THE ROOTS AND REALITIES OF *BLAKELY*

By Douglas A. Berman

Supreme Court Justice Sandra Day O'Connor's characterization of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), as a "No. 10 earthquake" may have been an understatement. At least one government brief filed last summer compared the decision to "Godzilla rampaging through Tokyo during a level 10 earthquake." Ultimately, I am not sure any metaphor can do justice to a decision that may be the most consequential and important criminal justice decision, not only of the last Term or decade or even of the Rehnquist Court, but perhaps in the history of the U.S. Supreme Court.

Blakely is so important and looms so large because it changes the seemingly settled procedures required at sentencing and thus will necessarily impact every case in the criminal justice system. A handful of other modern-era Supreme Court cases—*Gideon v. Wainwright*, *Terry v. Ohio*, and *Miranda v. Arizona*—have shaped or reshaped the criminal justice system by redefining how police conduct investigations and how courts conduct trials. But doctrinally and practically these rulings have their limits; not every criminal case is affected by *Gideon*, *Terry*, and *Miranda*. *Blakely* has the potential to impact every case in which a defendant is convicted of a crime and subject to punishment. In fact, every case in which a defendant may be charged with a crime is potentially impacted by *Blakely* because prosecutors always have an eye on sentencing when they decide which crimes to charge and how to conduct plea negotiations.

Douglas A. Berman *is a law professor at the Michael E. Moritz College of Law at The Ohio State University in Columbus, Ohio. He is a coauthor of the casebook,* Sentencing Law and Policy: Cases, Statutes, and Guidelines*, published in 2004 by Aspen Publishers, and managing editor of the* Federal Sentencing Reporter.

Blakely is also so important and looms so large because it follows a social, political, and legal revolution through which sentencing has been transformed from a field once rightly accused of being "lawless" into a field now replete with law. Over the last quarter century, legislatures and sentencing commissions have developed various structured or guideline systems to govern felony sentencing in state and federal courts. Although *Blakely* technically only declared unconstitutional one portion of Washington State's guideline sentencing system, Justice Antonin Scalia's dramatic opinion for the Court suggests that any and every fact that increases a defendant's effective maximum sentence must now be admitted by the defendant or found by a jury beyond a reasonable doubt. In other words, *Blakely* suggests that the U.S. Constitution does not permit judges to find facts that increase applicable sentences, even though nearly all modern sentencing reforms have made judges central and essential sentencing fact finders. Consequently, the ramifications of *Blakely* for modern sentencing reforms—and for past, present, and future sentences—cannot be overstated.

Depending upon your perspective, perceptions, and predictions, *Blakely* is wondrous or disatrous; it can be viewed as a simple and straightforward application of the Sixth Amendment or a wacky extension of a dubious line of precedents. Justice Scalia's majority opinion for an unusual coalition of Justices—he was joined by John Paul Stevens, David Souter, Clarence Thomas, and Ruth Bader Ginsburg—is both majestic and mysterious, historic and hysterical, stunning and stupefying. And, not to be outdone, the sharp dissents by Justices O'Connor and Anthony Kennedy and Stephen Breyer enrich the debate over sentencing reform while also obscuring the very meaning of *Blakely*.

In my view, *Blakely* is a decision that can and should mark a turning point in the modern story of sentencing reform because it has engendered a long-overdue national discussion and debate on the structure and procedures of sentencing decision making. In this article I hope to place *Blakely* within the broader story of sentencing reform and, in so doing, shed light on how *Blakely* came to pass. I will close by explaining why *Blakely* merits praise simply for getting us thinking about the proper direction for the future development of sentencing law and policy.

Blakely origins: Sentencing's transformation

Though the *Blakely* decision came as a surprise to many, the ground under sentencing reform had been rumbling for some time before the *Blakely* earthquake hit. Indeed, examined against the backdrop of modern sentencing reforms and recent Supreme Court rulings, the timing of *Blakely* is not so peculiar and the case can be viewed as another chapter in a dynamic evolution of sentencing rules and practices.

Beginning in the late nineteenth century and throughout the first three-quarters of the twentieth century, a highly dis-

Blakely on the State Level

What follows is a list of *Blakely v. Washington's* likely impact on state sentencing structures.

1. Presumptive sentencing guidelines systems fundamentally affected by *Blakely*:
- Minnesota
- North Carolina
- Oregon
- Tennessee
- Washington

2. Presumptive (non-guidelines) sentencing systems fundamentally affected by *Blakely*:
- Alaska
- Arizona
- California
- Colorado
- Indiana
- New Jersey
- New Mexico
- Ohio

3. Voluntary sentencing systems possibly affected by *Blakely*:
- Arkansas
- Delaware
- Maryland
- Rhode Island
- Utah
- Virginia

4. Voluntary sentencing systems apparently not affected by *Blakely*:
- District of Columbia
- Louisiana
- Missouri
- Wisconsin

5. Presumptive sentencing guidelines in indeterminate systems possibly affected by *Blakely*:
Michigan
Pennsylvania

(Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing*—Blakely v. Washington: *Practical Implications for State Sentencing Systems 3* (Aug. 2004).)

—Douglas A. Berman

cretionary, rehabilitative, "medical" model was the dominant approach to sentencing. Trial judges in both federal and state systems had nearly unfettered discretion to impose on defendants any sentence from within the broad statutory ranges provided for criminal offenses. Such broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender.

In 1949, the Supreme Court constitutionally approved this philosophical and procedural approach to sentencing in *Williams v. New York*, 337 U.S. 241 (1949). The trial judge in *Williams* sentenced a defendant to death relying upon information that was not presented at trial but appeared in a presentence report. In rejecting Williams's claim of a right to confront and cross-examine the witnesses against him, the Supreme Court stressed that "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence" and spoke approvingly of the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Thus, continued the Court, the Due Process Clause should not be read to require courts to "abandon their age-old practice of seeking information from out-of-court sources," because "[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies" that rely upon judges having "the fullest information possible concerning the defendant's life and characteristics." In short, according to the *Williams* Court, the value of "modern concepts individualizing punishments" meant that sentencing judges should "not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." In other words, the rehabilitative ideal not only justified entrusting judges (and parole officials) with enormous sentencing discretion, it also called for sentencing judges to be freed from any procedural trial rules that might work to limit the sound exercise of their discretion.

Notably, *Williams* was decided before the Supreme Court began "revolutionizing" criminal procedure by expansively interpreting the Constitution to provide criminal defendants with an array of procedural rights. Nevertheless, throughout the 1960s and 1970s, as numerous pretrial and trial rights were being established for defendants, the Supreme Court continued to cite *Williams* favorably and continued to suggest that sentencing was to be treated differently—and should be far less procedurally regulated—than a traditional criminal trial. Although the Supreme Court held that defendants had a right to an attorney at sentencing hearings, the Court did not formally extend other trial rights to sentencing. Indeed, the Supreme Court throughout this period repeatedly stated that at sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited

either as to the kind of information he may consider, or the source from which it may come." (*United States v. Grayson*, 438 U.S. 41, 52 (1978).)

Yet while the theory and procedures of the rehabilitative model of sentencing were being sanctioned by the Supreme Court, they were being questioned in other quarters. Throughout the 1960s and 1970s, criminal justice researchers and scholars were growing concerned about the unpredictable and disparate sentences that highly discretionary sentencing systems could produce. Inspired by Judge Marvin Frankel's criticism of "lawlessness in sentencing" and concerned about unjust disparities, many commentators advocated abandoning the discretionary, rehabilitative, "medical" model of sentencing. Reformers came to propose or endorse some form of guidelines to govern sentencing determinations, and many also urged the creation of specialized sentencing commissions to develop these guidelines.

Calls for reform were soon heeded. In the late 1970s and early 1980s, a few state legislatures passed determinate sentencing statutes, which abolished parole and created presumptive sentencing ranges for various classes of offenses. In 1978, Minnesota became the first state to establish a sentencing commission charged with developing comprehensive sentencing guidelines. Pennsylvania and Washington State followed suit by creating their own distinctive forms of sentencing commissions and sentencing guidelines in 1982 and 1983, respectively. The federal government soon joined the reform movement through the passage of the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop guidelines for federal sentencing. During the next 20 years, nearly all states adopted some form of structured sentencing—some through mandatory sentencing statutes, others by creating sentencing commissions to develop comprehensive guideline schemes.

Though there is considerable variation in the form and impact of structured sentencing reforms, the overall nationwide transformation of the sentencing enterprise in the last 30 years has been remarkable. The highly discretionary, indeterminate sentencing system that had been dominant for nearly a century was replaced by an array of sentencing structures to govern and control sentencing decision making. It seems fair to call these developments a "sentencing revolution" that has altered criminal justice practices and impacted criminal justice outcomes perhaps even more than the "criminal procedure revolution" engineered by the Supreme Court in the 1960s and 1970s.

Yet, significantly absent in all this sentencing lawmaking was a concern for sentencing procedures. Legislatures and sentencing commissions, while committing much time and energy to enacting laws and developing guidelines to govern substantive sentencing decisions, gave scant attention to regulating the processes through which judges obtain and assess the information that serves as the basis for reaching these decisions. Despite creating a significant body of substantive sentencing law, sentencing reforms in most jurisdictions left largely unaddressed fundamental issues such as notice to parties, burdens of proof, appropriate fact finders, evidentiary rules, and hearing processes—even though these procedural matters play a central role in the actual application of general sentencing rules to specific cases.

Though various explanations might be given for why legislatures and sentencing commissions tended to neglect procedural issues in modern reforms, certainly one contributing factor was the U.S. Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which essentially told them they could. Litigated during the early development of structured sentencing reforms, *McMillan* involved a constitutional challenge to a 1982 Pennsylvania statute that provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses. The defendant in *McMillan* argued that the U.S. Constitution required that the justice system treat the fact of firearm possession as an offense element with the traditional trial procedures of proof beyond a reasonable doubt and the right to a jury. The Supreme Court rejected this argument in an opinion that stressed the importance of allowing states to devise approaches to sentencing without significant constitutional limitations. Explaining that "we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties," the Court approved Pennsylvania's decision to describe and treat firearm possession as only a "sentencing factor" without the procedural safeguards of a trial. The Court cited *Williams v. New York* for the proposition that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden at all," and suggested it would be inappropriate to be "constitutionalizing burdens of proof at sentencing."

Rendered in 1986, at a time when many legislatures and commissions were developing or considering sentencing reforms, *McMillan* could have had a profound impact on both the shape and content of structured sentencing if the Court had held or even implied that the Constitution imposed significant procedural requirements on the sentencing process. But the *McMillan* Court instead stressed the importance of "tolerance for a spectrum of state procedures dealing with a common problem of law enforcement." Legislatures and sentencing commissions were thus readily able to forget—and, in fact, largely ignored—procedural matters when reforming the substance of sentencing decision making through structured sentencing reforms.

Blakely precursors: Challenges to lax procedures

In the wake of *McMillan*, as progressively more jurisdictions adopted guideline systems or mandatory sentencing statutes through the 1990s, two significant legal trends emerged. State courts and lower federal courts, citing *McMil-*

lan and *Williams* as controlling authority, regularly upheld against constitutional challenges various structured sentencing systems that imposed punishment without affording defendants the traditional procedural protections of a criminal trial. But, at the same time, many individual judges and academic commentators, citing the unfairness to defendants of being subject to fact-driven guideline sentencing determinations without significant procedural rights, regularly lamented the continued adherence to the two decisions as controlling authority.

Before long, the Supreme Court was itself swept up in these trends, primarily because the structure and operation of the U.S. Sentencing Guidelines heightened the importance of sentencing fact finding and highlighted the limited procedural rules at sentencing. After upholding the constitutionality of the Sentencing Reform Act against structural challenges in *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court began regularly confronting claims that certain aspects of sentencing under the federal sentencing guidelines were constitutionally problematic because of limited procedural rights of defendants.

In a series of decisions through the 1990s, the Supreme Court consistently rejected defendants' claims that federal guideline procedures were constitutionally problematic or repudiated defendants' arguments for expanding the procedural rights at sentencing. For example, in *Nichols v. United States*, 511 U.S. 738 (1994), the Court cited both *Williams* and *McMillan* and stressed that the "traditional understanding of the sentencing process [is] . . . less exacting than the process of establishing guilt" to hold that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction when sentencing him for a subsequent offense; in *Witte v. United States*, 515 U.S. 389 (1995), the Court again placed heavy reliance on *Williams* and *McMillan* and the fact that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial to hold that there was no double jeopardy violation when a prior conviction increased punishment through sentence calculations under the U.S. Sentencing Guidelines. This line of cases reached its high-water mark with the Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), which stressed the "significance of the different standards of proof that govern at trial and sentencing" to hold that federal courts could be required by the federal guidelines to consider at sentencing conduct relating to charges on which defendants had been acquitted.

Throughout this line of cases, a few Justices noted that the transformation of sentencing under the federal guidelines raised questions about continued approval of the lax procedures sanctioned in the context of the discretionary "medical" model of sentencing. Justice Stevens, in particular, consistently assailed the application of pre-guideline precedents to sustain the limited procedural rights afforded to defendants under the federal guidelines. In his dissent in *Witte v. United States*, for example, Justice Stevens stressed "the change in sentencing practices caused by the Guidelines" to argue that there were double jeopardy concerns when a prior conviction was used to increase punishment in federal guideline calculations. Similarly, dissenting in *Watts*, Justice Stevens complained about the Court's continued reliance on *Williams* since "its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system."

Blakely foreshadowed: Hints of a new world order

Justice Stevens's dissents in *Watts* and *Witte* clearly foreshadowed his vote and his opinion for the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the critical precursor to the *Blakely* decision. But the fact that these dissents did not garner other votes seemed, at the time, to indicate that only Justice Stevens was troubled by the continued application of pre-guidelines sentencing precedents to the new world of structured sentencing. However, with the benefit of hindsight, it now appears that a number of Justices may have been impacted by cases throughout the 1990s that highlighted the conceptual difficulties of reliance on lax sentencing procedures after guideline reforms turned sentencing decision making into more of a trial-like enterprise.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 526 U.S. 227 (1999), a significant and consequential number of Supreme Court Justices started to express serious concern with traditional sentencing procedures. The Supreme Court in *Almendarez-Torres* ultimately concluded that evidence of a defendant's prior convictions could be used to increase his or her sentence without being subject to the procedural rules for elements of crimes at trial. However, the 5-4 division of the Court in *Almendarez-Torres*, as well as Justice Scalia's strong dissent asserting that the Court's holding raised serious constitutional problems, was a harbinger of decisions to come. The following Term, in *Jones*, five Justices suggested that *Almendarez-Torres* announced a prior convictions "exception" to a rule that facts establishing higher penalties must be treated procedurally similar to offense elements. The *Jones* Court asserted that "a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century" suggested the principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

In 2000, the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), converted the *Jones* Court's dicta

into what Justice O'Connor in dissent called a "watershed" ruling. The *Apprendi* Court declared unconstitutional a hate crime enhancement that enabled a judge to impose a sentence higher than the otherwise available statutory maximum based on a finding of racial animus by a preponderance of the evidence. The Court asserted this was constitutionally impermissible because, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

At the time it was decided, observers of modern sentencing reforms realized that, by establishing a constitutional limitation on the procedures attending a legislative sentencing scheme, *Apprendi* was a landmark decision. However, the 5-4 split vote and the five separate opinions delivered by the Justices raised many questions about the exact scope and import of the Court's ruling. And, ultimately, the *Apprendi* decision itself at first proved to have a smaller impact than many observers and the *Apprendi* dissenters may have expected. Although the decision generated much litigation and many appellate decisions trying to interpret and give effect to the ruling, *Apprendi*'s impact on established criminal law doctrines was relatively limited: Lower federal and state courts typically interpreted *Apprendi* narrowly in order to preserve, as much as possible, existing sentencing structures that relied on judicial fact finding, and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.

The Supreme Court itself contributed significantly to restricting the reach of Apprendi through its decision in *United States v. Harris*, 122 S. Ct. 2406 (2002). The *Harris* Court held, in another 5-4 decision, that facts that establish required minimum penalties do not require submission to a jury or proof beyond a reasonable doubt. Interestingly, on the same day *Harris* was decided, the Court also expanded *Apprendi*'s reach in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), by holding that facts that establish eligibility for the death penalty require submission to a jury and proof beyond a reasonable doubt. However, because most jurisdictions already relied on jury sentencing in capital cases, the Court's decision in *Harris* to limit the procedural requirements for imposition of minimum sentences was the most important and telling iteration of the apparent scope of *Apprendi*. As Professor Stephanos Bibas noted at the time, by holding in *Harris* that only facts that raise maximum sentences, and not those that establish minimums, must be treated procedurally as elements, the Supreme Court seemed to have "caged the potentially ravenous, radical *Apprendi* tiger that threatened to devour modern sentencing law." (Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENT. REP. 79, 79 (2002).) Or, to return to the earthquake metaphor, it seemed that lower court rulings combined with the High Court's *Harris* decision served to quell constitutional rumblings even after *Apprendi* started to shake the foundations of sentencing reform.

Blakey hits: No more "business as usual"

When certiorari was granted in *Blakely v. Washington*, most observers believed the case was to serve as final confirmation that the *Apprendi* decision would not radically transform modern sentencing practices. It was thought that the Supreme Court would use *Blakely* to rule, as had nearly all lower courts, that *Apprendi* had no applicability to judicial fact finding that simply impacted guideline sentencing outcomes *within* otherwise applicable statutory ranges.

But then the earthquake hit. Justice Scalia, writing for the Court in *Blakely*, concluded that Ralph Blakely's Sixth Amendment right to trial was violated when a Washington State sentencing judge enhanced his guideline sentence based on the judge's factual finding that his kidnaping offense involved "deliberate cruelty." Linking this holding back to the Court's *Apprendi* ruling, Justice Scalia explained:

> Our precedents make clear . . . 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, and the judge exceeds his proper authority.

(124 S. Ct. at 2537.)

Justice Scalia further explained that this particular articulation of the meaning and reach of *Apprendi* "reflects not just respect for long-standing precedent, but the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Rebuffing a range of practical concerns expressed by the dissenting Justices, Justice Scalia concluded his opinion for the Court with the bold assertion that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."

Because the *Blakely* decision suggests that any and every fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant, the potential impact of *Blakely* on modern sentencing systems is truly staggering. Indeed, the dissenters spoke in near cataclysmic terms about what the *Blakely* decision might mean. Justice O'Connor predicted that the "practical consequences of today's decision may be

Additional Resources on *Blakely v. Washington*

In print

- "The *Blakely* Earthquake," *Federal Sentencing Reporter*, Volume 16, Number 5 (June 2004)
- "Considering the Post-*Blakely* World," *Federal Sentencing Reporter*, Volume 17, Number 1 (October 2004)
- Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing*—Blakely v. Washington: *Practical Implications for State Sentencing Systems* (Aug. 2004)
- Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing*—Blakely v. Washington: *Legal Considerations for State Sentencing Systems* (Sept. 2004)
- Minnesota Sentencing Guidelines Commission, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota* (short-term report Aug. 2004; long-term report Oct. 2004)

Online

- Sentencing Law & Policy Web blog, at http://sentencing.typepad.com/ (maintained by Professor Douglas A. Berman)
- USSGuide *Blakely* page, at http://www.ussguide.com/members/BulletinBoard/Blakely/Index.cfm (maintained by Peter G. Schmidt)
- NACDL *Blakely* page, at http://www.nacdl.org/public.nsf/newsissues/blakely?opendocument (maintained by the National Association of Criminal Defense Lawyers)
- FDAP *Blakely* page, at http://www.fdap.org/blakely.html (maintained by the First Department Appellate Division in California)

—Douglas A. Berman

disastrous" because the *Blakely* decision "casts constitutional doubt over [sentencing guidelines systems] and, in so doing, threatens an untold number of criminal judgments." Justice O'Connor stated that if "the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would," and she concluded her dissent by lamenting that "[o]ver 20 years of sentencing reform are all but lost; and tens of thousands of criminal judgments are in jeopardy."

Justices Kennedy and Breyer likewise expressed in dire terms their concerns about the *Blakely* majority's ruling. Justice Kennedy lamented that the decision does "considerable damage to our laws and to the administration of the criminal justice system," and he suggested the decision essentially commanded jurisdictions with sentencing guidelines systems "to scrap everything and start over." Justice Breyer commented that he "thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion."

Expressing concerns about the future of sentencing reforms, Justices O'Connor and Breyer both highlighted the many questions that the *Blakely* decision left in its wake. Noting the challenges for states, Justice O'Connor asserted: "The practical consequences for trial courts, starting today, will be . . . 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." Justice Breyer focused his questions on the federal sentencing system and pondered:

> (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? (4) How are juries to deal with highly complex or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge?

(124 S. Ct. at 2561.)

The *Blakely* majority's response to the dissenters' questions and concerns was spartan and tepid. Justice Scalia said simply that "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." And, in response to the dissenters' complaints that the majority's broad ruling would render unconstitutional fundamental provisions of the federal sentencing guidelines, Justice Scalia asserted simply: "The Federal Guidelines are not before us, and we express no opinion on them."

Blakely aftershocks: The earthquake's immediate aftermath

Sentencing scholars and constitutional scholars are sure to discuss and debate the meaning, reach, and importance of the *Blakely* decision for many years to come. However, *Blakely* began to have a profound impact on state and federal sentencing systems in only a matter of days.

As reflected in a rapid-fire series of lower federal court decisions, the shock waves created by the *Blakely* earthquake were especially destructive to the operation of the federal

sentencing guidelines, a system that has judicial fact finding built into its very foundation. Within weeks of the *Blakely* decision, dozens of lower federal courts had declared at least portions of the federal sentencing guidelines unconstitutional. Many judges not only found guideline enhancements based on judicial fact finding unconstitutional, but also concluded that these parts of the guidelines were not severable from the rest of the federal sentencing system. Consequently, some federal judges ruled that the entire federal guidelines system must be legally inoperative in some or all cases.

Seeking to preserve the existing federal guidelines, the U.S. Department of Justice developed an argument that *Blakely* applied only to statutory guideline sentencing systems. In a brief filed around the country, the Justice Department claimed that *Blakely* was inapplicable in the federal system because the federal guidelines were created by the U.S. Sentencing Commission, an administrative agency that Congress placed in the judicial branch. Though relatively few district courts found this argument persuasive, a number of circuit courts decided (for mostly prudential and institutional reasons) to continue to apply the federal sentencing guidelines unless and until the Supreme Court instructed otherwise. These appellate courts reasoned that, because the federal guidelines had been upheld against other constitutional attacks in the past, making dramatic changes to established federal sentencing practices was inappropriate until the Supreme Court definitively ruled whether and how *Blakely* applied to the federal system.

During this period of legal uncertainty, lower courts in various ways urged immediate action by the Supreme Court to address the meaning and impact of *Blakely* for the federal sentencing system. The same sentiment emerged from Congress, which within three weeks of the *Blakely* decision had discussed in two separate hearings *Blakely*'s impact on federal sentencing and possible legislative responses. During this period, many diverse proposals were circulated suggesting ways to "fix" federal sentencing in light of *Blakely*: Some commentators urged converting all of the federal guidelines from legally binding rules into simply advisory suggestions; others proposed altering the structure of guideline sentencing to convert the nature and effect of judicial fact finding in ways that would seem to make the federal guidelines technically compliant with the *Blakely* holding. However, because both the constitutional validity and practical impact of any proposed congressional "fix" was necessarily uncertain, the Senate was content over the summer to issue a concurrent resolution that implored the Supreme Court to clarify quickly *Blakely*'s applicability to the federal system. And on the same day that the Senate exhorted the Supreme Court to act quickly, the acting solicitor general sought expedited consideration of two of the first lower court cases finding portions of the federal sentencing guidelines unconstitutional.

Perhaps unsurprisingly, in light of the urgent pleas put forward by the executive, legislative, and judicial branches, on August 2, 2004, the Supreme Court granted certiorari in *United States v. Booker*, Case No. 04-104, and *United States v. Fanfan*, Case No. 04-105, to address the applicability of *Blakely* to the federal sentencing system. The Supreme Court ordered expedited briefing and scheduled two hours of oral argument for the first day of its October 2004 Term. At the *Booker* and *Fanfan* oral argument, a majority of the Justices seemed ready to apply the rule announced in *Blakely* to the federal sentencing system. However, at oral argument there was considerable discussion and debate over exactly how *Blakely* should apply to and impact the existing federal structure. Moreover, a number of Justices suggested they thought Congress would inevitably rework existing sentencing rules if and when the Supreme Court decides in *Booker* and *Fanfan* that its *Blakely* decision does render unconstitutional some established federal sentencing practices.

Critically, though the spectacle of federal sentencing chaos captured most of the newspaper headlines and academic attention in the wake of the *Blakely* decision, the profound impact that the decision could have on state sentencing systems may be truly the most important aftershocks to monitor. The fate of sentencing reform in the states is quite important because more than 90 percent of all criminal convictions are in state courts; it is also quite dynamic because state sentencing structures are diverse and will be impacted by *Blakely* in very different ways. Within just a few months of the *Blakely* decision, Arizona, California, Colorado, Minnesota, New Jersey, North Carolina, Ohio, and Tennessee all had major court rulings, which suggested that these states and perhaps many others might have to significantly restructure their sentencing systems after *Blakely*. As of this writing, at least five state supreme courts have docketed cases raising major *Blakely* issues. And because perhaps nearly two dozen state sentencing structures are significantly impacted by *Blakely* (see "*Blakely* on the State Level" on page 6), we can expect to see major responses to *Blakely* from state courts, state legislatures, and state sentencing commissions in the months and years ahead.

Blakely import: Reconsidering sentencing reform

With so much happening so fast, it is almost impossible to keep track of all the stunning law and policy developments in the wake of *Blakely*. Indeed, on my Web site I have been reporting on major post-*Blakely* developments nearly every day. (*See* Sentencing Law and Policy, *available at* http://sentencing.typepad.com.) And the journal I help edit, *Federal Sentencing Reporter*, has already produced three special issues covering *Blakely* and its aftermath. (See "Additional Resources on *Blakely v. Washington*" on page 10.) The range of short-term and long-term issues that *Blakely* raises for lawyers and lawmakers is truly mind-boggling. Issues such as available jury procedures, waiver, and harmless error will occupy courts and litigants as they handle ongoing cases. The availability of

collateral appeals, habeas corpus procedures, and the doctrines of retroactivity, will frame the impact of *Blakely* on seemingly settled criminal judgments in past cases.

But *Blakely*'s impact on the future of sentencing reform is the most enduring and compelling issue, especially because the central questions that the decision raises concern the very nature and foundation of our criminal justice system. Specifically, *Blakely* fundamentally raises questions about the appropriate structure and procedures of modern sentencing decision making, as well as questions about which institutions ought to be taking the lead in answering these questions.

As highlighted at the outset, the medical model of sentencing that dominated before modern reforms helped to justify reliance on lax procedural rights at sentencing. Since sentencing was conceived—at least formally, if not in actuality—as an enterprise designed to help "cure" the sick defendant, the idea of significant procedural rights at sentencing almost did not make sense. Just as patients are not thought to need "procedural rights" when being treated by a doctor, defendants were not thought to need procedural rights when being sentenced by a court. But, of course, it has been more than a quarter century since the rehabilitative model of sentencing has held sway, and, yet, until *Apprendi* and *Blakely* came along, our sentencing structures still relied without much question on lax procedures for proving the truth of facts that could lead to extended sentences.

Because the philosophy of modern sentencing has been reconceived, a rethinking of the appropriate structure and procedures of modern sentencing decision making has, in fact, been long overdue. Whatever else one thinks about *Blakely*, it merits credit for encouraging a national rethinking of these critical issues. And such reconsideration comes not a moment too soon. Prison populations in the federal and state systems have swelled over the last two decades, reaching record highs nearly every year. Moreover, the American Bar Association itself through its Justice Kennedy Commission report (see page 32 for details of the report) has powerfully urged sentencing policymakers to dramatically restructure various aspects of modern sentencing reforms.

Though the *Blakely* decision only technically concerns what sentencing procedures are constitutionally required, the case and its aftershocks have already engendered broad reexamination of the substance and practices of modern sentencing systems. Indeed, as evidenced by the dozens of articles about *Blakely* that have already been written, many commentators are doing a wonderful job not only chronicling the legal issues that now confront courts in the wake of *Blakely*, but also making insightful recommendations concerning how judges and lawmakers ought to respond to the *Blakely* decision in the months and years ahead. Though the *Blakely* legal aftershocks will be rumbling in many ways in many settings for quite some time, the long-term social, political, and practical impact of the decision will define *Blakely*'s ultimate place in the history of sentencing reform. ■