

## ***Blakely's Federal Aftermath***

by

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The media are sometimes slow to recognize landmark Supreme Court decisions. Even Professor Cass Sunstein praised the current Justices as “minimalists” who hew to judicial restraint, overlooking the Court’s most earth-shaking decision last Term.<sup>1</sup> Amidst all the fuss about the non-decision on the Pledge of Allegiance, most commentators at first overlooked a sentencing decision from Washington State. *Blakely v. Washington*<sup>2</sup> was not on people’s radar screens, but it certainly should be now.

Four years ago, the Supreme Court adopted a broad new interpretation of the Sixth Amendment’s scope. *Apprendi v. New Jersey* held that, except for recidivism, every fact that raises a defendant’s sentence above the statutory maximum is an element of the crime. Because these facts are elements, prosecutors must charge them in indictments (in federal cases) and prove them to juries

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<sup>1</sup>Cass R. Sunstein, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, § 4 (Week in Review), at 9 (not mentioning *Blakely v. Washington*). I am indebted to Doug Berman for pointing out this op-ed.

<sup>2</sup>542 U.S. \_\_\_, 124 S. Ct. 2531 (2004).

beyond a reasonable doubt.<sup>3</sup>

*Apprendi* provoked great speculation among academics, judges, and lawyers about how far it would go. Would it be retroactive? Would it invalidate judicially triggered minimum sentences? Would *Apprendi* errors be excusable as harmless or plain errors? Would it invalidate judicial capital sentencing or noncapital sentencing guidelines? Three years after *Apprendi*, its impact appeared to be modest. The Court did extend *Apprendi* to invalidate purely judicial capital sentencing, but it excused some *Apprendi* errors under the plain-error doctrine.<sup>4</sup> It refused to apply *Apprendi* to facts that trigger minimum sentences and eventually refused to apply *Apprendi* retroactively.<sup>5</sup> State courts were even more restrained; almost all decisions hewed closely to *Apprendi*'s basic rule and declined to extend it.<sup>6</sup> Less than a year ago, the *Apprendi* hurricane appeared to have petered out.

The Supreme Court has a way of proving predictions and forecasts wrong. In *Blakely v. Washington*, decided in June, the Court extended *Apprendi* greatly. Blakely pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm in Washington state court. Washington's statutory maximum sentence for second-degree kidnapping is ten years, but the state's statutory sentencing guidelines prescribed a presumptive range of 49 to 53 months. At sentencing, Blakely's judge found by a preponderance of the evidence that Blakely had acted with "deliberate cruelty." Accordingly, the judge departed upward and sentenced Blakely to 90 months, 37 months above the standard guidelines range but well below the statutory maximum.

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<sup>3</sup>530 U.S. 466, 476, 490 (2000).

<sup>4</sup>*Ring v. Arizona*, 536 U.S. 584 (2002); *United States v. Cotton*, 535 U.S. 625 (2002).

<sup>5</sup>*Harris v. United States*, 536 U.S. 545 (2002); *Schriro v. Summerlin*, No. 03-526, 2004 WL 1402732 (U.S. June 24, 2004).

<sup>6</sup>Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).

The Supreme Court of the United States reversed, 5-4. Writing for the Court, Justice Scalia read *Apprendi* very broadly: “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>7</sup> In other words, *Apprendi* applies to any finding of fact that is required by law in order to increase a sentence beyond what it would otherwise be. These facts are now elements of the offense. This rule, Scalia argued, is essential to delineate the scope of the Sixth Amendment right to jury trial and protect it against legislative and judicial encroachment.

*Blakely* raises far more questions than it resolves. In this limited space, I will try to address five clusters of issues. Part I will discuss how far *Blakely* is likely to go, and in particular whether it reaches the Federal Sentencing Guidelines. Part II addresses a host of transitional issues, especially what is left of the Federal Guidelines if *Blakely* applies to them. Part III discusses possible *Blakely* fixes or patches. Part IV considers briefly how plea bargaining might look different in a post-*Blakely* world. Finally, Part V muses on some of the fascinating jurisprudential issues raised by *Blakely*, such as the tension between formalism and pragmatism and the role of 18th-century history in our 21st-century world.

## I. *Blakely*’s Reach

### A. The Federal Sentencing Guidelines

The \$64,000 question everyone is asking is whether *Blakely* applies to the Federal Sentencing Guidelines. Justice Scalia’s majority opinion was terse, saying only in a footnote: “The Federal Guidelines are not before us, and we express no opinion on them.”<sup>8</sup> The dissenters argued that the Federal Guidelines were indistinguishable

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<sup>7</sup>*Blakely*, 124 S. Ct. at 2537.

<sup>8</sup>*Id.* at 2538 n.9.

from Washington's guidelines, so *Blakely* will apply to both.<sup>9</sup>

The Department of Justice's position is that the Guidelines survive *Blakely*. In a sample brief it has provided to prosecutors, the Department reasons that *Blakely* expressly declined to rule on the Guidelines. It relies on three Supreme Court decisions: First, *Edwards v. United States* held that judges may find drug type and quantity in applying the Guidelines, at least as long as they do not go above the statutory maximum.<sup>10</sup> Second, *Witte v. United States* upheld Guidelines sentencing based on uncharged conduct against a double jeopardy challenge.<sup>11</sup> Third, *United States v. Watts* interpreted the Guidelines as allowing consideration of acquitted conduct despite double jeopardy concerns.<sup>12</sup> It further notes that all of the circuits have upheld judicial fact-finding under the Guidelines against *Apprendi* challenges.

No commentator who has considered the issue agrees with the Department of Justice's position. *Edwards*, *Witte*, and *Watts* never mention the Sixth Amendment, though the petitioner in *Edwards* argued for reading the statute narrowly to avoid a potential Sixth Amendment problem. (More on this below.) And while *Apprendi* did cite *Edwards* with approval,<sup>13</sup> *Blakely* is squarely at odds with *Edwards*' (and the circuits') neat distinction between guidelines maxima and statutory maxima. Under *Blakely*, the relevant maximum is the maximum that a judge can impose based upon the jury's factual findings, whether that maximum is set by statute or guideline. It does not matter whether the Commission calls it a guideline maximum or

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<sup>9</sup>*Id.* at 2548-50 (O'Connor, J., dissenting); *see id.* at 2561 (Breyer, J., dissenting).

<sup>10</sup>523 U.S. 511, 514-15 (1998).

<sup>11</sup>515 U.S. 389, 399-401 (1995).

<sup>12</sup>519 U.S. 148, 156-57 (1997) (per curiam).

<sup>13</sup>*Apprendi*, 530 U.S. at 497 n.21.

a statutory maximum.<sup>14</sup> *Blakely* never suggests that Washington's statutory guidelines might be different from guidelines enacted by a separate sentencing commission. Any such distinction would be illogical, as it would suggest that Congress may delegate to a commission power that it may not exercise itself.<sup>15</sup> Moreover, Congress has begun to amend the Guidelines directly, for example in the Protect Act, which makes the Federal Guidelines look more like statutes.<sup>16</sup> If anything, the Federal Guidelines are far more specific, detailed, and rigid than Washington's and so look more like elements of the crime.<sup>17</sup> This similarity explains why, in *Blakely*, the Solicitor General could muster only a half-hearted argument to distinguish the Federal Guidelines from the Washington ones.<sup>18</sup> Both upward departures and upward enhancements or adjustments should fall within *Blakely*'s rule.

The more interesting question is whether lower federal courts should start applying *Blakely* to the Guidelines now or await the Supreme Court's lead. Lower courts must continue to follow directly applicable Supreme Court precedent, even when other cases have eroded its foundation, until the Supreme Court itself overrules the

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<sup>14</sup>*But see* United States v. Booker, No. 03-4225, 2004 WL 1535858, at \*9-\*10 (7th Cir. July 9, 2004) (Easterbrook, J., dissenting) (stressing the linguistic distinction between guidelines and statutory maxima); United States v. Pineiro, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (reading *Blakely*'s statutory-maximum language as limited to the United States Code, and declining to view the Guidelines "as having created for each United States Code section a hundred different *Apprendi* 'offenses' corresponding to the myriad possible permutations of Guidelines factors, with each 'offense' then requiring jury findings on all of its (Guidelines-supplied) elements").

<sup>15</sup>*Booker*, 2004 WL 1535858, at \*3 (Posner, J.).

<sup>16</sup>PROTECT Act, Pub. L. No. 108-21, § 401(b), (g), (I), 117 Stat. 668-69, 671-73 (Apr. 30, 2003).

<sup>17</sup>*Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting).

<sup>18</sup>Brief of the United States as *Amicus Curiae*, *Blakely v. Washington*, No. 02-1632, at 25-29 (U.S. Jan. 23, 2004).

precedent.<sup>19</sup> The one case that might have upheld the Guidelines against a Sixth Amendment challenge is *Edwards*.<sup>20</sup> Edwards's jury convicted him of possessing with intent to distribute powder cocaine or crack cocaine, in a general verdict that did not specify which drug was involved. The judge raised Edwards' sentence substantially after finding on his own that Edwards had possessed both drugs with intent to distribute them. A unanimous Court affirmed. Even if the jury's verdict were limited to powder cocaine, the Court reasoned, the crack would have been relevant conduct that called for an identical Guidelines sentencing range. Because the sentence imposed was below the statutory maximum for powder cocaine, the issue did not affect the sentence.

Though the issue is not free from doubt, on balance, *Edwards* is not on point. Though Edwards used the Sixth Amendment to argue for a narrow reading of the Guidelines, the Court addressed the issue only tangentially, without squarely construing or even mentioning the Sixth Amendment.<sup>21</sup> *Edwards* turned on the harmlessness of any error or ambiguity in the jury's verdict. The opinion does not discuss whether jury findings might be required for relevant conduct or facts that raise guidelines ranges. Indeed, *Edwards*'s last sentence is: "For these reasons, we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims."<sup>22</sup> Because *Edwards* did not squarely resolve a *Blakely* challenge, lower courts are not bound to reject *Blakely* challenges to the Guidelines. Thus, most of the federal courts that have weighed in have applied *Blakely* to the Guidelines instead of awaiting the

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<sup>19</sup>Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989).

<sup>20</sup>523 U.S. 511 (1998).

<sup>21</sup>*Id.* at 514-15; United States v. Booker, No. 03-4225, 2004 WL 1535858, at \*4-\*5 (7th Cir. July 9, 2004) (Posner, J.). *But see id.* at \*6-\*8 (Easterbrook, J., dissenting) (arguing that the petitioners in *Edwards* advanced Sixth Amendment arguments and that the Court necessarily passed on them in reaching its conclusions that judges may find facts within guidelines ranges).

<sup>22</sup>*Edwards*, 523 U.S. at 516.

Supreme Court's lead.<sup>23</sup>

### B. Other Possible Extensions of *Blakely*

Other extensions of *Blakely* within federal cases seem much less likely. *Blakely* reiterates *Apprendi*'s statements that judges may continue to find facts when setting sentences within discretionary or indeterminate ranges. Because the jury's verdict theoretically authorized the maximum sentence, judges may use discretion to mitigate down from this maximum. (This line between aggravators and mitigators is arbitrary, and it is easy to redraft aggravators as mitigators.) Also, because defendants have notice of the legal maximum, supposedly they cannot complain if they get anything less than the maximum the jury authorized. This fair warning argument rests on fictions about what notice defendants have. Moreover, its formalism makes little sense because juries do not know of the penalties they are supposedly authorizing. And it allows legislatures to delegate discretion to judges but not to guide how they exercise that discretion. Nonetheless, that is the law.

For the same reasons, voluntary or non-binding guidelines found in many states should survive, as they do not set legally enforceable maxima. Even appellate review should survive, as case-by-case review is different from clear maxima. Judges can still weigh aggravators against mitigators in imposing death sentences, so long as the jury has first raised the maximum to death by finding at least one aggravator. Probation, parole, and juvenile justice all depend on discretionary, multi-factor balancing rather than fixed rules or guidelines, so *Blakely* should not apply. And while *Blakely*'s logic would appear to reach recidivism enhancements, binding Supreme Court precedent carves out recidivism as an exception to *Apprendi*, at

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<sup>23</sup>*But see* United States v. Pineiro, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (upholding the Guidelines against a *Blakely* challenge); United States v. Penaranda, No. 03-1055(L), 03-1062(L), 2004 WL 1551369, at \*7 (2d Cir. July 12, 2004) (certifying three questions to the Supreme Court about *Blakely*'s effect upon the Guidelines and their constitutionality).

least for the time being.<sup>24</sup> That exception might not apply, however, if the recidivism enhancement requires additional factfinding (such as whether the prior crime involved violence). And it might not apply if the prior conviction did not include a jury-trial right (as with juvenile convictions).<sup>25</sup>

It is unclear whether *Blakely* requires extending the full panoply of trial rights to sentencing. If sentence enhancements are now elements of the offense, courts might have to apply the rules of discovery and evidence. This would be a major adjustment, as pre-*Blakely* sentencing relied heavily on hearsay contained in pre-sentence reports. Courts might have to afford defendants the rights to confrontation, cross-examination, and compulsory process, and even perhaps discovery. The argument for extending the latter three, constitutional rights is stronger than for non-constitutional rules of evidence and discovery, as those are creatures of legislative grace. The Department of Justice has instructed its prosecutors to seek waivers of any rights to object to hearsay or other “reliable evidence” at sentencing.<sup>26</sup>

The remaining big question in the federal system is whether and how *Blakely* applies to the choice of concurrent versus consecutive sentences. Some statutes, such as 18 U.S.C. § 924(c), mandate consecutive sentences automatically upon conviction, and *Blakely* should not affect them. For most statutes, however, the Guidelines call for concurrent sentences unless consecutive sentences

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<sup>24</sup>*Almendarez-Torres v. United States*, 523 U.S. 224, 244-46 (1998). While *Apprendi* questioned *Almendarez-Torres*'s logic, and one of the five members in the *Apprendi* majority later changed his mind, *Apprendi* treated *Almendarez-Torres* “as a narrow exception to the general rule we recalled at the outset.” 530 U.S. at 490; *see id.* at 520-51 (Thomas, J., concurring).

<sup>25</sup>*See United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) (refusing to apply *Almendarez-Torres*'s prior-conviction exception to nonjury juvenile convictions).

<sup>26</sup>Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors, *Re: Departmental Legal Positions and Policies in Light of Blakely v. Washington*, July 2, 2004, at 4.

are needed to result in the Guidelines sentence.<sup>27</sup> Before *Blakely*, some courts treated *Apprendi* errors as harmless because consecutive sentences could have achieved the same outcome.<sup>28</sup> Now, if a judicial finding of fact triggers a Guidelines enhancement that results in consecutive sentences, that finding is subject to *Blakely*. In other words, consecutive sentences are subject to *Blakely* if the Guidelines authorize them only upon a judicial finding of fact.

## II. Transitional Issues

### A. What Happens to the Guidelines Now?

Assume that the Department of Justice is wrong and that *Blakely* applies to the Guidelines. What should judges do?

Option 1: Judges might try to graft on sentencing juries, bifurcated trials, and complex special-verdict forms but otherwise proceed as before. While *Blakely* appears to have envisioned this result, so far few courts have taken this approach. Suddenly adding on enhancement facts for older convictions might jeopardize defendants' speedy-trial or even double-jeopardy rights.<sup>29</sup> Pre-*Blakely* prosecutions did not charge these enhancement facts in indictments. Nor did lawyers receive discovery on them and advert to them in their opening statements, questioning, and closing arguments. Thus, it would be unworkable to spring complex special-verdict forms on juries in trials that were pending when *Blakely* came down.<sup>30</sup>

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<sup>27</sup>U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(a), (d) (2003).

<sup>28</sup>*See, e.g.*, *United States v. Stokes*, 261 F.3d 496, 501 n.7 (4th Cir. 2001); *United States v. Sturgis*, 238 F.3d 956, 960-61 (8th Cir. 2001). *But cf. Apprendi*, 530 U.S. at 474 (passing not on the sentence the judge could have imposed by using consecutive sentence, but on the sentence the judge in fact imposed).

<sup>29</sup>*See United States v. Green*, Crim. No. 02-10054-WGY, 2004 WL 1381101, at \*37 (D. Mass. June 18, 2004).

<sup>30</sup>*United States v. Medas*, No. 03 CR 1048, 2004 U.S. Dist. LEXIS 12135, (continued...)

More fundamentally, the Guidelines were built on the assumption that judges would apply them. The Guidelines require findings on dozens of possible enhancements and relevant conduct, and it would be unworkable to provide intelligible instructions and require findings on each one. Juries cannot order psychiatric examinations, state their reasons for sentence on the record, engage in dialogue with the parties and probation office, and receive pre-sentence reports weeks before sentencing.<sup>31</sup> Nor can jurors keep dozens of complex, conditional alternatives in mind without the benefit of books, note-taking, et cetera. For example, when prosecutors asked a district court to submit to jurors a twenty-page special-verdict form listing dozens of possible Guideline factors, the court balked.<sup>32</sup> In short, grafting sentencing juries onto the Guidelines is unworkable and lopsided, particularly for pending cases.

Option 2: Judges might sentence defendants based only on the facts established by the jury's verdict or the defendant's plea allocution. So far, several courts have taken this approach.<sup>33</sup> For example, Judge Joseph Goodwin of the Southern District of West Virginia sentenced a 2,000-gram methamphetamine manufacturer as if he had made only 2 grams. Thus, he received only one year in prison instead of twenty years or life.<sup>34</sup> Judge Paul Cassell has argued cogently, however, that this approach "would be fundamentally unfair

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<sup>30</sup>(...continued)  
at \*25-\*29 (E.D.N.Y. July 1, 2004).

<sup>31</sup>United States v. Croxford, No. 2:02-CR-00302PGC, 2004 WL 1521560, at \*9-\*12 (C.D. Utah June 29, 2004).

<sup>32</sup>See *Medas*, 2004 U.S. Dist. Lexis 12135, at \*4-\*22.

<sup>33</sup>See, e.g., *United States v. Green*, 2004 WL 1381101, at \*37 (D. Mass. June 18, 2004); Memorandum re: Order Correcting Sentence, *United States v. Toro*, No. 3:02cr362 (PCD), at 8-9 (D. Conn. July 6, 2004).

<sup>34</sup>United States v. Shamblin, Crim. No. 2:03-00217, 2004 WL 1468561, at \*1, \*3, \*10 (S.D. W. Va. June 30, 2004) (also describing the one-year sentence as "almost certainly inadequate").

to the United States and would distort the Guidelines.”<sup>35</sup> Defendants would be able to receive downward adjustments but not upward ones, unbalancing what is supposed to be a package deal.

Option 3: Judges might find that the upward adjustments, upward departures, and relevant conduct are not severable and so strike down the Guidelines entirely. This was Judge Cassell’s approach in the *Croxford* case. While courts presume that unconstitutional portions of a statute or regulation are severable from the remainder, that presumption cannot hold here. Severance of the Guidelines would distort the system, imposing 2-gram sentences on 2000-gram drug traffickers. Judge Cassell’s argument is persuasive. The Guidelines must fall as a whole in cases where the Guidelines call for judicial finding of aggravating facts. Judges are left constrained only by the statutory minimum and maximum sentences.

This reasoning, however, is narrower than a facial invalidation of the guidelines. Except in the First Amendment context, a facial challenge succeeds only if there is no possible case in which a law would be constitutional.<sup>36</sup> In some cases, judges can apply the Guidelines faithfully without finding any facts that trigger upward adjustments. In those cases, it would seem, the Guidelines as a whole are still constitutional.<sup>37</sup>

Even if the Guidelines do fall as a whole in some or all cases, however, they may still serve as voluntary, non-binding guidance. Judge Cassell notes that under the pre-Guidelines sentencing system and *Williams v. New York*,<sup>38</sup> judges are free to examine all relevant information. That information includes facts not found by the jury, facts deemed irrelevant by the Guidelines, the pre-sentence report,

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<sup>35</sup>*Croxford*, 2004 WL 1521560, at \*12.

<sup>36</sup>*United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>37</sup>Memorandum Opinion Finding the Guidelines Constitutional as Applied to the Defendant’s Sentencing, *United States v. Thompson*, No. 2:04-CR-00095 PGC (C.D. Utah July 8, 2004) (Cassell, J.).

<sup>38</sup>337 U.S. 241 (1949).

and even the Sentencing Commission's wisdom manifested in the Guidelines themselves.<sup>39</sup> According to *Williams*, which remains good law, these facts may include hearsay and need not be found beyond a reasonable doubt. (Indeed, *Williams* does not require any particular standard of proof at all.)

Voluntary guidelines are in effect in about seven states. While not binding, they still exert pull on judges' decisions. They provide information that judges may use in consciously setting sentences. They also provide mental anchors, which judges unconsciously use as baselines from which they adjust up or down.

Option 4: Judges might revisit *Mistretta*<sup>40</sup> and declare the whole idea of the Guidelines an unconstitutional delegation of power. This approach reasons that *Blakely* made all aggravating sentencing factors into elements of crimes. Under the principle of legality, no act can be a crime unless the legislature has criminalized it. Our legal system no longer allows judges to create new common-law crimes. True, Congress can delegate to agencies the power to implement legislation by spelling out crimes. The SEC's rule 10b-5, which criminalizes insider trading, is the most famous example.<sup>41</sup> But never before has an agency been allowed to create so many new elements across such a wide range of crimes. And never before has such an agency been nominally a part of the judicial branch, in effect giving judges a role in creating new common-law crimes. While this non-delegation argument has some force, *Mistretta* forecloses it in the lower courts, so only the Supreme Court itself can choose to revisit the issue.

## B. Other Transitional Issues

*Stipulations and Waivers.* The Kansas Supreme Court decided its own equivalent to *Blakely* in *State v. Gould*. Kansas courts held

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<sup>39</sup>*Croxford*, slip op. at 25-29.

<sup>40</sup>*Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>41</sup>Securities Exchange Act of 1934, § 10(b), codified at 15 U.S.C. § 78j(b); Securities Exchange Act Rule 10b-5, codified at 17 C.F.R. § 240.10b-5 (2001).

that even a stipulation to a sentencing fact or waiver in a plea agreement could not waive a defendant's *Apprendi/Gould* rights.<sup>42</sup> This rule, however, should not hold under federal law. *Blakely* itself expressly allows defendants to stipulate to facts or waive their rights to juries.<sup>43</sup> Thus, defendants who have admitted facts at their plea allocutions or waived their *Apprendi/Blakely* rights in plea agreements have no relief. The same might well be true if the plea agreement contains factual recitations or stipulations. By the same logic, waivers of the right to appeal sentencing issues should apply to *Blakely* errors. (One might argue, however, that one cannot waive the right to appeal an illegal sentence above the statutory maximum and that *Blakely* errors are now sentences above statutory maxima.) The Department of Justice's July 2 memorandum instructs federal prosecutors to seek *Apprendi/Blakely* stipulations and waivers as part of plea agreements.<sup>44</sup>

The mere fact of a plea, however, is not by itself sufficient to waive all *Blakely* claims. Alleged *Blakely* errors happen at sentencing, when judges try to find facts and raise sentences. The plea alone cannot waive an error that occurs only afterwards.

Defendants may claim that their *pre-Blakely* pleas and allocutions to various Guidelines factors were not knowing, intelligent, and voluntary because they did not know of their *Blakely* rights. This argument might have some force if one conceptualized the error as unawareness of the elements to which one pleaded guilty. As discussed in the next section, however, courts are more likely to view *Blakely* as a procedural change rather than a retroactive, substantive one. Defendants thus cannot use *Blakely* retroactively to argue that their *pre-Blakely* pleas are invalid. "A voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that

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<sup>42</sup>*State v. Cody*, 35 P.3d 800 (Kan. 2001); *State v. Cullen*, 60 P.3d 933 (Kan. 2003).

<sup>43</sup>*Blakely*, 124 S. Ct. at 2541.

<sup>44</sup>Memorandum from James Comey, *supra* note \_\_\_, at 4.

the plea rested on a faulty premise.”<sup>45</sup>

*Retroactivity.* As just discussed, one could conceptualize the *Apprendi* line of cases as either procedural or substantive. All new criminal rules are retroactive to cases still pending on direct appeal or certiorari, and new substantive rules are retroactive to cases on collateral review.<sup>46</sup> New rules of criminal procedure, however, are not retroactive on collateral review unless they are “watershed rules . . . without which the likelihood of an accurate conviction is seriously diminished.”<sup>47</sup>

In *Schriro v. Summerlin*, the Court held that *Apprendi*’s progeny (*Ring v. Arizona*) was a procedural rather than a substantive rule.<sup>48</sup> The Court reasoned that *Ring* did not alter the elements of the offense or the range of conduct punishable by death, but simply attached different procedural protections to them.<sup>49</sup> While one might try to distinguish *Blakely* as actually altering the elements, it appears to fall within this rule. The Court further held that *Ring* was not a watershed rule. Judicial factfinding, it reasoned, does not seriously impair accuracy to the point of creating too large a risk of punishing the innocent.<sup>50</sup> If this is true for judicial factfinding in capital cases, where courts are especially sensitive to the risk of error, it should hold all the more in noncapital cases.

Defense lawyers might try to find two possible ways around *Schriro v. Summerlin*. The first is to argue that *Blakely* is not a new rule, but merely an application of *Apprendi*, which applies to all cases

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<sup>45</sup>United States v. Broce, 488 U.S. 563, 572 (1989) (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970) (internal quotation marks omitted)).

<sup>46</sup>*Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

<sup>47</sup>*Teague v. Lane*, 489 U.S. 288, 311, 313 (1989) (plurality opinion).

<sup>48</sup>124 S. Ct. 2519, 2523-24 (2004).

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 2524-26.

since June 24, 2000. In her *Blakely* dissent, Justice O'Connor feared this possibility.<sup>51</sup> This fear, however, seems more like a dissenter's rhetorical hyperbole than a real likelihood. The *Teague* test for a new rule is broad. It includes any rule whose "result was not dictated by precedent existing at the time the defendant's conviction became final."<sup>52</sup> While *Blakely* is a logical extension of *Apprendi*, its result was not dictated. *Blakely* could have decided instead that flexible sentencing guidelines are distinguishable from rigid statutory maxima, or that defendants have fair warning of any possible sentences below the statutory maxima. The unexpectedness of *Blakely* and the sudden disruptions it has caused underscore the novelty of the rule.

The second possible distinction is that *Schriro v. Summerlin* addressed only the jury-trial component of *Ring/Apprendi* and not the reasonable-doubt component. "Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue."<sup>53</sup> This distinction is plausible. If any rule of criminal procedure is a bedrock rule that contributes substantially to the accuracy of convictions (though not acquittals), proof beyond a reasonable doubt is. Thus, in several pre-*Teague* cases, the Court held that *In re Winship* and *Mullaney v. Wilbur* were retroactive.<sup>54</sup> This pre-*Teague* law is unlikely to survive *Teague*, however. And the enormous practical consequences of full retroactivity will probably lead most courts to find *Blakely* not retroactive on collateral review. Thus, it is no surprise that every circuit to address the issue so far has held that *Apprendi* is not

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<sup>51</sup>*Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting).

<sup>52</sup>*Teague*, 489 U.S. at 301 (plurality opinion).

<sup>53</sup>*Schriro*, 124 S. Ct. at 2522 n.1 (citation omitted).

<sup>54</sup>*Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (per curiam) (making retroactive *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt for juvenile convictions)); *Hankerson v. North Carolina*, 432 U.S. 233, 242-44 (1977) (making retroactive *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (requiring the prosecution to prove malice aforethought beyond a reasonable doubt in murder prosecutions, instead of presuming it and requiring defendants to rebut it by proving heat of passion)).

retroactive.<sup>55</sup>

*Harmless Error and Plain Error.* In *United States v. Cotton*, the Supreme Court held unanimously that unpreserved *Apprendi* errors are subject to plain-error review.<sup>56</sup> The same logic should apply to unpreserved *Blakely* errors. As for harmless error, defendants might characterize *Blakely* errors as structural defects, akin to not submitting an entire count to a jury, which would require automatic reversal. Some courts have agreed, refusing to find *Apprendi* errors harmless where indictments failed to allege drug quantities even if the evidence was overwhelming.<sup>57</sup> Prosecutors, on the other hand, would analogize failing to submit enhancements to a jury to omitting an element from jury instructions, which can be harmless error.<sup>58</sup> Many federal and state courts have followed the latter approach with *Apprendi* errors, excusing them if they are harmless beyond a reasonable doubt.<sup>59</sup> An error is not harmless if a reviewing “court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.”<sup>60</sup>

*Double Jeopardy.* Defendants who have already been convicted by trial or plea may raise double jeopardy challenges if prosecutors later try to add enhancements. In other words, trying to prove enhancements now is tantamount to trying to prove a new,

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<sup>55</sup>E.g., *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001).

<sup>56</sup>535 U.S. 625 (2002).

<sup>57</sup>*United States v. Mackins*, 315 F.3d 399, 408-09 (4th Cir. 2003); *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002).

<sup>58</sup>See *Neder v. United States*, 527 U.S. 1 (1999).

<sup>59</sup>See, e.g., *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002); *United States v. Anderson*, 236 F.3d 427, 429 (8th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 829 (11th Cir. 2000); *People v. Sengpadychith*, 27 P.3d 739, 745-48 (Cal. 2001).

<sup>60</sup>*Neder*, 527 U.S. at 19.

aggravated crime, one that should have been proved at the first trial if at all. There is no law on this point, but the argument has some merit. As noted, however, *Schriro v. Summerlin* treats *Ring* not as the addition of substantive new elements, but more as adding procedural protections to existing elements. If one can apply this logic to *Blakely* in the double-jeopardy context, there may be no problem because the change is not clearly a substantive one. Even if double jeopardy applies, courts may well carve out an exception for *Blakely*'s change in the law. The situation might be analogous to a change in the facts: when a defendant is convicted of assault and battery and the victim later dies, double jeopardy is no bar to a subsequent murder prosecution.<sup>61</sup>

*Ex Post Facto.* What if Congress or the Sentencing Commission, within the next few months, patches the Sentencing Guidelines, as discussed in the next Part? Would there be an *ex post facto* problem with applying these restored penalties to pending cases?

The *Ex Post Facto* Clause forbids certain changes in criminal law that disadvantage defendants. A legislature may not retroactively criminalize an innocent act, increase the penalties for an existing crime, or “alter[] the legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”<sup>62</sup> Not all procedural changes, however, are subject to this stricture. As a rule, procedural and evidentiary changes are not *ex post facto* laws.<sup>63</sup> If, however, the procedural change raised the maximum penalty, the defendant could not receive a substantive penalty enhancement.

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<sup>61</sup>*Dias v. United States*, 223 U.S. 442 (1912); see *Baumann v. Nelson*, No. 96 C 4292, 1997 WL 699655 (N.D. Ill. Nov. 7, 1997) (finding no double jeopardy bar to a murder prosecution following an attempted murder conviction and the victim's subsequent death).

<sup>62</sup>*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

<sup>63</sup>See, e.g., *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977) (collecting cases); *United States v. Molt*, 758 F.2d 1198, 1201 (7th Cir. 1985).

Even if this kind of sentencing change is substantive rather than procedural, there might be no *ex post facto* problem. If the legislative or commission solution effectively restores the law to what it was before *Blakely*, defendants who committed their crimes before *Blakely* cannot claim that the law required less proof or imposes more punishment than it did “at the time of the commission of the offence.” (This is true unless one takes an extremely formalist view that in fact *Blakely* was the law all along and only now have we realized that fact.) The fair-warning and legality arguments against patching the law seem particularly weak in this context, suggesting an *ex post facto* exception for remedial laws. So far, however, I have been unable to find any precedent on what happens if a defendant commits a crime at time A, an intervening decision changes the law at time B, and the legislature at time C restores the law to what it was at time A.

I cannot provide any definitive answers. On the contrary, I want to stress that the *ex post facto* issues are among the most difficult and thorny raised by *Blakely*, and it will take years of litigation and many briefs and articles to sort them out. The issues are manifold: to what extent is *Blakely* substantive and to what extent is it procedural? Should the relevant change in law date from when *Apprendi* was handed down, the date *Blakely* was handed down, or something else? Does *Blakely* change the law in defendants’ favor, or (on a Blackstonian view) does *Blakely* merely announce what the law in fact always was all along? If post-*Blakely* legislation imperfectly tries to restore the status quo ante, is that a change in the law for *ex post facto* purposes? What does it mean to increase the punishment *ex post facto*—must it involve raising the statutory maximum, raising the guidelines maximum, or even reintroducing aggravating factors that had been invalidated? If post-*Blakely* legislation raises the statutory or guidelines maximum sentence, but a particular defendant’s sentence falls below the older maximum, is there no *ex post facto* problem even though the higher maximum might have psychologically influenced the sentencing judge? Only time will provide good answers to these questions.

*Sentencing in the Alternative.* Until the Supreme Court resolves the issue, judges face uncertainty about which legal regime to apply at sentencing. If they apply the wrong one in the interim, they risk

having to hold a full-fledged resentencing for every case later on. To avoid this problem, Judge Paul Cassell decided to impose two sentences: one sentence on the assumption that the Guidelines are not binding, and a backup sentence in the event that the Guidelines are later upheld.<sup>64</sup> The Department of Justice is likewise instructing federal prosecutors to ask for three alternative sentences: one under the Guidelines without *Blakely*, one under the Guidelines applying *Blakely*, and one without the Guidelines.<sup>65</sup> This approach makes eminent sense. The only danger is that district judges will be tempted to conform their non-Guideline sentences to their Guideline sentences not because they think the sentences are right, but to avoid a tidal wave of work on remand.

### III. Possible Solutions

Assuming that *Blakely* invalidates the Guidelines or large portions of them, what will sentencing look like after *Blakely*?

*Jury Sentencing? Unlikely.* Justice Scalia's majority opinion envisions trying sentencing enhancements to juries, either to the jury that decided guilt or to a separate sentencing jury. Trying enhancements before the first jury, however, could prejudice it on the issue of guilt, while bifurcating or empaneling a second jury would be costly and time-consuming. As noted earlier, multi-part, complex verdict forms full of conditional questions would be hard for jurors to manage. Moreover, most cases never make it to juries. Only about 4% of defendants enjoy jury trials, and a few more have bench trials. 95% plead guilty and waive their rights to jury trials. Whatever the resulting system looks like, juries are unlikely to play a very large part.

*Indeterminate Sentencing? Unlikely.* Congress could return to the indeterminate-sentencing system that prevailed for nearly two

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<sup>64</sup>United States v. Croxford, No. 2:02-CR-00302PGC, 2004 WL 1521560, at \*19 (C.D. Utah June 29, 2004).

<sup>65</sup>Memorandum from James Comey, *supra* note \_\_\_\_, at 4.

hundred years. If the sentence for kidnapping was zero to twenty years, then judges could sentence anywhere within that range. This approach would reintroduce the dangers of arbitrariness, discrimination, and variation that fueled determinate-sentencing reforms. It would also give defendants less notice, warning them only of the theoretical twenty-year maximum without any guidance about where they would fall within the range. The upshot would be less predictability, less coherence, and less uniformity in sentencing. Moreover, Congress is not likely to trust judges with this much power. As the recent PROTECT Act shows, Congress is frustrated with what it perceives as soft-on-crime judges and will balk at returning sentencing discretion to them.

*Voluntary Guidelines? Unlikely but Possible.* A slightly firmer approach would turn the current guidelines into voluntary, non-binding guidelines. Before *Blakely*, “guideline” was a misnomer for the federal system, as the Guidelines were really binding rules. One could now treat the Guidelines as genuine guidelines, informative but not binding. This is how Judge Paul Cassell treated them in *United States v. Croxford* after finding that *Blakely* invalidated their binding force.<sup>66</sup> A number of states use voluntary guidelines to inform judges’ exercise of their discretion. The use of information to illumine sentencing discretion is on the rise. For example, Multnomah County, Oregon’s Smart Sentencing Project tells judges the recidivism rates that followed after various past sentences of similar offenders.<sup>67</sup> Given Congress’s current distrust of judges, as mentioned above, this outcome seems unlikely.

*Appellate Review of Sentences: Possible.* The next possibility is that Congress could make guidelines into rules of thumb. District judges would have some leeway, but they would have to give detailed, written statements of reasons and appellate courts would review their sentences. Unlike the preceding two solutions, this approach would

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<sup>66</sup>United States v. Croxford, No. 2:02-CR-00302PGC, 2004 WL 1521560, at \*15 (C.D. Utah June 29, 2004).

<sup>67</sup>See <http://ourworld.compuserve.com/homepages/SMMarcus/whatwrks.html> (last visited July 9, 2004).

have some teeth; appellate judges would bring more uniformity to sentencing than district judges alone. The degree of discretion would depend on the level of deference: *de novo* review would allow for much less variation than abuse-of-discretion review. It would also allow highly contextualized, fact-specific evaluations of blame and dangerousness *ex post*, unlike the rigid, *ex ante* approach of the Guidelines. While some would regard this flexibility as an asset, however, Congress would probably see it as a liability. Any flexible rule-of-thumb system would allow far more room for variation than the pre-*Blakely* one, and Congress would probably balk at entrusting this much discretion to judges.

*Turning All Aggravators Into Mitigators? Too Gimmicky.* The *Apprendi* line of cases consistently distinguishes aggravating from mitigating factors and covers only the former. The dissenters have repeatedly pointed out that legislatures could easily evade this rule. All they would have to do is raise penalties across the board and turn all aggravating factors into mitigating ones. In the robbery example given earlier, the gun enhancement would become a lack-of-gun mitigator subtracted from a higher base sentence.

The utterly formalistic logic of *Apprendi* permits this gimmick, as a defendant supposedly has fair warning of the highest possible sentence. The Court also predicted, somewhat naively, that “structural democratic constraints” would restrict the raising of sentences.<sup>68</sup> As Professors Nancy King and Susan Klein have shown, however, legislatures frequently redraft their criminal codes around new Supreme Court decisions.<sup>69</sup> The politics of being tough on crime give them incentives to do so.

*Apprendi* hinted, however, that if a legislature redrafted its entire criminal code to turn aggravators into mitigators, the Court

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<sup>68</sup>*Apprendi*, 530 U.S. at 490 n.16.

<sup>69</sup>Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1490-92, 1546 (2001).

might invalidate this gimmick.<sup>70</sup> Faced with this warning, Congress might not take the risk, lest another adverse ruling create an additional year or two of chaos and extremely light sentences for defendants in the interim. But some aggressive jurisdiction, be it federal or state, is likely to test this limit at some point. We cannot know whether *Apprendi* will extend even further to extend past its current arbitrary, formalistic line.

*More Mandatory Minima? Quite Possible.* The most troubling possibility is that *Blakely* will provoke legislatures to pass a plethora of harsh mandatory penalties. Deprived of the Guidelines scalpel, Congress may turn to the mandatory-minimum sledgehammer. The pending Sensenbrenner drug bill marks another step along this road. This legislation may be politically popular because it is tough on crime, but it carries a steep price. Mandatory penalties give prosecutors tools with which to tie judges' hands without turning discretion over to juries. Broad mandatory penalties are crude and poorly calibrated to guilt. It is little consolation that they provide clear notice.

*Raise the Guidelines Maxima—The Most Likely Response.* The most likely response is one proposed by Professor Frank Bowman, which is currently gathering steam on Capitol Hill. That proposal would amend the Guidelines to raise all Guidelines maxima up to the statutory maxima, but leave Guidelines minima in place. This change would require amending the Sentencing Reform Act, which currently requires the top of each sentencing range to be no more than 25% or six months above the bottom of the range, whichever is greater.<sup>71</sup> The Commission could add a non-binding recommendation that judges ordinarily not sentence more than 25% above the bottom of the range. It could also list the upward-departure grounds as illustrations of when a higher sentence might be appropriate and provide for appellate review. Because judicial factfinding would never raise the maximum sentence, *Blakely* would not require jury involvement or proof beyond a reasonable doubt.

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<sup>70</sup>530 U.S. at 490 n.16.

<sup>71</sup>28 U.S.C. § 994(b)(2).

Though this raising of maxima might seem odd, it is not nearly as gimmicky as the aggravator/mitigator switch discussed above. There is no obvious way that the Court could or would extend *Apprendi* to forbid this maneuver. On the contrary, the Court has repeatedly reaffirmed that judges may find facts and set sentences within ranges, so long as they do not increase the tops of those ranges.

This solution seems similar to the status quo ante. While judges would in theory be more free to move upwards, pre-*Blakely* they did not do so often. What really does the work is not the top but the bottom of each range, where most sentences cluster and below which some judges strain to go. Judges currently depart upwards in fewer than 1% of cases, in part because many judges think the Guidelines as a whole are too harsh already. Appellate review might also scrutinize upward departures, though searching review might make the upper bound seem too law-like and trigger *Blakely* protections.

The danger is that removing maxima will distort patterns of sentencing and bargaining. Judges who were inclined to split the difference between the minimum and maximum before might be psychologically influenced by the new, higher maxima and move upwards. Hanging judges who were checked by the fear of appellate review will feel much freer to be harsh. Higher maxima will provide higher mental anchors for defendants, making sentence bargains seem like larger discounts and the prospect of post-trial sentencing even more risky.

Perhaps the raise-the-maximum solution would be a stopgap to give the Sentencing Commission and others time to formulate a long-term solution. The Commission could study Kansas' experience with jury sentencing and enact more far-reaching sentencing reform, addressing the criticisms that made the Guidelines so unpopular. But I suspect that any temporary solution, even one with a sunset provision, would likely become permanent. The weight of inertia, fear of judicial discretion, and fear of the mandatory-minimum alternative would push policymakers toward a system similar to the current one. One would hope that a fresh look might incorporate some of the lessons of state sentencing reform. The Commission bureaucracy,

however, seems set in its heavily quantified, mathematical-formula mode and would find it hard to switch to a different model. And the current closely divided Congress is unlikely to lurch far in either direction, unless one party or the other gains greatly in the November elections. Thus, the status quo bias makes this raise-the-maximum approach the most likely solution in the short and long terms.

#### IV. Plea Bargaining in a Post-*Blakely* World

The most interesting question about *Blakely* is what impact it will have on the 95% of cases that plead guilty. This question in turn depends on whether the Guidelines stand in some modified form, with extra procedural protections, or whether the Guidelines fall as a whole.

If the Guidelines stand, then *Blakely* makes each and every Guidelines enhancement, upward departure, or relevant conduct into an element of the offense. Put another way, *Blakely* shatters the criminal code into literally millions of pieces. One version of robbery is now robbery by a ringleader while using but not discharging a gun, pistol-whipping and tying up the bank teller, stealing \$25,000, and obstructing justice by lying to police. Another version is the same crime but by a non-ringleader, another version involves \$100,000, and so on. Each of these facts is now a distinct element of a new crime that needs to be charged in an indictment and proved to a jury.

The Guidelines kept prosecutors more or less honest and constrained charge bargaining through their real-offense system. The offense characteristics that mattered were not simply those that prosecutors chose to include in the indictment, but all those found by the court. Of course no system works perfectly and there was some fact bargaining, but the knowledge of judicial supervision served as a check. Probation officers served as an additional check, because their pre-sentence reports provided a somewhat independent version of the facts.

Now, what was fact bargaining has become charge

bargaining.<sup>72</sup> Prosecutors have historically had a free hand in deciding which charges to include in indictments, and judges cannot second-guess their decisions not to charge. Prosecutors may choose not to allege a gun in an indictment. If they do not, then judges may not sentence based on the gun. *Blakely's* fragmentation in essence turns what was a modified real-offense sentencing system into an almost pure charge-offense system. If a prosecutor has not charged every fact, the most a judge can do is sentence toward the top of the narrow range. No longer can the judge use the pre-sentence report to detect and thwart a fact bargain, even a blatant one. Likewise, appellate courts would have no power to review these prosecutorial decisions. Prosecutors would gain even more power to sentence through their unilateral charging decisions. In theory, prosecutorial charging policies could standardize practice. In practice, however, each prosecutor and each prosecutor's office has much discretion, and it is hard to supervise and standardize the exercise of that discretion.

This intricate labyrinth would greatly benefit defendants who could afford first-rate lawyers and those lucky enough to face lenient prosecutors. While these defendants would benefit, the overall result would be far more arbitrariness, disparity, and variations in sentences.

If the Guidelines fall as a whole, then the parties will engage in wide-open charge and sentence bargaining. Under the indeterminate-sentencing scheme that would prevail, judges would set sentences, so they would have great power to accept or reject sentence bargains. The parties could still charge-bargain, however, especially by using statutes that carry fixed or mandatory penalties. Guidelines would no longer set good benchmarks for likely post-trial sentences. Defendants would thus find it harder to compare plea-bargain offers with likely trial outcomes. Overconfidence and risk-taking or gambling impulses might lead many more to risk trial, in the hopes that even a conviction could lead to a very low sentence.<sup>73</sup> Just

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<sup>72</sup>I am indebted to Frank Bowman for putting the point in this particular way.

<sup>73</sup>See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 (continued...)

as the Guidelines have produced steadily rising guilty-plea rates, the fall of the Guidelines might produce a wave of trials in the short term. Prosecutors would likely respond by getting legislatures to give them even more bargaining leverage, such as more mandatory penalties, to coerce pleas. Thus, what starts out as a more flexible sentencing might well generate into a more rigid and prosecutor-driven one.

## V. Jurisprudential Issues

In closing, I want to mention a few of the fascinating jurisprudential issues raised by *Blakely*. I have the time and space to mention only three: the role of the Sentencing Commission, the role of history in constitutional criminal procedure, and the war between the formalists or legalists on the Court versus the pragmatists.

*The Role of the Sentencing Commission.* *Mistretta* dubbed the Sentencing Commission a part of the judicial branch. This designation, however, seems more unrealistic than ever. Judges are not supposed to create new crimes, but *Blakely* tells us that is what the Sentencing Commission has been doing all along. The Guidelines are not really guidelines, but are statutory maxima. In other words, the Commission is not really an arm of the judicial branch at all, or even an independent agency. It is, in the words of Justice Scalia's lone *Mistretta* dissent, "a junior-varsity Congress."<sup>74</sup> By persuading four of his colleagues to join *Blakely*, Justice Scalia has fulfilled his own prophecy. Can the Commission continue to play such a large role in creating and defining what are in essence new crimes? This role is in tension with the principle of legality and the need for clear legislative creation of crimes. Perhaps the Court will even revisit *Mistretta* and strike the whole exercise down as an unconstitutional delegation of power, leaving Justice Scalia triumphant and vindicated.

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<sup>73</sup>(...continued)

HARV. L. REV. 2463 (2004).

<sup>74</sup>*Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

A related issue is the Commission's role in the separation of powers and interbranch dialogue. Justice Kennedy's dissent in *Blakely* lamented how the majority's decision stifles this kind of ongoing dialogue. Judges and academics began the call for sentencing reform, which led Congress to pass the Sentencing Reform Act, which created the Sentencing Commission, which fashioned a set of rules, which in turn was developed through case law and Commission and statutory amendments, and so on. The system never worked perfectly: the Commission was more insular and secretive than its state counterparts, it did not include the bar and trial bench as much in formulating its initial rules, and Congress at times lost patience with it. But this model of dynamic interaction and dialogue at least allowed for experimentation, learning, and development. *Blakely* threatens to shut down what is left of this dialogue and development.

One would have hoped that the Commission would respond to *Blakely* by holding hearings, collecting ideas, and floating proposals. Its expertise might have provided ideas and templates that Congress could consider in debating post-*Blakely* reforms. Unfortunately, the reality has not lived up to this ideal. Immediately after *Blakely*, judges began writing opinions on the constitutionality of the Guidelines, academics speculated and proposed reforms, and the House and Senate quickly held hearings. But in the weeks following *Blakely*, the Commission not only did not take the lead; it stayed completely silent. This regrettable slowness calls into question Justice Kennedy's hopes for the Commission as a forum for dialogue and creative proposals.<sup>75</sup>

*The Role of History in Constitutional Criminal Procedure.* *Blakely*, like *Apprendi*, relied on quotations from Blackstone and a nineteenth-century treatise to justify its interpretation of the Sixth Amendment. But Blackstone and the nineteenth century never contemplated anything like sentencing guidelines. Indeed, in Blackstone's day, sentences were largely fixed; indeterminate sentencing developed later. What role, then, should eighteenth-century history play in twenty-first-century criminal procedure?

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<sup>75</sup>I am indebted to Doug Berman for this point.

One important observation is that the majority is not about to return America to the eighteenth century. While judicial fact-finding within indeterminate ranges was not the norm until the nineteenth century, *Apprendi* reaffirmed this settled practice.<sup>76</sup> Nor does *Blakely* return us to the world of jury trials by abolishing guilty pleas or forbidding plea bargaining. On the contrary, *Blakely* went out of its way to endorse factual stipulations and waivers of *Blakely* rights as part of pleas.<sup>77</sup> In other words, the majority is trying to graft an eighteenth-century jury-trial rule onto a twenty-first-century landscape of guilty pleas. The idea may be theoretically attractive, but it will not have the practical effect of guaranteeing jury sentencing because most defendants will still plead guilty. Furthermore, juries today, unlike those in the eighteenth century, are generally ignorant of the penalties that their verdicts will lead to. *Blakely*'s and *Apprendi*'s insistence that juries authorize certain punishments is thus a legal fiction.

This half-way effort to import some history, then, fails on its own terms. Its main effect will be to disrupt and reallocate plea-bargaining power in ways that are hard to foresee. The decision is a ringing symbolic victory for juries, and symbolism is worth something. The Framers were very concerned about preserving juries, and they enshrined jury rights in many places in the Constitution. But this symbolic victory must acknowledge its high cost.

*Formalism versus Pragmatism.* What seems to drive the *Blakely* majority is not so much history as formalism. Justice Scalia's majority opinion trumpets the need to give notice to defendants of their maximum penalties. As a practical matter, criminals rarely know the law. Once they are arrested, their lawyers advise them that having a gun will add an additional year or two to a five-year robbery sentence, regardless of what the nominal guidelines range is. But *Blakely*'s rule sets up a neat, formalistic bright line. This bright-line supposedly "give[s] intelligible content to the right of jury trial" and guards

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<sup>76</sup>530 U.S. at 481.

<sup>77</sup>*Blakely*, 124 S. Ct. at 2541.

against a slippery slope of legislative encroachment on juries.<sup>78</sup> Though the rule is a safeguard, legislatures can easily evade it by recharacterizing aggravators as mitigators. Thus the strength of formalism, namely its clarity, also becomes its weakness, because the path to evasion is clear. So the Court might have to tack on another rule to prevent circumvention of the first one. But if the first rule may not do much good on its own to stop the slippery slope, why adopt it in the first place? Perhaps the rule will give legislatures pause before they evade it, but that supposition is speculative and weak at best.

Commentators often divide the current Court into three camps: the liberals (Justices Stevens, Souter, Ginsburg, and Breyer), the conservatives (Chief Justice Rehnquist and Justices Scalia and Thomas), and the swing voters (Justices O'Connor and Kennedy). But the *Apprendi* line of cases highlights another cleavage that cuts across ideological lines. Justices Scalia and Thomas, though they are often the toughest on criminal defendants, have endorsed the *Apprendi* right in the strongest terms. They have joined with Justices Stevens, Souter, and Ginsburg to adopt the *Apprendi* and *Blakely* bright-line, formalist rules. Justices Scalia, Stevens, and Ginsburg were long-time law professors. While Justice Stevens practiced law for two decades (in addition to teaching) and Justice Souter worked in the New Hampshire Attorney General's office for years, the other three had no significant experience in private practice or trial courts.<sup>79</sup> In short, most of these justices are more academic than practice-oriented. *Apprendi* and *Blakely* highlight their concerns with formalism and theoretical purity and their relative lack of concern with practicality.

The dissenting Justices, the pragmatists, likewise come from various points on the ideological spectrum. Three of them--Chief Justice Rehnquist and Justices O'Connor and Kennedy--had significant experience in private practice. In addition, Justice O'Connor served as a state legislator, deputy county attorney, and

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<sup>78</sup>*Id.* at 2538-40.

<sup>79</sup>See Bibas, *supra* note 6, at 12 n.63.

trial-court judge. Though Justice Breyer taught, he also served as counsel to the Senate Judiciary Committee and on the Sentencing Commission, where he helped to create the Guidelines.<sup>80</sup> These Justices had greater first-hand experience with the practicing bar and trial bench and may be much more sensitive to the practical costs of theoretical purity. Biography, in short, may matter as much as ideology. And often the true battle is not between conservatism and liberalism, but between Justice Scalia's historical, formalist ideal and Justice Breyer's bureaucratic pragmatism.

The final question is whether a deeper hatred of the Guidelines is driving *Blakely's* formalism. Though the *Blakely* majority largely confines itself to discussing the Washington system, it does criticize the federal practice of enhancing sentences based on perjurious trial testimony.<sup>81</sup> One suspects that this jab manifests a deeper hatred. To put it bluntly, many judges and others hate the Guidelines, regarding them as the Frankensteinian creation of a runaway, unresponsive Commission. *Blakely*, in short, may be a quick and dirty way to demolish the Guidelines edifice and its marginalized Commission. What new structure will emerge from the debris, and how long the reconstruction will take, remains to be seen.

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<sup>80</sup>*See id.*

<sup>81</sup>*Blakely*, 124 S. Ct. at 2539 n.11.