter. Finally, on March 9, 2001, defendant loaned GLC \$154,000 to make necessary modifications on the ship and again did not report the loan.

Early on, GLC appeared to have a promising future, receiving reserve bookings worth about \$3,000,000. On April 21, 2001, GLC repaid the October 2000 loan of \$100,000. However, when the time came for GLC to bring the ship from Greece to the Great Lakes, GLC did not have the \$580,000 needed to take possession. Rather than have Attica draw on the second letter of credit, defendant authorized a loan to GLC of \$580,000. Prior to doing so, he approached the credit committee and advised it that the loan was "cash collateralized" and thus "risk free." Although defendant hoped and expected that GLC would have sufficient cash reserves to collateralize the loan, it did not, in fact, have such reserves at the time. Thus, his statement to the committee was false. Based on defendant's statement, the committee approved the loan, and in May 2001, defendant wired the funds to Greece. On June 1, 2001, the second letter of credit (in the amount of \$580,000) expired.

GLC began offering cruises in June 2001. However, it began experiencing cash flow problems and found it could not make the \$300,000 lease payment due. Rather than permitting Attica to draw on the first letter of credit, defendant agreed to authorize a loan of \$300,000 to Craig personally to cover the payment. Defendant immediately wired the money to Greece. Considered in isolation, defendant had the authority to make this loan. However, because he made the loan to an individual who had personally guaranteed GLC's obligations, the loan did not comply with bank policy.

GLC's chance to be successful ended soon after its ship began to cruise the Great Lakes. On or about June 24, 2001, the Centers for Disease Control ("CDC") boarded the ship, found it unfit and issued a

no-sail order.<sup>3</sup> The order generated substantial adverse publicity and as a result many persons who had reserved bookings cancelled them. GLC was forced to cancel its planned cruises for the remainder of the cruise season, and its business failed. Aside from the \$100,000 loan that GLC repaid in April 2000, the bank lost all of the money defendant loaned to GLC and Craig.<sup>4</sup> Its total loss was \$1,134,000.<sup>5</sup>

With the business collapsing and the bank's funds in jeopardy, defendant retained the law firm of Kirkland and Ellis to try to protect the bank. Initially, he did not advise the bank that he had retained Kirkland and Ellis or how much credit he had extended to GLC and Craig. At the prodding of the firm, defendant eventually disclosed what he had done. In August 2001, the bank fired defendant.

In February 2004, the government charged defendant in a three count indictment. Count one charged him with misapplication of bank funds by a bank officer pertaining to the \$580,000 loan, count two charged him with making a false statement in connection with a loan application (his statement to the credit committee concerning the same loan), and count three charged him with misapplication of bank funds pertaining to the \$300,000 loan to Craig. Defendant went to trial, at which he admitted exceeding his loan authority and misleading his employer but denied that he intended to harm or defraud the bank. The jury convicted him on all three counts.<sup>6</sup>

Prior to defendant's trial, the Supreme Court issued its decision in *Blakely*, casting serious doubt on the status of the guidelines. However, the government did not seek jury findings as to any sentencing enhancements under the guidelines. Thus, defendant argued that he could

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<sup>3</sup>The CDC issued the order because of Attica's failure to properly prepare the ship, not because of any failing on GLC's part.

<sup>4</sup>It appears that Attica later made a claim on the first letter of credit, which the bank paid \$100,000 to resolve.

<sup>5</sup>This figure is based on adding the \$580,000 loan, the \$300,000 loan, the \$154,000 loan, and the \$100,000 paid out on the first letter of credit.

<sup>6</sup>Under counts one and three, the government was required to prove: (1) that defendant was an officer or employee of the bank; (2) that the bank was federally insured; (3) that defendant used his position to wilfully misapply funds; (4) that he did so with intent to injure or defraud the bank; and (5) that he wilfully misapplied funds in excess of \$1000. Federal Criminal Jury Instructions of the Seventh Circuit 208 (1999). Regarding the fourth element, the applicable jury instruction stated: "A bank officer or employee acts with the intent to injure or defraud a bank when he uses his relationship with or position in the bank for his own or another's personal advantage, or when he acts with the intent to injure the bank's interests or with reckless disregard for the interests of the bank." Based on the evidence and the jury's questions during deliberations, it is likely that the jury found that defendant acted with reckless disregard.

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not constitutionally be sentenced under the guidelines. Two days before sentencing, the Court decided *Booker*. Based on *Booker*, I determined the guideline range in the usual manner and then considered the range along with the other factors set forth in § 3553(a).

I determined that the applicable offense level was 21 (base level 6, U.S.S.G. § 2F1.1(a) (2000), plus 11 for amount of loss, § 2F1.1(b)(1)(L), plus 2 for more than minimal planning, § 2F1.1(b)(2)(A), plus 2 for abuse of a position of trust, § 3B1.3)<sup>7</sup> and the criminal history category was I, creating an imprisonment range of 37-46 months.<sup>8</sup> The government argued that I should impose a sentence consistent with that range. The defense argued for a period of home confinement. I rejected both recommendations and imposed a sentence of one year and a day.

I determined that the factors set forth in § 3553(a) fell into three general categories: the nature of the offense, the history and character of the defendant, and the needs of the public and the victims of the offense. I analyzed each category and in so doing considered the specific statutory factors under § 3553(a), including the advisory guidelines.

First, I considered the nature of the offense. The offense was serious for several reasons, the primary one being the amount of the loss. In addition, defendant made repeated loans outside of his authority over an extended period of time, abusing his employer's trust. When things started to go badly, defendant was not honest with his employer, recklessly loaned GLC more money and attempted to conceal what he had done.

However, defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another. Under §

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<sup>7</sup>I determined defendant's offense level under the 2000 version of the guidelines because it produced a lower range than the 2004 version. See U.S.S.G. § 1B1.11(b)(1) (stating that courts should use the version of the guidelines in effect at the time of sentencing unless doing so would violate the Ex Post Facto Clause). Even though the guidelines are no longer mandatory, making it unclear whether the Ex Post Facto Clause applies, because the *Booker* Court did not instruct district judges to apply the guidelines any differently than they previously did in determining the advisory guideline range, I applied § 1B1.11(b)(1) and all other applicable provisions.

<sup>8</sup>I resolved the factual disputes regarding the guidelines on the record as I did before *Blakely/Booker*. A court cannot reasonably consider the guideline range until it properly determines what that range is. Further, a court might unreasonably exercise its discretion if were it to apply the guidelines but calculate them incorrectly. Cf. United States v. Ferron, 357 F.3d 722, 724 (7th Cir. 2004) ("[A] misapplication of the guidelines is an error of law and is by its very terms, an abuse of discretion."); Maynard v. Nygren, 332 F.3d 462, 467 (7th Cir. 2003) (stating that "a district court by definition abuses its discretion when it makes an error of law").

3553(a) and the decisions of the Supreme Court, a sentencing court may properly consider a defendant's motive. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (stating that "the defendant's motive for committing the offense is one important factor"). In the present case, defendant did not know Craig and Diehl before he lent them money, and he had no personal stake in making the loans. Nor did he intend to harm the bank. On the contrary, he wanted GLC to succeed so that it could repay the loans. When the loans went bad, defendant made attempts to protect the bank. Further, it was by no means a foregone conclusion that GLC would fail. If the ship that GLC leased from Attica had met appropriate standards, GLC might well have been able to repay the loans in full. The evidence presented at trial showed that GLC's venture was a promising one and generated substantial early bookings. GLC failed primarily because of the inadequacy of the ship it obtained from Attica. Thus, although the offense was a serious one, I found some of the circumstances surrounding it to be unusual.

Defendant's offense level under the advisory guidelines was largely the product of the loss amount. One of the primary limitations of the guidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level. For example, the guidelines treat a person who steals \$100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child.<sup>9</sup> It is true that, as the government argued in the present case, from the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference. See *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) ("Were less emphasis placed on the overly-rigid loss table, the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society would perhaps assume greater significance in assessing the seriousness of different frauds."). In the present case, defendant did not act for personal gain. He made loans outside his authority and was reckless with his employer's money. But that is not the same as stealing it. Thus, due to the nature of the case, I found the guideline range, which depended so heavily on the loss amount, greater than necessary.

I then considered the second general category – the history and character of defendant. The factors in this category weighed heavily in defendant's favor. He is fifty years old, had no prior record, a solid employment history, and is a devoted family man. He has two children, one of whom is still in school. Prior to his recent marriage, he was a

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<sup>9</sup>Further, some courts of appeals prohibited downward departures on the basis of the defendant's not acting for personal gain. See *United States v. Corry*, 206 F.3d 748, 750-51 (7th Cir. 2000).

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single father who did an excellent job of raising two daughters. He also provides care and support for his elderly parents. His father suffers from Alzheimer's disease and is particularly dependent on defendant – defendant is one of the few people he still recognizes. Defendant's mother is also elderly and suffers from depression. I concluded that defendant's absence would have a profoundly adverse impact on both his children and his parents. Defendant himself suffers from serious health problems, including diabetes and sleep apnea.<sup>10</sup>

In addition, numerous friends and business associates wrote letters attesting to defendant's good character. Of particular interest were letters from defendant's former boss and a former co-worker from State Financial Bank. Both spoke highly of defendant.

I also noted that defendant's conviction had significant collateral effects on him. After his termination by State Financial Bank, defendant obtained a good job at Anchor Bank. As a result of the conviction he lost that job and will be unable to work in banking again.

Under all of the circumstances, I concluded that defendant is not a danger to society and is highly unlikely to reoffend.

Finally, I considered the needs of the public and the victim. Because the case was so unusual, I doubted whether a prison sentence would have much value as a deterrent. Loan officers will generally follow bank rules because their jobs depend on it. As previously stated, I also concluded that the public did not need to be protected from defendant. As for the victim, the bank, defendant's ability to make restitution would be enhanced if he was not incarcerated for an overly long time.

Nevertheless, in order to promote respect for the law and in recognition of the significant loss to the bank, I concluded that defendant had to be confined for a significant period of time. However, I concluded that the sentence called for by the guidelines, 37-46 months, was much greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a). The range does not properly account for defendant's absence of interest in personal gain, for the fact that GLC could easily have succeeded, for defendant's otherwise outstanding character and for the significant benefits to family members resulting from his presence. Instead, I imposed a sentence of twelve months and one day, followed by five years of supervised release. This sentence was sufficient to promote

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<sup>10</sup>Defendant's physician advised me that in his view imprisonment would further adversely affect defendant's health. However, I did not believe that defendant's health problems were so severe that the Bureau of Prisons could not handle them.

respect for the law and account for defendant's serious abuse of trust over an extended period of time.<sup>11</sup>

## Notes

1. *Comparing Wilson and Ranum.* What *Booker* really means for federal sentencing depends on how it is applied in practice, and the rulings in *Wilson* and *Ranum* both provide clear and cogent – and quite different – accounts of how two judges think *Booker* must be applied.

What deference would Judge Cassell and Judge Adelman give to the guidelines after *Booker*? Judge Cassell's sentence in *Wilson* treated the guidelines as nearly mandatory in a case which involved a violent crime committed by a person with a long criminal history (and, notably, the case apparently had no “*Blakely* facts” in dispute), while Judge Adelman's sentence in *Ranum* treated the guidelines as more advisory in a case which involved a non-violent crime committed by a first offender (and, notably, the case did appear to have some “*Blakely* facts” in dispute). Many persons have rightfully distinguished how we should treat violent recidivists and non-violent first offenders at sentencing, and have also expressed concern about whether the federal guidelines do an adequate job in this regard. In other words, achieving true substantive uniformity and proportionality in sentencing may call for Judge Cassell to follow the guidelines in *Wilson* and for Judge Adelman to depart from the guidelines in *Ranum*. Both Judge Cassell and Judge Adelman sit in districts with a relatively high rate of sentences imposed within the guidelines (and a relatively low rate of departures—22% for the District of Utah and 27.3% for the Eastern District of Wisconsin in 2002, compared to a nationwide average of 35%, and a number of districts with departure rates in the range of 40-50%). See <http://www.ussc.gov/ANRPT/2002/table26.pdf>.

The defendant in *Wilson* had apparently admitted all the guidelines facts and signed a *Blakely* waiver. Consequently, if the Stevens/Scalia/Thomas proposed remedy in *Booker* had carried the day, it seems Judge Cassell would have been *required* to impose a sentence of no less than 188 months and would have had (unreviewable) discretion to impose a sentence up to 235 months. But, because Breyer's remedy carried the day, Judge Cassell clearly had discretion to impose a sentence less than 188 months and, arguably because of the parsimony mandate,

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<sup>11</sup>I note that defendant would likely have received a lower sentence had the remedial dissenters in *Booker* carried the day. The jury made no findings on any guideline enhancements. Thus, defendant's guideline sentence would have been capped at the base offense level.

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did not have discretion to go above 188 months. In contrast *Ranum* reflected one of the rare trials in the federal system with Ranum admitting the actus reas but contesting the existence of the required mental state.

2. *The “new” section 3553(a) sentencing factors.* Judge Cassell considers the statutory parsimony mandate of 3553(a) and acknowledges the virtually non-existent role that the parsimony concept has played in federal sentencing. The same point could be made about all of the elements of section 3553(a) other than the requirement that judges consider the guideline sentence. Another critical part of the statute is the requirement in 3553(a)(1) that a judge “shall consider ... the history and characteristics of the defendant.” This provision is central to the decision in *Ranum*. What consideration does it get in *Wilson*?

Is Section 3553(a) the guts of the whole new federal sentencing system after *Booker*? If this provision is so important, why has it not played a major role in federal sentencing cases over the past fifteen years? See *United Stats v. Davern*, 937 F.2d 1041 (6th Cir. 1991) (holding that § 3553(a) justifies approaching the guidelines as “general principles of sentencing” in order to “transform mandatory rules into the more modest name guidelines”), reversed, 970 F.2d 1490 (6th Cir. 1992) (en banc) (rejecting broad reading of the role of 3553(a)).

3. *Do judges measure the political winds?* Judge Cassell issued the decision in *Wilson* the day after *Booker*. How was it possible for Judge Cassell to assess the complex and long *Booker* decision so quickly? Would Judge Cassell have been aided by briefing and arguments from counsel? Reports describe an email from a respected Arkansas trial judge within a day or two of Judge Cassell’s decision sending *Wilson* to every other federal judge, and encouraging all judges to consider whether Judge Cassell’s approach might encourage Congress to leave the federal sentencing system (and the newly freed federal judges) alone. Should protection of the federal judiciary (or protection of judicial discretion) be a factor in how a judge decisions a case? Is there anything wrong with judges sharing public judicial decisions with other judges?

## PROBLEM 1: ASYMMETRICAL GUIDELINES

In the aftermath of the *Blakely* decision, staff working for the Sentencing Commission and for various members of Congress began exploring drafting options for a revised federal sentencing system that could survive any Sixth Amendment violations as described in *Blakely*.

One leading option, first conceived by Professor Frank Bowman (a former prosecutor, defense attorney, and staff attorney for the Sentencing Commission), called for asymmetrical guidelines. The proposal called for Congress to pass a statute redefining the “guideline maximum” to be the current statutory maximum for the crime of conviction. However, the existing sentencing guidelines would remain in place for the bottom of the range. Any guideline adjustments that raise the bottom of the guideline range would continue to bind the sentencing judge. Bowman describes the justification and likely effect of this proposal as follows:

The practical effect of such an amendment would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact. No modifications of pleading or trial practice would be required. The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure. However, given that the current rate of upward departures is 0.6%, and that judges sentence the majority of all offenders at or below the midpoint of existing sentencing ranges, the likelihood that judges would use their newly granted discretion to increase the sentences of very many defendants above now-prevailing levels seems, at best, remote.

This proposal could not be effected without an amendment of the SRA because it would fall afoul of the so-called "25% rule," 28 U.S.C. §994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. The ranges produced by this proposal would ordinarily violate that provision....

In addition, if such a statute were passed, the Commission might think it proper to enact a policy statement recommending that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure. Failure to adhere to this recommendation would not be appealable, and thus such a provision would not fall foul of *Blakely*. A few modifications to the Guidelines themselves would also be required to bring them into conformity with *Blakely* and the new statute.... But otherwise, very little would have to change.....

The Sentencing Commission is debating whether to endorse this proposal, and Congress is deliberating whether to enact such a statute. Some members of Congress suggested that the asymmetrical guidelines would operate as a temporary “fix,” allowing them to consider more carefully other more thoroughgoing changes to the federal system.

You serve on the staff of a member of Congress, and you specialize in criminal justice issues. Your boss wants to know how various groups

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are likely to respond to the “asymmetrical guidelines” proposal, both as a temporary response to *Blakely* and as a longer-term restructuring of the system. What is the likely reaction of the leadership of the Department of Justice? What about the National Association of Federal Defenders? The federal judges, as represented by the Judicial Conference of the United States?

What suggestions do you have for any longer-term solutions for the federal sentencing system? Here are several options:

- Congress picks some high priority crimes and designates mandatory minimum sentences for those crimes.
- Congress leaves judges discretion to impose a sentence anywhere between the statutory minimum and maximum, perhaps relying on guidelines for voluntary guidance (and eliminating any appellate review of sentences based on application of the guidelines).
- Congress creates “inverted guidelines” that designate the presumptive sentence as the statutory maximum, and use guideline factors (and judicial factfinding) to justify any downward movement from that statutory maximum.
- Congress designates a few critical “enhancement factors,” such as use of a weapon, and authorizes prosecutors to allege such factors in the indictment and prove them to a jury, either during the trial or in a bifurcated sentencing proceeding.

Professor Bowman was not alone in assessing *Blakely* and recommending congressional fixes. Indeed, *Blakely* spurred an unusually fast and unusually spirited scholarly response. For more details about these and other possible legislative responses, see Albert W. Alschuler, *To Sever or Not To Sever? Why Blakely Requires Action By Congress*, 17 Fed. Sent. Rep. 11 (2004); Rachel E. Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 17 Fed. Sent. Rep. 312 (2004); Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 Fed. Sent. Rep. 333 (2004); James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?* 17 Fed. Sent. R. 97 (2004); Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sent. Rep. 316 (2004); Mark Osler, *The Blakely Problem and The 3x Solution*, 16 Fed. Sent. Rep. 344 (2004); Ian Weinstein & Nathaniel Z. Marmur, *Federal Sentencing During the Interregnum: Defense Practice as the Blakely Dust Settles*, 17 Fed. Sent. Rep. 51 (2004).

## C. State Responses to *Blakely*

The impact of *Blakely* in a given state turns on the particulars of that state's sentencing system. Courts, commissions and legislatures are all wrestling with the possible impact of the decision. For states, is *Blakely* a bump in the legal road or a sinkhole? What differences exist, if any, between implications for federal law and state systems?

### 1. Responses in Different Institutions

The report from Minnesota's Sentencing Guidelines Commission and the case from the Oregon Supreme Court below provide two distinct examples of how *Blakely* impacts sentencing laws and practices in particular states and also provide windows into the different ways different sentencing institutions can sort through and seek to resolve the many issues that *Blakely* raises for state sentencing practices.....

#### **THE IMPACT OF BLAKELY V. WASHINGTON ON SENTENCING IN MINNESOTA: SHORT TERM RECOMMENDATIONS** **Minnesota Sentencing Guidelines Commission (August 6, 2004)**

... The recent *Blakely v. Washington* decision directly impacts neither the constitutionality nor the structure of the Minnesota Sentencing Guidelines. However, the decision does affect certain sentencing procedures pertaining to aggravated departures and specific sentence enhancements that will need to be modified to meet the constitutionality issues identified under *Blakely*. Those procedures can be corrected, as demonstrated by the state of Kansas, who addressed this very issue in 2001, with limited impact on the criminal justice system as a whole....

Even though the federal guidelines and presumptive guideline states, including Minnesota, are both directly impacted by *Blakely*, the impact is very different in scope due to the differences in the structure of the two guideline systems. Both systems allow for the finding of aggravating factors in determining departures or enhanced sentences from the standard sentence range. What differs, however, is that enhancement factors are built into the structure of the federal guidelines through a complicated point system that results in the assignment of a point value for the finding of aggravating factors.... The point value for the aggravating factor(s) is added to the points assigned for the offense

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itself and the defendant's total points determine the level from which the sentence is pronounced....

Aggravated departures resulting in enhanced sentences under the Minnesota Sentencing Guidelines are outside the structure of the guidelines. Unlike the federal guidelines, there are no points assigned for aggravating factors, nor are judges mandated by the guidelines to impose an aggravated departure or enhanced sentence. The sentencing guidelines determine presumptive sentences for offenses on the sentencing grid. Departures are viewed as sentences outside or apart from presumptive sentences set forth on the sentencing grid and are available for judges to use when deciding a case that is atypical or when the factors surrounding a specific case sets it apart from the norm. A departure/enhanced sentence is not controlled by the guidelines regarding the length of the enhancement other than not exceeding the statutory maximum for a specific offense....

The Sentencing Guidelines Commission strongly believes that preserving aggravated departures is necessary to ensure public safety and provide for appropriate sentencing when aggravating factors related to an offense are present and an enhanced sentence is in the interest of justice.... In Minnesota, aggravated departures accounted for approximately 7.7% (1,002) of a total of 12,978 felony sentences in 2002. Aggravated departures can occur in two ways under sentencing guidelines. The first type of aggravated departure is an aggravated dispositional departure in which the defendant should have received a presumptive stayed sentence under the guidelines but the court instead imposes a prison sentence. The second type of aggravated departure is an aggravated durational departure that occurs when the offender receives a sentence length that is longer than the sentence recommended by the sentencing grid, regardless of whether the sentence is a presumptive stay or a presumptive prison sentence. Listed below is the distribution of aggravated departures for 2002.

*Total Aggravated Departures For 2002*

Type of Departure	# Cases	% Overall Cases
Aggravated Disposition	481	3.7%
Agg. Disposition and Agg. Duration	50	0.4%
Aggravated Duration-Prison	224	1.7%
Aggravated Duration-Probation	247	1.9%
Total	1,002	7.7% (of 12,978)

From the data available, approximately 1,000 cases per year involve aggravated departures and would be subject to the constitutional issues raised in *Blakely*. When this data is further examined by method of conviction, approximately 92% (923) of the cases involved a guilty plea and only 8 % (79) of the cases involved a trial. The data would indicate that a very small number of cases resulting in aggravated departures actually involve a criminal trial. [The largest number of trials occurred for defendants who received an aggravated duration in a prison term: 46 of 224 (21%) of those cases were resolved by trial rather than guilty plea.]

It would be reasonable to assume that there will be a slight increase in the number of trials in the future since a certain percentage of offenders who currently plead guilty may request a jury trial in the future to have the aggravating factors determined by a jury. There would be corresponding costs to the courts for these additional trials. However, it should be noted that 67% of the offenders who pled guilty in 2002, either agreed to the departure in the guilty plea or the defendant requested the aggravated dispositional departure.

What the data demonstrate is that aggravated departures represent a very small percentage of the total number of felony sentences imposed each year in Minnesota. When the ... aggravated departures are further subdivided by type of conviction, a very small number of cases actually involve a criminal trial. The state of Kansas implemented the bifurcated jury trial system in 2001 in response to the *Apprendi* ruling and to date has not experienced a significant growth in the number of trials related to aggravated departures. Although there may be a slight increase in the number of jury trials involving aggravated departures, there is no basis to believe at this time that the number of jury trials would reach the hundreds or thousands as some have predicted....

There are four potential situations that could result when pursuing aggravated departures:

- (1) the defendant pleads not guilty to the offense and does not admit to any of the aggravating factors;
- (2) the defendant pleads not guilty to the offense but admits to the aggravating factors;
- (3) the defendant pleads guilty to the offense but does not admit the aggravating factors; and
- (4) multiple offenses involve any combination of the above.

The issue of whether a defendant can waive a jury trial on guilt or innocence but request a jury to determine the presence of aggravating factors is an issue that will have to be addressed. The Kansas statute relevant to bifurcated trials states that if a defendant waives the right to a

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jury trial he also waives the right to have a jury determine the presence of aggravating factors. This is an issue that will need further legislative or judicial consideration....

The Court in *Blakely* discussed whether a defendant could waive the right to a jury trial when it related to sentencing enhancements. The Court stated,

... If appropriate waivers are procured, states may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial fact finding as to sentence enhancements, which will be in his interest if relevant evidence would prejudice him at trial.

Although the plea bargaining process is permitted when aggravated departures are involved, the defendant must stipulate to the aggravating factors or consent to judicial fact finding. Neither of these options is currently being required in pleas involving aggravated departures, thus, our current plea process would need to be modified to bring the state into compliance with the *Blakely v. Washington* ruling.

### ***Recommendations:***

- (1) Notice Procedures should be modified when there is an intent to seek an aggravated departure ...
- (3) Procedures will need to be developed to permit juries to determine aggravating factors
  - a. Develop bifurcated trial policies and procedures ...
  - c. Consider K.S.A. 21-4718 on departure procedures and procedures for jury requirements as a model
  - d. Develop special jury verdict forms to be used in bifurcated jury trial situations ...
  - e. Incorporate Special Interrogatories on the jury verdict form

In Minnesota, there are several specific statutory enhancements for certain offenses that result in an aggravated departure or an enhanced sentence above the presumptive sentence for the offense due to the determination of one or more aggravating factors, other than prior convictions. Currently, the court makes the determination of additional factors that increase the length of sentence for a conviction under these statutes. They include sentencing enhancements for heinous crimes; certain pattern and predatory sex offenders; mandatory sentences for repeat sex offenders; dangerous offenders; career offenders; and depriving of custodial or parental rights....

A very small number of offenders are sentenced under these statutes

per year. The number averages 50 to 60 offenders per year, with only a total of 420 offenders sentenced since 1991.

***Recommendation:***

Due to the public safety issues and seriousness of the offenses in this category, bifurcated trials should be used when sentencing under these specific statutes....

... The commission recommends that the state move cautiously and thoughtfully as it explores potential changes to the current sentencing system. It may be counter productive to begin developing solutions before the nature of the problem is fully understood. Before embarking on a series of statutory responses to the *Blakely* decision, it may be more prudent for the judiciary, prosecutors and defense attorneys to develop temporary interim policies and procedures that are advisory in nature for conducting bifurcated jury trials, plea negotiations, and sentencing procedures that impact the areas of sentencing that have previously been identified as most likely be affected by this decision....

Although advisory policies and procedures will carry no legal force, they will provide for some consistency in sentencing throughout the state as the legal issues work their way through the courts at both the state and federal levels. In addition, they will help to limit the number of future of appeals that could result from every judicial district interpreting and responding to *Blakely* in a different manner....

There will be a period of transition that may result in a certain level of confusion and frustration, but trials will continue and sentencing will occur and protecting public safety will remain a priority in the state. Although presently there may be a certain level of apprehension, sentencing in Minnesota is not in a state of chaos....

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**State v. Randy Everett Dilts  
2004 WL 290385 (Oregon, Dec. 16, 2004)**

BALMER, J.

This case is before us on remand from the United States Supreme Court. In our prior decision, we affirmed defendant's conviction and sentence for assault. State v. Dilts, 82 P.3d 593 (2003) (*Dilts I*). Defendant petitioned for a writ of certiorari from the United States Supreme Court, and the Court vacated the judgment in *Dilts I* and remanded the case to us for further consideration in light of the Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). For the

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reasons that follow, we now reverse the decision of the Court of Appeals and the judgment of the trial court, and remand the case to the trial court for further proceedings....

Defendant pleaded guilty to assault in the third degree. The trial court found that the crime was racially motivated and imposed an upward departure sentence under the Oregon Felony Sentencing Guidelines (sentencing guidelines). The trial court sentenced defendant to 36 months' imprisonment and an additional 36-month period of post-prison supervision. Defendant appealed, ... arguing that the trial court violated his state and federal jury trial rights and his federal due process rights by imposing a departure sentence based on a fact not pleaded in the indictment or proved beyond a reasonable doubt....

In *Dilts I*, this court affirmed defendant's sentence, holding that [the statute defining the penalties for third-degree assault] established the maximum penalty for the crime that defendant had committed and that defendant's sentence therefore was constitutional under *Apprendi* because it had not exceeded that prescribed statutory maximum. [Following] its decision in *Blakely*, the Court vacated and remanded this court's judgment in *Dilts I* for further proceedings in light of *Blakely*.

[The government concedes] that this court's decision in *Dilts I* "cannot be reconciled with the constitutional requirements set forth in *Blakely*." Specifically, the state concedes that *Blakely* rejected the proposition, upon which this court based its holding in *Dilts I*, that the statutory maximum sentence for *Apprendi* purposes is the statutory indeterminate maximum sentence, rather than the guidelines' presumptive sentence. The state argues, however, that this court should sever the requirement in OAR 213-008-0001 that makes the presumptive sentence mandatory. According to the state, if this court treats the presumptive sentence merely as a "recommended" sentence and permits the trial court either to impose that sentence or a departure sentence based on the factors in the guidelines, then the presumptive sentence no longer will be the "statutory maximum," and the Oregon sentencing scheme will be consistent with *Blakely* and *Apprendi*....

The Court's decision in *Blakely* compels us to reverse our decision in *Dilts I*.... Oregon law provides that "the sentencing judge *shall* impose the presumptive sentence ... *unless* the judge finds substantial and compelling reasons to impose a departure. " OAR 213-008-0001; see also ORS 137.671(1) ("The court may impose a sentence outside the presumptive sentence or sentence range made presumptive by ORS 137.669 for a specific offense if it finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence."). If the trial court imposes a sentence that exceeds the

presumptive sentence without making the required additional findings, then that sentence is erroneous.

Here, the presumptive sentence that was based on the facts that were alleged in the indictment and admitted by defendant in his guilty plea was 15 to 18 months' imprisonment, so the "statutory maximum" sentence that the trial court could have imposed without making additional factual findings was 18 months' imprisonment.... The trial court had authority to impose the upward departure *only* because it made additional findings of fact. That is precisely the procedure that the Court in *Blakely* found did not comply with the Sixth Amendment's jury trial guarantee....

We now turn to the consequences of that conclusion. As noted, the state argues that, notwithstanding *Blakely*, this court should affirm defendant's sentence by construing the presumptive sentence that the sentencing guidelines establish for his crime to be a "recommended" sentence rather a "mandatory" sentence. The state argues that this result can be achieved by severing OAR 213-008-0001, which provides that the sentencing court "shall" impose the presumptive sentence "unless the judge finds substantial and compelling reasons to impose a departure" from the rest of the sentencing guidelines. If that mandatory provision is severed, the state asserts, the guidelines would not suffer from any constitutional infirmity.

The state misapprehends the nature of severability. ORS 174.040 governs decisions regarding severability. That statute provides that, "*if any part* of the statute is held unconstitutional, the *remaining parts* shall remain in force" unless certain conditions identified in the statute are met.... The state's severability argument suffers from two defects. First, the state asks us to sever a part of the guidelines—the requirement that the presumptive sentence be imposed in the absence of additional findings—that no party claims is unconstitutional. Second, nothing in *Blakely* or in our application of *Blakely* to the sentencing guidelines here suggests that the guidelines themselves, properly applied, are unconstitutional....

Because we have not held that a part of the sentencing guidelines is unconstitutional, we can identify no unconstitutional part of the guidelines that might be appropriate to sever. Rather than add to or subtract from the words in the sentencing guidelines, as the state suggests, our holding simply requires Oregon courts to apply the guidelines in a way that respects the Sixth Amendment....

Our holding in this regard illustrates the appropriate role of the judicial branch in criminal sentencing. Determining the range of possible sentences for particular crimes historically has been a legislative, rather than a judicial, function. Here, the legislature authorized the creation of

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the sentencing guidelines and later adopted the guidelines that the Oregon Criminal Justice Council promulgated. The guidelines describe the presumptive sentence range as the “appropriate punishment” for a crime based on “the seriousness of the crime of conviction … and the offender’s criminal history.” OAR 213-002-0001(3)(d)....

The state has an alternative argument. The state argues that, if this court concludes that defendant’s sentence is invalid, then it should remand to allow a jury to consider aggravating factors that could support a sentence in excess of the presumptive sentence in the guidelines.... Defendant asserts that the common law and various state and federal constitutional provisions require the state to allege in the indictment any facts that may enhance the defendant’s sentence, or at least to notify the defendant before trial that those facts will be at issue. Defendant points out that the indictment here did not allege such facts and that the state did not notify defendant that such facts would be at issue before his guilty plea. In those circumstances, he argues, the state is precluded from seeking to present those facts to a sentencing jury now.

We decline to answer the question that the state raises, because, at this point in the proceeding, it is not presented in a sufficiently concrete way. It is, at least, contingent on actions that the parties may or may not take on remand.... Our discussion above makes clear that a sentence within the guidelines’ presumptive range would be constitutional. However, we do not speculate as to the specific positions that the parties may take before the trial court respecting that court’s authority in the resentencing proceedings. It is inappropriate to address statutory issues, as well as more fundamental state and federal constitutional issues, relating, *inter alia*, to indictment, notice, and jury trial until they have been raised before and decided by the trial court....

## **Notes**

1. *Number of cases affected.* The central claim of the report from the Minnesota Sentencing Commission is that Blakely does not require a fundamental restructuring of the sentencing guidelines because it affects so few “contested” enhancement cases. As the commission put it, “The impact of *Blakely* on sentencing in Minnesota, while temporarily disruptive, is limited in scope and can be addressed within the current sentencing guidelines scheme.” This limited impact holds true for most state systems because the number of enhancement factual findings to be made at sentencing is small. Unlike the federal system’s use of “relevant conduct” to increase the top available guideline boundary, most state systems rely more heavily on “charge offense conduct” – that is, conduct

already alleged in the indictment and proven at trial (or admitted in the guilty plea).

Are courts or sentencing commissions best suited to estimate the number of cases affected by the new Sixth Amendment jurisprudence? Does the commission have an incentive to minimize its estimate of the impact? The Minnesota Commission report mentions only in passing two loudly ticking time bombs that could lead to an exploding number of cases affected. First, *Blakely* might affect all cases involving a “custody status point” (an additional criminal history point added if the current offense was committed while still on probation or parole status from a previous crime). Second, *Blakely* could affect all probation revocations. These two categories could dwarf the small number of cases with *Blakely* effects noted elsewhere in the report.

2. *Several versions of severability.* How does the Oregon Supreme Court’s remedy compare to the remedy of the U.S. Supreme Court in *Booker*? Did the two courts reach different conclusions because of different features in the sentencing rules for that jurisdiction? Or different conceptions of the proper judicial role after declaring a legislative act unconstitutional? The Oregon court explicitly left for other courts to resolve many unanswered questions of how to implement the constitutional ruling. As the *Dilts* court said in footnote 5:

The state makes several other arguments regarding how this court should or should not apply *Blakely* in other contexts. Here, we reach only the arguments necessary to the disposition of this case in this court. We recognize the many unsettled questions regarding the application of *Blakely* and *Apprendi* to different aspects of Oregon’s sentencing scheme. We think that those questions are better answered in the context of specific cases in which they are raised and briefed. Moreover, we are aware that we may be shooting at a moving target. In response to *Blakely*, prosecutors, the criminal defense bar, and members of the legislature in many states, including Oregon, may be reviewing sentencing procedures for possible modification. Additionally, the United States Supreme Court has granted petitions for certiorari in two cases that raise *Blakely*-related issues, [citing *Booker* and *Fanfan*]. In deciding those cases, the Court may provide further guidance regarding the scope of the jury trial right as it applies to criminal sentencing.

Was this route available to the U.S. Supreme Court in fashioning a remedy?

## 2. Breadth of Application

**AGGRAVATED SENTENCING: BLAKELY V. WASHINGTON  
PRACTICAL IMPLICATIONS FOR STATE SENTENCING SYSTEMS**  
**Jon Wool & Don Stemen**  
**Vera Institute of Justice**  
**17 Federal Sentencing Reporter 60 (2004)**

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At the close of its 2003-2004 term, the United States Supreme Court roiled many states' criminal justice systems when it struck down Washington's sentencing guidelines scheme....

Five states—Kansas, Minnesota, North Carolina, Oregon, and Tennessee—employ presumptive sentencing guidelines systems that enable judges to enhance sentences by finding aggravating facts, as does the Washington system addressed, by the Court. At least eight additional non-guidelines states—Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio—employ functionally equivalent presumptive sentencing systems. The systems in this core group of 13 states appear to be fundamentally affected by the *Blakely* decision. The fallout may also envelop six other states—Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia—employing voluntary sentencing guidelines systems that nonetheless require a court to apply a suggested sentence range and provide justification for any sentence above that recommended by the range. Depending on how future court decisions define the scope of *Blakely*, it is also possible that two indeterminate sentencing states—Michigan and Pennsylvania—that employ presumptive sentencing guidelines systems may run afoul of the ruling. Finally, *Blakely* has implications for other state sentencing provisions beyond these 21 with structured sentencing systems. Every statute that provides for an enhanced penalty beyond that authorized solely by the jury's verdict must be examined to determine whether it is based on facts—other than prior conviction—determined by a judge. Such statutes include those that allow additional punishment upon a judge's finding that the defendant was on parole at the time of the offense, that the crime was committed for compensation, or that the victim was of a certain age.

[Affected] states will have to amend their sentencing structures in large or small ways. But that reality is tempered by the fact that in many states, unlike the federal system, judicial fact-finding is used in only a small fraction of cases and thus is easier to avoid while states are constructing responses. Moreover, there are ways to cure *Blakely* ills, and examples exist of constitutionally-sound solutions that largely

preserve the goals that drove states to enact structured sentencing systems....

It is perhaps ironic that the Court has found that the Sixth Amendment, with its jury guarantee as a bulwark against state power, actually limits attempts to reign in judicial authority through structured sentencing. On the one hand, it is hard to argue with the Court's view of the centrality of both the right to be tried by a jury of one's peers and the application of the highest standard of proof beyond a reasonable doubt; indeed the dissenting justices do not make much of an effort. On the other hand, it is the Court's insistence on drawing a "bright-line" formulation to protect these rights, one that establishes a firm constitutional line rather than allowing legislative and judicial flexibility, that is precipitating the present upheaval....

#### ***Presumptive Sentencing Guidelines Systems***

It is evident that [four states] with presumptive sentencing guidelines systems—Minnesota, North Carolina, Oregon, and Tennessee—will be affected by the decision to the same extent as Washington. In each of these states, guidelines establish a range for an offense that sets the maximum sentence a judge may impose based on the jury's verdict. A judge may impose a sentence above the maximum in the range only when the judge makes a finding of aggravating factors.... The guidelines systems in Minnesota and Oregon are nearly identical in structure to Washington. Those in North Carolina and Tennessee are different, but not in ways relevant to the ruling in *Blakely*.

Unlike other systems, North Carolina's guidelines are "mandatory" in that they require a judge in every case to impose a sentence within the designated cell of a sentencing guidelines grid. Thus, judges in North Carolina cannot impose a sentence above those recommended within a guidelines cell, as judges can in Washington. However, the North Carolina guidelines set mitigated, presumptive, and aggravated ranges within each cell. The court must impose a sentence within the presumptive range unless the judge finds aggravating factors by a preponderance of the evidence. Only then may the judge impose a sentence within the aggravated range. In this sense, a sentence in the aggravated range in North Carolina is an enhanced sentence, equivalent to an "exceptional sentence" under the Washington guidelines.

In Tennessee, on the other hand, guidelines establish sentence ranges with single-term "presumptive sentences" within those ranges. For the most serious class of felonies, the presumptive sentence is the midpoint in the guidelines range; for lesser felonies, the presumptive sentence is the minimum term in the guidelines range. The court must impose the presumptive sentence unless the judge states on the record a finding of an

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“enhancement factor.” In such instances the judge may impose a sentence up to the maximum in the guidelines range for the offense. Thus, Tennessee’s guidelines differ from those in Washington in that the presumptive sentence is a single term of years rather than a range of sentences....

Kansas employs a presumptive sentencing guidelines system similar to Washington’s. However, Kansas’s system is not generally implicated by *Blakely* because it has amended its statutes to require that a jury find any fact that forms the basis of an enhanced sentence. Kansas acted in response to the only state court decision that struck down its guidelines system for the reasons ultimately determined by the Court in *Blakely*. State v. Gould, 23 P.3d 801 (Kan. 2001)....

### ***Presumptive (Non-Guidelines) Sentencing Systems***

At least eight states that do not formally employ guidelines—Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio—nonetheless employ presumptive sentences and require judges to provide justification when they deviate from those sentences.... In all of these—often referred to as presumptive sentencing or determinate sentencing systems—statutes set a single presumptive sentence or range of sentences for each offense within the statutory range. The judge must impose that presumptive sentence or one within the presumptive range and may impose a higher term only after finding aggravating factors.

New Mexico is typical. In New Mexico, statutes set a single-term “basic sentence of imprisonment” for each offense. For a first degree felony, for example, the basic sentence is 18 years; for a second degree felony, it is nine years. The appropriate basic sentence must be imposed unless the court alters it based on aggravating or mitigating circumstances. When the judge finds any “aggravating circumstance” relevant to the offense or the defendant, the judge may impose a sentence up to one-third above the basic sentence.... In California, statutes prescribe a “lower,” “middle,” and “upper” term for each offense and require a judge to impose the middle term absent a finding of “aggravating circumstances.”...

### ***Voluntary Sentencing Systems***

In contrast with states that use presumptive sentencing systems, with or without guidelines, 10 jurisdictions employ voluntary guidelines systems. These systems are similar in structure to the Washington guidelines in that they prescribe a range of sentences for each offense or offense class, but they differ in that the ranges are expressly not binding. Because there is considerable variety in the structure of these systems

and differences in how legislatures instruct judges to employ the guidelines, some states may be at greater risk to *Blakely* challenge than others. These 10 jurisdictions fall into two basic groups.

In four of these systems—those of the District of Columbia, Louisiana, Missouri, and Wisconsin—judges are encouraged to consider guidelines ranges in determining appropriate sentences, but no additional fact-finding is required of a judge to impose a sentence outside the range and up to the statutory maximum. Nor is there a requirement that judges provide reasons for doing so. [They] do not seem to conflict with *Blakely*.

The other six voluntary guidelines states—Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia—may, however, run afoul of *Blakely*. They require judges first to apply the guidelines ranges but then allow them to depart upward—provided they state their reasons for doing so. In Arkansas, for example, “the presumptive sentence” in all cases is determined according to sentencing guidelines; for the judge to impose a sentence that varies more than five percent from the presumptive sentence, written justification “specifying the reasons for such departure” must be given....

The requirement in each jurisdiction that a judge first apply the sentences articulated in the guidelines and then provide reasons for a decision not to follow them may bring them within the *Blakely* rule. Put another way, the requirement that a judge state reasons as a pre-condition of an enhanced sentence may establish the top of the guidelines range as the effective maximum sentence—a situation no different from the one presented in *Blakely*....

Such a result is far from certain for the following reasons. One could argue that the advisory character of the systems in these five states would spare them *Blakely* problems; judges are expressly not required to follow the guidelines recommendations. A court could hold, therefore, that the requirement that judges apply the guidelines and provide reasons for departing does not in fact constrain a judge’s discretion but serves solely as an information-recording function. Or it could determine that the requirement that reasons be provided is so flexible—allowing a statement to the effect of “the guidelines range is not adequate for this offense”—that the jury verdict or plea alone authorizes a sentence up to the statutory maximum. In such instances, these states may indeed be immune to *Blakely*....

#### ***Presumptive Sentencing Guidelines in Indeterminate Systems***

Two states—Michigan and Pennsylvania—are in a somewhat different situation and it is less clear whether *Blakely* will affect them. Indeed, it is possible to construct equally compelling arguments that

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*Blakely* does or does not apply. The arguments turn on competing definitions of the effective maximum sentence in such indeterminate states.

Michigan and Pennsylvania employ indeterminate sentencing schemes with presumptive guidelines. In both states, judges set a minimum and maximum term to each sentence, but limits are imposed only on the setting of the minimum term. The maximum term may be set in all instances up to the statutory maximum. The minimum term determines a defendant's parole eligibility date, or the period a defendant must serve in prison; the maximum term controls a defendant's mandatory release date, or the maximum period a defendant will serve if not released by a parole board. Thus, in each state, the judge determines how long an offender must serve in prison before being eligible for parole release. The sentencing guidelines in these states establish a range of minimum terms. A judge may impose a minimum term above the guidelines range only by finding aggravating factors on the record.

The Court has previously held that the Sixth Amendment is not violated by a system that requires an enhanced minimum sentence based upon judicial findings of fact. [A] defendant who receives [an enhanced minimum] sentence likely will remain incarcerated longer than one who receives a sentence with a minimum term within the guidelines range. To the extent that an enhanced minimum term—that is, one beyond the guidelines range—leads to a longer period of incarceration by extending the date at which the defendant is eligible to be released, these systems may be held to violate *Blakely*.

On the other hand, it is also possible to characterize the maximum sentence authorized by the jury verdict as being controlled solely by the maximum term in an indeterminate system, and there is no limit on the maximum term a judge may set in these two states up to the statutory maximum.... Thus, to the extent it is determined that the effective maximum sentence is the statutory maximum or that the mere likelihood of an increased period of incarceration is not sufficient to trigger the jury right, these systems will be upheld....

### ***Reconciling State Sentencing Systems with Blakely***

[The] *Blakely* decision allows for some seemingly perverse effects. For example, in a sentencing system that fully relies on statutory minimum and maximum sentences, judges have the fact-finding authority necessary to determine the appropriate sentence anywhere within the statutory range up to the maximum in any given case. In such a system a judge may be authorized to make a fact-finding of deliberate cruelty, for example, and sentence a defendant to three years more incarceration than the judge might have otherwise. Yet a state is no

longer free to do precisely that if it imposes limits on judicial sentencing discretion, as Washington did by enacting guidelines that regulate maximum sentences short of the statutory maximum. Thus the states may achieve in one context what the Court says the Constitution prohibits in another. It is perhaps perverse that the scope of the right to trial by jury turns on such a distinction.

Such effects notwithstanding, the Court's ruling does not require states to abandon their guidelines systems—although it certainly limits a state's avenues to channel judicial discretion. States that have chosen to rein in judicial discretion through the presumptive or voluntary systems affected by *Blakely* still have an option that retains the core of their systems and complies with the ruling. Those states can allocate fact-finding to juries when enhanced sentences are sought....

### ***The Feasibility of Jury Fact-Finding***

After the Kansas Supreme Court invalidated the state's guidelines system in 2001 (presaging *Blakely*), the legislature chose to retain presumptive guidelines by incorporating jury fact-finding as the basis of an enhanced sentence.<sup>29</sup> Kansas's choice and its subsequent experience thus provide some guidance for states that must alter their systems. Under the revised system, if Kansas prosecutors decide to seek an enhanced sentence, they must file a motion 30 days before trial. The judge then decides whether, in the interests of justice, the evidence of enhancing factors must be presented at a post-trial sentencing hearing rather than at the trial. Only evidence that has been disclosed to the defense is admissible in an enhancement determination; if the defendant testifies at such a hearing it is not admissible in any subsequent criminal proceeding. The jury must be unanimous that a factor has been proven beyond a reasonable doubt. If the jury finds such a factor, the judge nonetheless retains the discretion to sentence within or beyond the guidelines range....

Interviews with defenders in the state indicate that the defense bar generally finds the procedure unobjectionable with one exception: the possibility that prejudicial "sentencing factors" might be presented during the trial (which appears not to have occurred to date). Interviews with prosecutors and judges in the state also indicate that the procedure does not place significant extra burdens on the system. It has been used infrequently, but not because it is unworkable. Indeed, it had always been rare for judges to sentence defendants to enhanced sentences after trial,

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<sup>29</sup> Kan. Stat. Ann. § 21-4718(b).

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largely because in a plea-driven system the available sentences after trial are already effectively “enhanced.”<sup>31</sup> ...

Even before the state’s high court later validated that concern, the Kansas Sentencing Commission created a subcommittee to study the applicability of the ruling and to consider policy responses. Importantly, the subcommittee included legislators, prosecutors, defense attorneys, and judges. The participation of all four of these groups was essential to the creation of a legislative response that was not only substantively workable and fair but politically acceptable....

It is perhaps not surprising that jury fact-finding has proved feasible in Kansas. It is common in parts of other states’ systems. Although not a structured sentencing state, Illinois previously authorized extended sentences based on judicially-determined facts. Following the Supreme Court’s ruling in *Apprendi*, Illinois changed its enhancement statute to require that an aggravating factor be included in the charging document and that it be proved to the jury beyond a reasonable doubt. 725 Ill. Comp. Stat. 5/111-3(c-5)....

On the other hand, there are two ways—not present in Kansas—in which jury fact-finding of aggravating factors may lead to significant administrative difficulties.... First, in systems that use a large number of judicially-determined factors in arriving at the initial presumptive range—such as the federal system—jury fact-finding would have to be employed in virtually every sentencing, not just those in which an enhanced sentence was sought. It appears, however, that no state system relies on factors that determine the presumptive range to a degree comparable to the federal system. Second, in states that require prosecution by grand jury indictment there may be the significant additional burden of presenting “sentencing factors” for grand jury consideration at the outset of virtually every felony case to enable their later presentation to the trial jury.

### ***Fully Voluntary Guidelines***

Some states, particularly those with voluntary systems that are deemed to be affected by *Blakely*, may choose not to follow Kansas’s example of requiring juries to make such fact findings. Rather they may choose to eliminate their effective sentencing thresholds and adopt fully voluntary sentencing systems. Here, too, there are examples from which states may draw lessons. The District of Columbia, Louisiana, Missouri, and Wisconsin have enacted such fully voluntary systems. Presumably they did so to achieve a proper balance between judicial discretion and

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<sup>31</sup> Indeed, in the four years before the new procedure took effect, there were never more than 24 jury trial cases in the state that led to enhanced sentences....

legislative or administrative control so that sentences are geographically and racially neutral and appropriate to the offense.

To make their systems fully voluntary, these states might eliminate the requirement that judges provide reasons as a prerequisite to an enhanced sentence. Such a change is not, of course, without consequences and again suggests an apparently perverse result of the *Blakely* ruling. [A] state seeking to understand the causes of racial or geographic disparities in sentencing, for example, might examine the reasons stated in cases where members of different groups are given enhanced sentences. Moreover, ... appellate courts might in the future perform a rudimentary reasonableness review of all sentences, and this review would rely on sentencing judges' statements of their reasons. A regime that discourages the stating of reasons may adversely affect such appellate review of the reasonableness of sentencing decisions.

Voluntary states affected by *Blakely* have another option, however, for achieving fully voluntary systems. They can retain the general requirement that judges provide reasons for their sentencing decisions but make explicit that judges need only consider, but need not apply, the guidelines in any given case....

### ***Other Possible Options***

[Another option for states] is an outright bar on judicial discretion through ... mandatory terms or ranges of terms from which a judge may not depart. There is one state example of this approach in the non-guidelines context. Iowa uses a mandatory system in which judges are bound to impose the sole statutory term of years for most felony offenses and the parole board has discretion to determine how long the defendant ultimately will serve. But, in the guidelines context, it appears that no state uses a system that is fully mandatory. Other than Iowa, the states shy away from such extreme limits on judicial sentencing discretion.

[Another option] is a retreat from guidelines altogether, to the indeterminate sentencing regimes used in roughly half the states. But given the caution and discernable lack of appetite to abolish guidelines systems that many state officials have shown in the weeks since *Blakely*, there is little reason to suspect that states will jettison their guidelines altogether rather than apply one of the modifications mentioned above.

[There] may be more threatening responses to *Blakely*, such as a top-down system in which the presumptive sentence for each offense would be the maximum sentence authorized by statute. A sentencing judge might then depart downward only after finding mitigating facts. Yet, there is no reason to believe this option will prove attractive to state

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policymakers as it would be costly and might lead to harsh, perhaps unpredictable, sentences....

How courts will interpret different systems in light of *Blakely* is largely unknown and will guide legislatures in crafting new systems that preserve a reinvigorated right to trial by jury while also preserving to the greatest extent possible the goals of their structured sentencing systems. The hope is that *Blakely* provides as much an opportunity as it does a challenge and that legislators will develop different and better approaches than those we have mentioned....

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### **Kenna Ryle v. State 819 N.E.2d 119 (Ind. App. 2004)**

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NAJAM, J.

In March 2003, the State charged Kenna Ryle with Murder. A jury found him guilty of the lesser-included offense of Voluntary Manslaughter, a Class A felony. The trial court entered judgment of conviction and sentenced him to an enhanced term of forty-five years. Ryle now appeals and presents the following issue for review: whether the trial court improperly imposed an enhanced sentence under *Blakely v. Washington* (2004). We affirm.

On February 25, 2003, Ryle shot Maurice Sanders at the Phoenix Apartments in Indianapolis. That same day, Ryle called Audrea Harris on her cell phone and told her that he had shot Sanders in the chest and that he was sorry. Sanders died as a result of a gunshot wound to his chest.

The State charged Ryle with murder, unlawful possession of a firearm by a serious violent felon, and carrying a handgun without a license. The State dismissed the two handgun-related charges and tried Ryle only on the murder charge. The jury found him not guilty of murder, but guilty of voluntary manslaughter.... The trial court ultimately imposed an enhanced sentence of forty-five years....

Ryle contends that under *Blakely*, his sentence violates his Sixth Amendment right to have the facts supporting the enhancement of his sentence tried to a jury. In *Holden v. State*, 815 N.E.2d 1049 (Ind. App. 2004), this court ... concluded from the discussion in *Blakely* that the “statutory maximum” sentence of that case equates with the presumptive sentence called for by the applicable Indiana statutes.

In this case, the trial court imposed an enhanced sentence of forty-five years and identified the following aggravators: Ryle’s criminal history, which included two adult criminal convictions and four juvenile adjudications, and the fact that he was on probation at the time he committed the instant offense. The trial court identified a single

mitigator, namely, Ryle's age, but the court gave that factor "minimal" weight.

As we have noted, the fact of a prior conviction is an exception to *Blakely*. And this court has held that where an enhanced sentence is based upon a defendant's prior criminal history and aggravators derived from that history, the *Blakely* analysis is not implicated. But Ryle maintains that (1) the fact that he was on probation when he committed the instant offense is not derivative of his criminal history; and (2) his juvenile adjudications are not "prior convictions" under the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Accordingly, Ryle maintains that both his probation status and his juvenile adjudications are facts the jury had to find beyond a reasonable doubt under *Blakely*. We disagree.

First, [in] *Bledsoe v. State*, 815 N.E.2d 507, 508 (Ind. App. 2004), this court concluded that the fact that the defendant was on probation at the time he committed the instant offense is derivative of the defendant's criminal history. Thus, following *Bledsoe*, the fact that Ryle was on probation at the time he committed the instant offense does not implicate *Blakely*.

But even if the fact of Ryle's probationary status were not derivative of his criminal history and required determination by the jury, *Blakely* would not be triggered in this case. Ryle's presentence investigation report shows that he was on probation on the date he committed the instant offense. At the sentencing hearing, Ryle was asked but had no additions or corrections to make to the presentence investigation report. Also, the trial court inquired about the status of Ryle's probation for his prior drug-related convictions. Ryle told the court that his probation had been revoked, and the court had ordered him to serve fifteen years executed. The court then explained to Ryle that because his probation had been revoked in those cases, the court was required to order that his voluntary manslaughter sentence be served consecutive to the executed term ordered in the probation matter. Ryle responded that he understood. Ryle's statements during the sentencing hearing, and his failure to object to the information contained in the presentence report, amount to an admission that he was on probation at the time he committed the instant offense. Thus, the trial court's reliance on Ryle's probationary status to enhance his sentence does not implicate *Blakely*.

Regarding Ryle's juvenile adjudications, another panel of this court recently determined that the trial court's reliance on the defendant's "significant and consistent adult and juvenile criminal history" as an aggravating factor did not trigger a *Blakely* analysis. *Holden v. State*, 815 N.E.2d 1049, 1059 (Ind. App. 2004)....

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Since *Apprendi*, courts have split regarding whether juvenile adjudications qualify as “prior convictions” for purposes of the *Apprendi* exception. Ryle directs us to the Ninth Circuit Court of Appeals’ decision in United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir.2001), which held that juvenile adjudications that do not afford the right to a jury trial and require a beyond-a-reasonable doubt burden of proof do not fit within *Apprendi*’s exception for prior convictions. But at least three jurisdictions have disagreed with the holding in *Tighe*. See United States v. Jones, 332 F.3d 688 (3d Cir. 2003); United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002); State v. Hitt, 42 P.3d 732 (Kan. 2002). After reviewing the decisions in all of the cases that have addressed the issue, we agree with the analyses in *Jones*, *Smalley*, and *Hitt*. Specifically, we find persuasive the following analysis of the Kansas Supreme Court in *Hitt*:

*Apprendi* created an exception allowing the use of a prior conviction to increase a defendant’s sentence, based on the historical role of recidivism in the sentencing decision and on the procedural safeguards attached to a prior conviction. Juvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications.

42 P.3d at 740. We now join those courts which disagree with the holding of the Ninth Circuit in *Tighe* and conclude that juvenile adjudications are “prior convictions” under *Apprendi*. Thus, the trial court in this case did not violate Ryle’s constitutional rights when it identified Ryle’s criminal history as an aggravating factor and included in that criminal history Ryle’s four juvenile adjudications.

In sum, the two aggravators identified by the trial court, namely, Ryle’s criminal history, which includes juvenile adjudications, and the fact that he was on probation at the time he committed the instant offense are both proper under *Blakely*. We therefore hold that Ryle’s enhanced sentence of forty-five years does not violate his Sixth Amendment rights.

## Notes

1. Blakely’s meaning for the states. Though the Vera Institute report documents the problems that *Blakely* may create for many existing state sentencing systems, it is worth spotlighting that the majority of states still do not have comprehensive guideline systems depending on judicial fact-finding and thus the majority of states will not have to alter significantly their current sentencing practices in light of *Blakely*.

Interestingly, at the time *Blakely* was decided, the American Law Institute was far along with a project to revise the sentencing provisions of the Model Penal Code in order to encourage more states to adopt guideline systems which depend on judicial fact-finding. Deliberations on those revisions were slowed by the *Blakely* ruling, and many have expressed concerns that the *Blakely* ruling would impede efforts to encourage states without guideline systems to consider such reforms.

2. *State-specific variation and Blakely questions.* As the Vera Institute report highlights, the impact of *Blakely* in particular states varies dramatically depending upon the types of sentencing structures utilized in various jurisdictions. The opaque aspects of the *Blakely* ruling and its broad dicta, make the case potentially applicable in many states. States such as Oregon or North Carolina, with sentencing systems quite similar to Washington's, obviously face challenging questions concerning the application of *Blakely*. Moreover, even in some states such as California and Ohio, which have sentencing structures much different from Washington's, *Blakely* may still have an impact because the sentencing rules still involve significant judicial fact-finding.

3. *The basis of the “prior conviction” exception.* As a result of the Supreme Court's 5-4 decision in *Almendarez-Torres*, 523 U.S. 224 (1998), a “prior conviction” exception has been built into the Sixth Amendment's application in *Apprendi* and *Blakely*. That is, both *Apprendi* and *Blakely* state that its rule requiring certain facts to be proven to a jury beyond a reasonable doubt or admitted by the defendant only applies to facts “other than the fact of a prior conviction.” The theoretical soundness of this exception has been widely questioned, and Justice Thomas' own comments about *Almendarez-Torres* suggest that there are no longer five votes on the High Court in support of this exception. Nevertheless, the “prior conviction” exception remains good law (for now), and Ryle highlights the tendency of some courts in the wake of *Blakely* to give this exception a fairly broad reading.

Apart from the historical ability of sentencing judges to consider the prior criminal record of an offender, is there some functional reason to give a judge rather than a jury the authority to find such facts? What sorts of evidence does a jury hear at trial, and what sorts of conclusions does it draw? To the extent one believes that facts about an *offense* are meaningfully different from facts about an *offender*, perhaps the judge is better suited than a jury to find facts in the latter category. Does this offense/offender distinction explain the “prior conviction” exception?

## **Sentencing Law and Policy**

4. *Juveniles and prior convictions.* The *Ryle* decision highlights that there is a split on the specific issue of whether a juvenile adjudication is “the functional equivalent of a ‘prior conviction’” for purposes of *Apprendi*. The legal debate about whether juvenile adjudications fall within the “prior conviction” exception is fascinating for a number of reasons. First, as noted above, the very exception itself is both doctrinally and theoretically shaky. Second, because juveniles are not afforded the right to a jury trial, juvenile proceedings do not employ the sorts of safeguards that may give adult prior convictions the added reliability justifying an exception to the *Apprendi/Blakely* rule. The court split on this issue is not just between federal circuits. Compare *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), with *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), and *State v. Brown*, 2004 WL 1490192 (La. July 06, 2004).