

**TRAIN WRECK?  
OR CAN THE FEDERAL SENTENCING SYSTEM BE SAVED?  
A PLEA FOR RAPID REVERSAL OF *BLAKELY V. WASHINGTON***

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## INTRODUCTION

On June 24, 2004, five black-clad figures seized control of the Criminal Justice Express, crashed through warning barriers, flattened the Washington State Sentencing Guidelines, opened the throttle, and sent the train hurtling from the main line down the old rail spur where the Federal Sentencing Guidelines and the sentencing systems of numerous states lay tied helplessly to the tracks. Whereupon, the 2003 Term of Court being concluded, the justices twirled their collective mustachios, sent their robes off to the cleaners, and went on vacation. Two months on, as this Essay goes to press, the rest of us stand staring slack-jawed, some delighted and some aghast, at the disarray and paralysis in the locomotive's wake and the impending carnage at the end of the line.

I refer, of course, to *Blakely v. Washington*,<sup>1</sup> the most significant criminal procedure case in the past century in terms of its immediate effects, regardless of whether in the end it proves to have any enduring legacy. In *Blakely*, the Court found the Washington State Sentencing Guidelines unconstitutional, placed the validity of the Federal Sentencing Guidelines in the gravest doubt, and cast a shadow of deep uncertainty over many state sentencing systems and the entire twenty-five-year sentencing reform movement. Over the next year, legal publications will be deluged with sober analyses, exegeses, dissections, and deconstructions of the doctrinal origins and long-term effects of *Blakely*. If the big train wreck really happens, I expect I'll write a few myself. However, it is early for that sort of thing since so much about *Blakely* remains unclear. Indeed, there remains the possibility (for which the Solicitor General will be arguing fervently come October<sup>2</sup>) that the Justices will find some way of wiggling out of the plain implications of their own language. Better yet, upon their return from holiday, the Court might survey the shambles *Blakely* has created, put on the brakes, and issue the juridical equivalent of Emily Litella's slightly sheepish, "Never mind."<sup>3</sup>

At the risk of seeming a Dudley Doright figure standing with palm outstretched in front of the onrushing *Blakely* engine, I will devote this Essay to a possibly vain plea for Litella-ism. It would doubtless be embarrassing for any member of the *Blakely* majority to admit error only months after casting so important a vote, but there is no legal barrier to such a change of mind. Indeed, the courage to change course when presented with evidence that one has erred is the hallmark of the great public servant. This Essay is a very modest effort to marshal such evidence. It is addressed primarily to the federal implications of *Blakely* and makes five basic points: First, *Blakely* has created a ghastly

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1. 124 S. Ct. 2531 (2004). In an unusual move, the State of Washington sought rehearing of the case. See *Blakely v. Washington*, Petition for Rehearing on Behalf of the State of Washington, 2004 WL 1686266 (2004). The petition was denied. *Blakely v. Washington*, \_\_\_ S.Ct. \_\_\_, 2004 WL 1872712 (Aug. 23, 2004).

2. On August 2, 2004, the Supreme Court granted the Solicitor General's requests for expedited review of two cases raising the question of the constitutionality of the Federal Sentencing Guidelines in the wake of *Blakely v. Washington*, *United States v. Booker*, Case No. 04-104, and *United States v. Fanfan*, Case No. 04-105. Combined oral argument has been scheduled for October 4, 2004, the first day of the term.

3. For readers of less than a certain age, Emily Litella was a character played by Gilda Radner on Saturday Night Live, who would rant about some misunderstood bit of news and, when corrected, would close with a falsetto "never mind." See Obituary of Gilda Radner, available at <http://obits.com/radnergilda.html> (last visited Aug. 16, 2004).

mess,<sup>4</sup> bringing the federal criminal justice system to a virtual halt and a putting a number of state systems in disarray. Second, if the Court extends *Blakely* to the Federal Sentencing Guidelines, the chaos will not abate; instead, the field of struggle will simply widen to include Congress. Third, the unprecedented disruption that *Blakely* has caused, and that a ratifying successor would extend, cannot be justified as necessary to vindicate a transcendent constitutional principle because the principle on which *Blakely* rests is at best opaque and at worst incoherent. Fourth, the modifications and extensions of the *Blakely* rule that would be required to make it logical and coherent would destroy structured sentencing in both federal and state courts. Finally, it is obvious to even the dullest observer that the *Blakely* decision, whatever its ostensible doctrinal basis, was at least in some measure a response to rising concern among judges about a federal sentencing system that in recent years has produced ever-harsher sentencing rules and an ever-increasing tilt of sentencing authority away from the judiciary and toward an alliance of Congress and the Justice Department. Yet paradoxically, virtually all of the likely reconfigurations of federal sentencing law in response to *Blakely* would do little or nothing to reduce sentence length and would decrease judicial sentencing power while increasing prosecutorial and congressional control.

#### I. *BLAKELY* V. *WASHINGTON* AND THE FEDERAL SENTENCING GUIDELINES

*Blakely v. Washington* involved a challenge to the Washington State Sentencing Guidelines. In Washington, pre-*Blakely*, a defendant's conviction of a felony produced two immediate sentencing consequences. First, the conviction rendered the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines within the statutory minimum and maximum sentences. Under the Washington State Sentencing Guidelines, a judge was obliged (or at least entitled) to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, *Blakely* was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years.<sup>5</sup> The fact of conviction generated a "standard range" of forty-nine to fifty-three months;<sup>6</sup> however, the judge found that *Blakely* had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permitted imposition of a sentence above the standard range<sup>7</sup> and imposed a sentence of ninety months.<sup>8</sup> The U.S. Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.<sup>9</sup>

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4. "Tradition, discipline, and rules must be the tools. Without them – disorder! Chaos! Moral disintegration! In short, we have a ghastly mess!" "A British Bank," MARY POPPINS, lyrics available at <http://www.stlyrics.com/lyrics/marypoppins/abritishbank.htm> (last visited Aug. 16, 2004).

5. See WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2000).

6. See § 9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score two based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of thirteen to seventeen months); § 9.94A.310(3)(b) (thirty-six-month firearm enhancement).

7. See § 9.94A.390(2)(h)(iii).

8. See *Blakely v. Washington*, 124 S. Ct. 2531, 2535 (2004).

9. *Id.* at 2543.

In reaching its result, the Court relied on a rule it first announced four years ago in *Apprendi v. New Jersey*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>10</sup> In the years since *Apprendi*, many observers (including myself) assumed that *Apprendi*’s rule applied only if a post-conviction judicial finding of fact could raise the defendant’s sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction.<sup>11</sup> For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant’s motive in committing the offense was racial animus.<sup>12</sup> The Supreme Court held that increasing Apprendi’s sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.<sup>13</sup>

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what has always before been considered the statutory maximum. Henceforward, “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.*”<sup>14</sup> Any fact that increases a defendant’s “statutory maximum,” as newly defined in *Blakely*, must be found by a jury.

Accordingly, the Federal Sentencing Guidelines seem to fall within the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence below the statutory maximum (as that term was understood before *Blakely*). However, the actual sentence a judge may impose can only be ascertained after a series of post-conviction findings of fact. The Sentencing Guidelines are, in a sense, nothing more than a long set of instructions for a sentencing table – a grid with 258 intersections, each of which designates a sentencing range expressed in months. A defendant’s position on the horizontal axis of the sentencing table is determined by his criminal history.<sup>15</sup> The vertical axis reflects the seriousness of the current offense, measured in “offense levels.” The offense level calculation begins with the crime of which the defendant was actually convicted. The court must determine, primarily by reference to the “Statutory Index,”<sup>16</sup> which guideline in Chapter Two (“Offense Conduct”) applies to that crime. Most Chapter Two offense conduct guidelines contain two components: a “base offense level,” a seriousness ranking based purely on the fact of conviction of a particular statutory violation, and a set of “specific offense characteristics.” The “specific offense characteristics” are an effort to customize the sentence by accounting for commonly occurring factors that cause us to think of one crime as worse than another. For example,

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10. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

11. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103-23 (2001); Nancy J. King & Susan R. Klein, *Après Apprendi*, 12 FED. SENTENCING REP. 331 (2000).

12. *Apprendi*, 530 U.S. at 468-69.

13. *Id.* at 491-97.

14. *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (emphasis in the original).

15. See U.S. SENTENCING GUIDELINES MANUAL ch. 4 (2003) (setting out rules for calculation of criminal history score and criminal history category under the Guidelines).

16. See U.S. SENTENCING GUIDELINES MANUAL app. A (2003).

the Guidelines differentiate between a theft of \$1000 and a theft of \$1,000,000,<sup>17</sup> and between a bank robbery where the robber hands the teller a note and a robbery where the robber pistol-whips the teller and shoots the bank guard.<sup>18</sup>

Once the court determines an offense level by applying the Offense Conduct rules from Chapter Two, it considers a series of other possible adjustments contained in Chapter Three. These include increases in the offense level based on factors such as the defendant's role in the offense;<sup>19</sup> whether the defendant engaged in obstruction of justice;<sup>20</sup> commission of an offense against a government official<sup>21</sup> or particularly vulnerable victim;<sup>22</sup> and the existence of multiple counts of conviction.<sup>23</sup> The court may also reduce the offense level based on a defendant's "mitigating role" in the offense,<sup>24</sup> his so-called "acceptance of responsibility,"<sup>25</sup> or other enumerated factors.

Once the court has determined a defendant's offense level on the vertical axis and the criminal history category on the horizontal axis, it can ascertain the sentencing range. The judge retains largely unfettered discretion to sentence within that range.<sup>26</sup> However, in order to go above or below the range, to "depart," the judge must explain why and the explanation must be couched in terms of factors recognized in the Guidelines as authorizing a departure<sup>27</sup> or for which the Guidelines do not adequately account.<sup>28</sup>

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17. This was true under the former separate guidelines for theft and fraud. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2000) (reflecting an increase in two offense levels for a theft of \$1000 and increase of thirteen offense levels for a theft of \$1,000,000). It remains the case under the consolidated economic crime guidelines adopted in 2001. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2001) (reflecting no increase in offense level for a theft or fraud loss of \$1,000 and an increase of fourteen offense levels for a loss of \$1,000,000).

18. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b) (2003) (reflecting possible increases of up to eleven offense levels for the use of a weapon and causing injuries in the course of a robbery).

19. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2003). The defendant's offense level can be enhanced by either two, three, or four levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.

20. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2003). Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.3 (2003).

21. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.2 (2003).

22. *See Id.* (creating an enhancement where a victim was selected based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, physical or mental condition").

23. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 3, pt. D (2003).

24. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2003) (allowing decreases in offense level of two or four levels if defendant is found to be a "minor participant" or "minimal participant" in the criminal activity).

25. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003) (allowing reduction of two offense levels where defendant "clearly demonstrates acceptance of responsibility," and three offense levels if otherwise applicable offense level is at least sixteen and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphemism "acceptance of responsibility," § 3E1.1 is neither more nor less than an institutionalized incentive for guilty pleas.

26. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(a) (2003) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

27. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 n. 18(c) (2003) (authorizing a downward departure in an economic crime case if "the offense level determined under this guideline substantially overstates the seriousness of the offense")

Customarily, the base offense level generated by the simple fact of conviction is quite low, with sentencing ranges escalating logarithmically with the addition of offense levels.<sup>29</sup> A defendant's maximum guideline sentence generally increases as the judge finds more facts triggering upward adjustments of the defendant's offense level.<sup>30</sup> In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court. In both systems, the fact of conviction generates a sentencing range. In both systems, post-conviction judicial findings of fact raise the range and increase the length of a defendant's possible sentence.

There are, of course, many differences between the two systems, but most of those differences would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis. For example: (1) Various observers have pointed out that the Washington guidelines are statutory, while the Guidelines are the product of a Sentencing Commission nominally located in the Judicial Branch.<sup>31</sup> However, the federal guidelines were authorized by statute and amendments must be approved by Congress (at least through the negative sanction of inaction). More importantly, the institutional source of the rules seems immaterial to the Court's Sixth Amendment concern about the role of the jury in determining sentencing facts. (2) The federal guidelines are far more detailed than their Washington counterparts, but that seems only to make them a greater offender against the Sixth Amendment principle enunciated in *Blakely* insofar as they assign even more sentence-affecting facts to post-conviction judicial determination. (3) The modified real-offense structure of the Guidelines, in particular their reliance on uncharged, or even acquitted, relevant conduct,<sup>32</sup> is different than the Washington system, but surely much more offensive to the *Blakely* rule than the Washington scheme.

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28. See 18 U.S.C.A. § 3553(b) (2003); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2003).

29. For example, the base offense level for the conviction of mail fraud is seven, a level that, for a first-time offender, correlates to a sentencing range of zero to six months. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1) (2003). However, judicial findings of loss amount caused by the fraud can increase the offense level by as much as thirty levels. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(P) (2003).

30. The top of the guideline range remains static at six months even as the offense level increases for all cases within Zone A of the Sentencing Table. For all cases in Zones B, C, and D, the top of the guideline range increases with every increase in offense level. U.S. SENTENCING GUIDELINES MANUAL § 5A (Sentencing Table) (2003).

31. This was a primary distinction between the Federal Guidelines and the Washington state guidelines advanced by the Solicitor General's Office in its brief in *Blakely*. See Brief for United States as Amicus Curiae, 2004 WL 177025, at \*25-30 (2004). The government has adopted the same argument in post-*Blakely* cases. See, e.g., *United States v. Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004) (describing and rejecting government's attempt to distinguish Federal Sentencing Guidelines from Washington state sentencing guidelines on ground that Washington guidelines were statutory and Federal Guidelines were promulgated by a sentencing commission in the judicial branch). In certifying certain questions regarding *Blakely* to the Supreme Court, the Second Circuit noted, "That the Sentencing Guidelines are not promulgated by Congress could prove critical to the determination of whether or not they are affected by *Blakely*." *United States v. Penaranda*, 375 F.3d 238, 245 (2d Cir. 2004).

As Steve Chanenson has pointed out, the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 667 (April 30, 2003), weakened the already tenuous distinction between guidelines and statutes insofar as the Act directly amended the Federal Sentencing Guidelines. Steven L. Chanenson, *Hoist With Their Own Petard?* 17 FED. SENT. REP. \_\_\_ (forthcoming October 2004).

32. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003) (defining the concept of "relevant conduct" and setting out rules for use of relevant conduct in setting a defendant's offense level). For a more complete description of the relevant conduct concept and its place in federal sentencing, see William W. Wilkins &

The potential impact of *Blakely* on federal sentencing was so obvious that it dominated the Court's consideration of this ostensibly state case. The Solicitor General of the United States filed briefs as amicus curiae arguing that the Washington state guidelines should be upheld at least in part because to do otherwise would endanger the Federal Sentencing Guidelines.<sup>33</sup> Moreover, the Solicitor General not only obtained leave from the Court to present oral argument, but was granted more time than was allotted to the State of Washington, the named respondent.<sup>34</sup> At oral argument, petitioner's counsel had been speaking for less than a minute when Justice O'Connor broke in to ask, "Well, I assume that if your position were adopted it would invalidate the Federal sentencing scheme that we have, too, wouldn't it?"<sup>35</sup> The remainder of the hour's argument was remarkable for the degree to which the fate of the federal system was pregnant in virtually every exchange.<sup>36</sup>

The *Blakely* decision was made on a five-to-four vote, with the following peculiar alignment: Justice Scalia wrote the opinion of the Court, joined by Justices Thomas, Stevens, Souter, and Ginsburg; with Justices O'Connor, Kennedy, Breyer, and Rehnquist dissenting.<sup>37</sup> Justices O'Connor,<sup>38</sup> Kennedy,<sup>39</sup> and Breyer<sup>40</sup> all wrote withering dissents, with O'Connor<sup>41</sup> and Breyer<sup>42</sup> giving particular attention to the likelihood that the majority's holding would strike down the federal guidelines.<sup>43</sup> Yet, despite the obvious fact that the Federal Sentencing Guidelines were on every mind, the *Blakely* majority primly declared in a footnote that, "The Federal Guidelines are not before us, and we express no opinion on them."<sup>44</sup>

One could argue endlessly about whether the Court's abstention on the issue of the federal guidelines' constitutionality was simply an inevitable product of the Court's mandate to decide only the case and controversy before it, or was instead a notable act of institutional irresponsibility. Justice Breyer, recognizing the repercussions of the majority's decision, suggested that the Court take a more comprehensive view of the

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John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

33. Brief for United States as Amicus Curiae Supporting Respondent, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632), available at 2004 WL 177025.

34. *Blakely v. Washington*, 124 S. Ct. 1493 (2004) (Order granting leave to participate in oral argument and for divided argument).

35. Transcript of Oral Argument at 4, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-1632.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1632.pdf) (last visited Aug. 16, 2004).

36. *Id.*, passim.

37. *Blakely v. Washington*, 124 S. Ct. 2531, 2531 (2004).

38. *Id.* at 2543.

39. *Id.* at 2550.

40. *Id.* at 2551.

41. *Id.* at 2549 ("Today's decision casts constitutional doubt over [all state and federal guidelines systems] and, in so doing, threatens an untold number of criminal judgments.")

42. *Id.* at 2561 ("Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.")

43. Interestingly, Justices Rehnquist and Kennedy did not join that portion of Justice O'Connor's opinion that explicitly forecasts the application of *Blakely*'s reasoning to the Federal Guidelines. *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004).

44. *Id.* at 2538 n.9.

problem by ordering reargument addressing a wider array of issues.<sup>45</sup> Unmoved, the Court issued its opinion. And chaos descended.

## II. “CRISIS? WHAT CRISIS?”

In the weeks following *Blakely*, a number of voices were raised denying that there was chaos, or even any “crisis” in the federal courts. For example, on July 13, 2004, the Senate Judiciary Committee held a hearing to ascertain the effect of *Blakely* on federal sentencing (an event so unusual in itself as to suggest that something extraordinary had happened).<sup>46</sup> At the hearing, representatives of the primary institutional actors in the sentencing system – the Sentencing Commission, the Justice Department, and the judiciary – all expressed the view that the federal criminal system is not in “crisis” as a result of *Blakely v. Washington* and that Congress need not legislate immediately in response to that decision.<sup>47</sup> While one understands and sympathizes with the caution that produced those statements, the confidence expressed by the official witnesses in the ability of the system to handle the current situation had, even then, a certain air of unreality. The essence of the scene was captured by Senator Leahy’s incredulous statement to District Judge Paul Cassell of Utah: “Judge Cassell, you said there was no crisis but you just held the entire criminal justice system unconstitutional.”<sup>48</sup>

Of course, neither Judge Cassell nor anyone else had held the entire criminal justice system unconstitutional, but Judge Cassell did hold the Federal Sentencing Guidelines unconstitutional under *Blakely*.<sup>49</sup> And as we will see, sentencing issues so pervade every aspect of federal criminal practice that throwing out the Guidelines casts constitutional doubt on virtually every phase of the federal criminal system. Since the Senate hearing, a four-way circuit split on the constitutionality of the Guidelines has emerged, with more opinions issuing daily. The result *has* been chaos and a growing crisis in the administration of federal criminal law. To understand why requires a bit more elaboration.

In the first place, the Supreme Court could not have struck at a more vital spot in the structure of federal criminal law, and could not have done it in a more debilitating fashion. Every criminal case, except those few terminating in prosecutorial dismissal or a

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45. Justice Breyer wrote:

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court’s view.

*Id.* at 2561.

46. *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (webcast and written witness statements available at <http://judiciary.senate.gov/hearing.cfm?id=1260> (last visited Aug. 16, 2004)).

47. *Id.*

48. *Id.* at 47 (draft hearing transcript).

49. *United States v. Croxford*, No. 2:02-CR-00302-PGC, 2004 WL 1551564 (D. Utah July 12, 2004).

not guilty verdict at trial, must be sentenced. Some 64,000 federal defendants are sentenced under the Guidelines every year.<sup>50</sup> It would have been bad enough if *Blakely* had merely cast doubt on the conduct of sentencing hearings themselves, but by insisting that juries make many factual determinations previously made by judges, the entire trial process, from indictment to plea or verdict, is now uncertain. In the Guidelines era, if the rules for sentencing defendants are imperiled, not only can judges not impose sentence, but the parties cannot meaningfully negotiate pleas and courts cannot conduct trials, or at least cannot do so with any confidence that the results will withstand appeal.<sup>51</sup>

Second, despite *Blakely*'s unmistakable implications for the federal sentencing system, the Supreme Court hasn't actually administered the coup de grace . . . and might never do so. To abandon the train metaphor for a moment, it is as if the Court had set demolition charges in an occupied office building, lit slow fuses, and then left the site, telling the tenants to sit tight because they might come back and decide not to blow the place up after all.

Third, unsurprisingly in light of *Blakely*'s language, a good many of the tenants of the federal sentencing structure have begun sidling toward the exits. But most unsettling of all in the near term is the fact that, although the Supreme Court probably won't cut the fuses, it hasn't even told the tenants whether it proposes to blow the whole building, or only parts, and if only parts, which ones. Putting it less metaphorically, because the Court did not address the federal guidelines directly in *Blakely*, lower federal courts are unsure both of whether *Blakely* applies to the Guidelines at all, and if it does, of how.

### III. *Blakely* in the Federal Courts, So Far

The resultant judicial landscape is, at the moment of writing this Essay, so splintered, and so rapidly changing, that it is difficult even to provide an accurate snapshot of the scene. Very roughly, the lower federal courts have divided into four camps: those holding that *Blakely* does not (at least necessarily) apply to the Federal Sentencing Guidelines;<sup>52</sup> those holding that *Blakely* does apply to the Guidelines, but that Guidelines rules can continue to be used if Guidelines facts are proven to a jury or admitted by the defendant;<sup>53</sup> those holding that *Blakely* applies to the Guidelines and that the Guidelines cannot be severed from judicial fact-finding and must therefore fall;<sup>54</sup> and finally, a large group of courts, led by the Second Circuit, that don't know what to make of *Blakely* and

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50. UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 3 (2004) (reporting 64,366 cases sentenced in federal court in fiscal year 2002).

51. The particular implications of *Blakely* for pre-conviction litigation are discussed in more detail *infra* notes 85-94, and accompanying text.

52. *United States v. Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004); *United States v. Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug 2, 2004) (en banc) (unpublished order with majority and dissenting opinions forthcoming); *United States v. Koch*, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) (en banc).

53. *United States v. Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. July 9, 2004).

54. *United States v. Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July 23, 2004) (2-1 decision), *vacated and reh'g en banc granted* (August 6, 2004); *United States v. Montgomery*, No. 03-5256, 2004 U.S.App. LEXIS 14384 (6th Cir. July 14, 2004), *vacated and reh'g en banc granted* (July 19, 2004).

have decided not to decide until the Supreme Court gives further guidance.<sup>55</sup> The first three of these positions are discussed in detail in the following sections.

#### A. *Blakely Does Not Apply to the Federal Sentencing Guidelines*

Of the seven circuits to have ruled (or in several instances merely hinted at a ruling) at the time of this Essay, the Fourth, Fifth, and Sixth Circuits have held definitively that *Blakely* does not apply to the federal guidelines.<sup>56</sup> However, none of the three circuits exhibited much confidence in the staying power of its own conclusion. The Fourth Circuit, in *United States v. Hammoud*,<sup>57</sup> addressed the constitutionality of the Guidelines en banc, voted that they remain constitutional, and then immediately issued a one-paragraph order to that effect (majority and dissenting opinions to follow) which nonetheless recommends that district courts issue two sentences in every case: a guideline sentence and “a sentence pursuant to 18 U.S.C. §3553(a) treating the Guidelines as advisory only.”<sup>58</sup> Similarly, the Fifth Circuit’s opinion in *United States v. Pineiro*<sup>59</sup> is notable primarily for its caution. The judges do not argue very forcefully that the Guidelines survive *Blakely*, only that they might and that lower appellate courts should wait for the Supreme Court to strike them down rather than inferring so momentous a result from *Blakely*’s language.<sup>60</sup> In *United States v. Koch*, the Sixth Circuit provides

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55. The Second Circuit first punted by issuing an *en banc* order certifying the question of *Blakely*’s federal applicability to the Supreme Court, *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (en banc), but later suggested in a panel opinion that the Guidelines remain good law until the Supreme Court holds otherwise. *United States v. Mincey*, No. 03-1419L, 03-1520(CON), 2004 WL 1794717 (2d Cir. Aug. 12, 2004). Meanwhile, the Chief Judge of the Circuit has issued an order staying all mandates in cases raising sentencing issues pending resolution by the Supreme Court of whether *Blakely* applies to the Guidelines. Procedural Order of Chief Judge John M. Walker, Jr., Aug. 6, 2004, available at <http://www.usssguide.com/members/BulletinBoard/Blakely/02CA/2CA-ProceduralRules.pdf> (last visited Aug. 16, 2004).

56. As noted above, the Second Circuit, sitting en banc, certified the question of *Blakely*’s applicability to the Guidelines to the Supreme Court. *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (en banc). But a later panel opinion has stated that the Guidelines remain good law in the Second Circuit until the Supreme Court holds to the contrary. *Mincey*, No. 03-1419L, 03-1520(CON).

57. *United States v. Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug 2, 2004) (en banc) (unpublished order with majority and dissenting opinions forthcoming).

58. For text of Order, see [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/the\\_fourth\\_circ.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/the_fourth_circ.html) (last visited Aug. 16, 2004).

59. *United States v. Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004).

60. The panel concludes with this less than ringing endorsement of the Guidelines’ future:

The Supreme Court might later decide that *Blakely* is broad enough to sweep away any distinction between the Federal Guidelines and the statutes that the Court addressed in *Apprendi*, *Ring*, and *Blakely*; the peculiar nature of the Guidelines might not serve to save them from the fate of the statutes involved in those cases. *Cf. Blakely*, slip op. at 12-13 (O’Connor, J., dissenting). Nonetheless, considering the entire matrix of Supreme Court and circuit precedent, we adhere to the position that the Guidelines do not establish maximum sentences for *Apprendi* purposes. In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response.

perhaps the most forceful exposition of the view that the Supreme Court's past cases upholding the federal guidelines are in tension with the conclusion that *Blakely* invalidates the guidelines.<sup>61</sup> Even so, the *Koch* majority exhibits remarkably little confidence that the Guidelines will ultimately survive.<sup>62</sup> In addition, panels of the Second and Eleventh Circuits have said that district courts should continue applying the guidelines until instructed otherwise by a higher court, but neither panel actually addressed the constitutionality of the Guidelines.<sup>63</sup> Only a handful of district courts outside the Fourth and Fifth Circuits have upheld the Guidelines.<sup>64</sup>

*B. The Federal Sentencing Guidelines Survive, But Must Be "Blakely-ized"*

The second option available to puzzled jurists is to find that the process of applying the sentencing guidelines based on post-conviction judicial findings of fact is unconstitutional, but that the Guidelines rules themselves can be salvaged. The basic idea here is that the Guidelines remain constitutional as a set of sentencing rules, but that the facts necessary to apply the rules must be found beyond a reasonable doubt by a jury or be agreed to by the defendant as a condition of his or her plea. In effect, all Guidelines rules whose application would increase the maximum of a defendant's sentencing range, probably excluding rules relating to calculation of criminal history,<sup>65</sup> would be treated as "elements" of a crime for purposes of indictment, trial, and plea.

*1. "Blakely-izing" the Guidelines and the Treatment of Existing Cases*

This family of approaches has come to be known colloquially as "*Blakely-izing*" the Guidelines, and has been endorsed by at least two circuits and number of district courts.<sup>66</sup>

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*Id.* at \*9.

<sup>61</sup> United States v. Koch, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) (en banc).

<sup>62</sup> The en banc court divided seven to five. The majority ended its analysis by saying, "It may be that the trajectory of *Apprendi*, *Ring* and *Blakely* will end with a nullification of the Guidelines. But, in the face of these relevant precedents, it is not for us to make that prediction or to act upon it." Koch, 2004 WL 1899930, at \*5.

<sup>63</sup> *Mincey*, No. 03-1419L, 03-1520(CON); United States v. Duncan, No. 03-15315 (11th Cir. Aug. 18, 2004).

<sup>64</sup> See, e.g., United States v. Harris, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290, at \*1 (W.D. Pa. July 16, 2004); United States v. Olivera-Hernandez, Case No. 2:04-CR-13, 2004 U.S.App. Lexis 15031 (D. Utah July 12, 2004) (Benson, C.J.); United States v. Emmenegger, Case No. 04 Cr. 334 (GEL), 2004 WL 1752599, (S.D.N.Y. Aug. 4, 2004). Judge Frank Easterbrook has also adopted this view, dissenting from Judge Richard Posner's opinion for the Seventh Circuit holding *Blakely* applicable to the Guidelines. United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

<sup>65</sup> The Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). However, it is unclear whether *Almendarez-Torres* will ultimately survive *Blakely*.

<sup>66</sup> United States v. Ameline, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004) (holding Guidelines unconstitutional under *Blakely*, but severing procedure of post-conviction judicial fact-finding and permitting application of Guidelines rules to facts admitted by a defendant or pled and proven to a jury); *Booker*, 375 F.3d 508; United States v. Harris, Criminal No. 03-354 (JBS), 2004 WL 1853920 (D.N.J. Aug. 18, 2004). For other district courts adopting this approach, see *infra* note 77.

I use the term “family” because different courts have adopted different variants of the basic idea, in part to accommodate cases at different stages of the criminal process.

*a. Cases with Guilty Pleas or Guilty Verdicts, But No Sentence*

The first group of cases with which district courts have had to contend are cases in which, on or after June 24, 2004, guilty pleas have been entered or guilty verdicts returned at trial, but no sentence has been imposed. The problem presented by these cases is that, prior to *Blakely*, the facts triggering upward Guideline adjustments need not have been pled and proven at trial or admitted as part of a plea colloquy. Since *Apprendi*, a few sentencing facts, such as drug amounts that trigger an increase in the old, pre-*Blakely* “statutory maximum” sentence, have been pled and submitted to juries,<sup>67</sup> but the vast majority of facts that affect guideline ranges do not change the old statutory maximum and therefore have not been presented to juries. Likewise, before *Blakely*, some U.S. Attorney’s Offices made it a practice to include stipulations to guidelines sentencing factors in their plea agreements, but others did not. Even offices that employed the practice did not necessarily extend it to all cases, and in every office there will have been many plea agreements leaving disputed sentencing factors for resolution by the judge at sentencing. Consequently, some thousands of defendants are pending sentencing who have admitted or been convicted at trial of offenses that subject them to a sentence corresponding to the base offense level set by the Guidelines, but who have not admitted or been found responsible by a jury for some or any of the guidelines factors that would ordinarily be used to increase the base offense level to the final sentencing guideline range.

Because *Blakely* appears to prohibit a judge from making the factual findings necessary to employ sentence-enhancing factors, a judge who decides that the Guidelines must be *Blakely*-ized is obliged to confer sentences lower, sometimes far lower, than the Guidelines would require for a defendant in the presence of the same factual findings. For example, a defendant convicted of mail or wire fraud receives a base offense level of seven,<sup>68</sup> which for a first-time offender equates to a sentencing range of zero to six months.<sup>69</sup> If, however, such a defendant caused a loss of \$300,000 in a case that involved ten or more victims, and in which the defendant abused a position of trust, the combined offense level would be twenty-three and the sentencing range forty-six to fifty-seven months.<sup>70</sup> If such a defendant were convicted by a jury on June 25, 2004, a judge who

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67. Even in drug cases with drug amounts that trigger mandatory minimum sentences, the practice has been to plead and seek a jury verdict only to the trigger amount, not to the exact amount, if higher. That is, if possession with intent to distribute five kilograms of powder cocaine increases the statutory maximum sentence, the jury would be asked to find that the defendant possessed with intent to distribute five kilograms or more of cocaine, even if the actual amount was fifty kilos and the larger amount would result in a much higher guideline sentence than five kilos. Proof of the actual amount would be left to the sentencing phase.

68. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1) (2003).

69. U.S. SENTENCING GUIDELINES MANUAL § 5A (Sentencing Table) (2003).

70. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(G) (2003) (adding twelve offense levels for a loss greater than \$200,000 but less than \$400,000); § 2B1.1(b)(2)(A) (2003) (adding two offense levels for offenses involving ten or more victims); and § 3B1.3 (2003) (adding two offense levels if defendant abused a position of trust); § 5A (Sentencing Table) (2003) (assigning a sentencing range of forty-six to fifty-seven months to a defendant with an offense level of twenty-three and a Criminal History Category of I).

opted for *Blakely*-ized guidelines would be compelled to sentence the defendant to no more than six months, regardless of the strength of the available evidence on the size of the loss, the number of victims, the defendant's abuse of trust, or indeed any other aggravating fact that a judge might think relevant to a proper sentence. However, because *Blakely* does not require jury findings regarding mitigating factors, the judge could consider factors such as acceptance of responsibility<sup>71</sup> that lower a guideline sentence.<sup>72</sup>

A number of district courts have imposed sharply reduced sentences based on the foregoing analysis. For example, in *United States v. Fanfan*,<sup>73</sup> one of the two cases on which the Supreme Court recently granted certiorari, the judge refused to apply offense level increases for drug type and quantity and leadership role that would have called for a 188-235 month (fifteen to nineteen year) sentence for a convicted crack dealer, imposing instead a sixty-three to seventy-eight month (five and one quarter to six and one half year) sentence based solely on the facts established at trial.<sup>74</sup> In a drug case from West Virginia, the court reduced the defendant's sentence from twenty years to twelve months because no guideline enhancements were found by the jury.<sup>75</sup> Likewise, in the so-called "Tractor Man" case familiar to residents of the District of Columbia area, Judge Thomas P. Jackson reduced the sentence of a defendant who snarled traffic for forty-seven hours by driving his tractor into a pond on the National Mall and claiming that it was loaded with "organophosphate bombs" from six years to sixteen months because the guideline factors producing the longer sentence were not admitted in the plea.<sup>76</sup> A number of other judges have adopted similar reasoning.<sup>77</sup>

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71. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003) (providing for two and three-offense-level reductions for defendants who "accept responsibility" by entering prompt guilty pleas).

72. For an actual case applying *Blakely* and presenting facts quite similar to the hypothetical in the text, see *United States v. Emmenegger*, Case No. 04 Cr. 334 (GEL), 2004 WL 1752599, (S.D.N.Y. Aug. 4, 2004).

73. *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (slip opinion).

74. Sentencing transcript at 98-106, *United States v. Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/Hornby06-28-04.pdf> (last visited Aug. 16, 2004). See also, Gregory D. Kesich, *Recent Ruling Cuts Jail Term*, PORTLAND PRESS HERALD, July 1, 2004, available at <http://www.ussguide.com/members/BulletinBoard/Blakely/Hornby2.html> (last visited Aug. 16, 2004).

75. *United States v. Shamblin*, No. CRIM.A. 2:03-00217, 2004 WL 1468561 (S.D.W.Va. June 30, 2004).

76. *United States v. Watson*, No. CR 03-0146 (D.D.C. June 30, 2004). See Carol D. Leonnig and Neely Tucker, *U.S. Judge Cuts Farmer's Sentence in Mall Standoff*, WASH. POST, July 1, 2004, at A1.

77. See, e.g., *United States v. Toro*, No. 3:02CR362PCD, 2004 WL 1575325 (D. Conn. July 8, 2004) (finding guidelines unconstitutional as applied, but severable from the process of post-conviction judicial fact-finding, and ruling that any enhancements based on facts not stipulated or admitted by Defendant or found by a jury will not be considered); *United States v. Leach*, No. CRIM. 02-172-14, 2004 WL 1610852 (E.D. Pa. July 13, 2004) (sentencing defendant based only on admitted facts); *United States v. Montgomery*, No. 2:03-CR-801 TS, 2004 WL 1535646 (D. Utah July 8, 2004) (sentencing defendant only on admitted facts); *United States v. Terrell*, No 8:04CR24 (D. Neb. July 22, 2004) (applying guidelines only to admitted facts). See also, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (testimony of Judge Paul Cassell) (reporting that Judge Cameron Currie of the District of South Carolina advised that, "The first judge to sentence after *Blakely* simply removed the *Blakely* enhancement and gave a lower sentence."); *Ex-Accountant Sentenced*, THE REPUBLICAN, Aug. 19, 2004 (reporting sentencing hearing in *United States v. Anzalotti*, in which defendant was sentenced to six months of home confinement in embezzlement case rather than fifteen months in prison because the Massachusetts district court determined that it could not consider the loss amount in setting a sentencing in light of *Blakely*), available at <http://masslive.com/springfield/republican/index.ssf?/base/news-7/109291923598610.xml> (last visited Aug. 24, 2004).

Alternatively, a judge might try to empanel a jury to adjudicate sentencing facts for defendants who have previously pled guilty to the substantive offense, or empanel a second sentencing jury for those convicted at trial. At least one court seems to have actually done this following a plea.<sup>78</sup> However, there are substantial double jeopardy questions about whether such a course is permissible. Under *Blakely*, every possible combination of substantive offense and guideline factors becomes, in effect, a separate crime. To the extent that a fact increases the top of a guideline range, *Blakely* seems to make that fact an “element” of a more serious “crime.” If this is correct, then the substantive offense to which the defendant pled guilty before *Blakely* becomes, in effect, a lesser included offense of the new substantive-offense-plus-guidelines-factors crime created by *Blakely*. And if that is so, it is at least doubtful that a court could convene a new post-plea or post-verdict jury to find the defendant guilty of the greater guideline offense.

As a general matter, the Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after conviction.<sup>79</sup> Whether two offenses are the same for double jeopardy purposes depends on whether each offense requires proof of an element that the other does not.<sup>80</sup> If an additional element is required, they are separate offenses; if not they are considered the same offense for double jeopardy purposes.<sup>81</sup> By this definition, a greater offense is considered the same crime as a lesser-included offense. Conviction of a lesser-included offense is an implicit acquittal of the greater offense.<sup>82</sup> As the Supreme Court has said, “Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”<sup>83</sup>

A substantive offense of which a defendant has been convicted at trial would appear to be a lesser-included offense of the new substantive-offense-plus-guidelines-factors *Blakely* offense, and would therefore be the “same offense” for double jeopardy purposes. Thus, it would seem just as impermissible to convene a new jury to try the defendant on the sentencing-enhancing guideline factors that distinguish the new *Blakely* offense as it would be to convene a new jury to try a defendant for first degree murder after trying and convicting him for second degree murder. Presumably the same analysis would apply to a defendant who pled guilty to a substantive offense, but did not admit sentencing-enhancing facts as part of the plea.<sup>84</sup>

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78. *United States v. Landgarten*, No. 04-CR-70 (JBW), 2004 WL 1576516, (E.D.N.Y. July 15, 2004). Judge Weinstein does not appear to have considered the double jeopardy issues raised by his approach.

79. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause also protects a defendant against a second prosecution for the same offense after acquittal, and against multiple punishments for the same offense. *Id.* However, these aspects of double jeopardy jurisprudence are not implicated in cases where the defendant is pending sentence, but pled or was found guilty pre-*Blakely*. In such cases, there has been no acquittal. Likewise, when double punishment is the issue, the test is whether the legislature authorized the multiple punishments, *Simpson v. United States*, 435 U.S. 6 (1978), which in the case of guidelines factors Congress surely did.

80. *Blockburger v. United States*, 284 U.S. 299 (1932).

81. *Id.*

82. *Green v. United States*, 355 U.S. 184 (1957) (finding conviction of second degree murder an implied acquittal of first degree murder).

83. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

84. See *United States v. Mueffleman*, No. 01-CR-10387, 2004 WL 1672320, at \*1 n.1, (D. Mass. July 26, 2004) (Gertner, J.) (concluding that defendants are placed in jeopardy by “admitting facts necessary to

Even if double jeopardy does not bar the use of juries to find guidelines “elements” for defendants who have already been convicted by plea or trial, there remains a substantial question about the authority for using juries in this way. There is no warrant in the Federal Rules of Criminal Procedure for impaneling a sentencing jury except in capital cases. And, though one prominent district judge contends that judges have inherent authority to call juries to serve this purpose, his authority for the claim seems thin.<sup>85</sup>

*b. Sentenced Cases Pending Appeal*

Even if *Blakely* is not held to be retroactive, it would nonetheless apply to any case in which the defendant has been sentenced but in which the conviction and sentence are not final because the process of direct appeal has not been completed. A new decision of the Supreme Court is applicable to “all cases pending on direct appeal, or not yet final.”<sup>86</sup> In all such cases, if *Blakely* renders the Guidelines unconstitutional as applied, but intact as a set of sentencing rules to be implemented through jury trials and pleas, then the analysis in the preceding section applies. Thus, on remand, judges who opt for *Blakely*-ized guidelines would be obliged to re-sentence all such defendants using only facts implicit in the jury’s verdict or admitted as part of the plea.

*c. Cases in Which Neither a Trial Nor a Plea Has Occurred*

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support a conviction on the counts to which they have pled, by waiving their rights to a jury trial with respect to those charges, including their Fifth Amendment rights, and by permitting the government to get access to information through the presentencing investigation to which it was not otherwise entitled”). However, jeopardy might not attach for all guidelines factors. There may be an exception to the prohibition against successive prosecutions “where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.” *Id.*, at 169 n.7, citing *Diaz v. United States*, 223 U.S. 442, 448-49 (1912); *Ashe v. Swenson*, 392 U.S. 436, 453 n.7 (1968) (Brennan, J., concurring). The facts necessary to determine the applicability of Guidelines factors such as obstruction under U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2003), might not become apparent until after the trial.

85. In *United States v. Khan*, No. 02-CR-1242 JBW, 2004 WL 1616460 (E.D.N.Y. July 20, 2004), Judge Jack Weinstein found that federal judges have an inherent power to empanel advisory sentencing juries in the wake of *Blakely*. He acknowledges the absence of any reference to such a power in the Federal Rules of Criminal Procedure, but surveys a broad array of historical sources on English and colonial jury practice en route to the conclusion that juries can be used to determine sentencing facts for purposes of applying the Federal Sentencing Guidelines. Though the display of erudition is impressive, none of the sources, ancient or modern, seem particularly apposite. For example, the facts that Virginia legislatively recognized jury sentencing in 1796, and that, in 1919, fourteen states still utilizing jury sentencing in capital cases, *id.* at \*14, does not seem particularly compelling evidence on the question of whether federal judges can *sua sponte* employ juries in ways not otherwise authorized by law.

At least one other district judge has used a jury to find sentencing factors, but the jury in that case was already sitting on the day *Blakely* was decided. Nonetheless, the judge’s otherwise excellent opinion explaining the procedure he adopted does not cite any authority for using a jury in this fashion. *United States v. Harris*, Criminal No. 03-354 (JBS), 2004 WL 1853920 (D.N.J. Aug. 18, 2004).

86. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). A case is “final” when “a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari denied.” *Id.* at 321 n.6.

If the Guidelines are to be *Blakely*-ized, the problems in dealing with cases where there has already been a trial or plea pale by comparison with the uncertainties and complications inherent in figuring out how to *Blakely*-ize the entire trial process. If Guidelines adjustments were henceforward to be treated as elements of a crime to be proven beyond a reasonable doubt at trial, a host of new rules and procedures would have to be devised. At this point, no one has fully mapped out all the modifications that would be required<sup>87</sup>; however, the list would seem to include at least the following:

- The government would presumably have to include all sentencing-enhancing guidelines factors as “elements” in the indictment. The Justice Department has advised Assistant U.S. Attorneys to do this.<sup>88</sup> However, it is at present uncertain whether such a procedure will be constitutionally required even if the High Court were ultimately to sanction the *Blakely*-ization of the Guidelines.<sup>89</sup> Perhaps guidelines enhancements sought by the prosecution could be enumerated in separate sentencing informations; but if so, such a procedure would presumably have to be authorized by statute or rule.
- If guidelines elements were required to be stated in indictments, grand juries as well as trial juries would have to find guidelines facts, and thus grand jurors would have to be instructed on the meanings of an array of guidelines terms of art: “loss,” reasonable foreseeability, sophisticated means, the differences between “brandishing” and “otherwise using” a weapon, etc.
- Grand juries have hitherto been prevented from considering sentencing factors, both because they have been legally irrelevant and because many such factors were thought prejudicial to the defendant. Several U.S. Attorney’s Offices have begun considering whether it will be necessary to bifurcate grand jury indictments and presentations by presenting the “substantive” section of the indictment in one session, and then, after the grand jury has returned a true bill on the substantive offense, presenting the sentencing portion of the indictment with supporting evidence.
- Since guidelines enhancements would be elements for proof at trial, the Federal Rules of Criminal Procedure and local discovery rules and practices might require revision to provide discovery regarding those elements.

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87. In his dissent in *United States v. Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004), Judge Gould lists the following possible changes: “[T]he application of *Blakely* to the Guidelines may require, among other things, changes to grand jury procedure, new forms of arraignments, revision of plea colloquy procedures, resolution of novel evidence and trial issues, whole new forms of jury instructions, possibly a bifurcated trial for sentencing, and decision of a host of other issues perhaps not yet identified . . .”

88. Memorandum from Christopher A. Wray, Assistant Attorney General, Criminal Division, to All Federal Prosecutors 3 (after July 2, 2004) [hereinafter “Wray Memorandum”], *available at* <http://www.ussguide.com/members/BulletinBoard/Blakely/DOJMemo2.pdf> (last visited Aug. 20, 2004).

89. One district court has permitted the government to provide a notice of sentencing factors rather than including such factors in an indictment. However, the procedural context of this decision was unique inasmuch as the case was in mid-trial on the day *Blakely* was decided. *Harris*, Criminal No. 03-354 (JBS).

- New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase or pre-*Blakely* offense elements and post-*Blakely* sentencing elements would all be tried to the same jury at the same time.<sup>90</sup> One district court has not only bifurcated the trial and sentencing phases, but bifurcated the sentencing phase by separating the presentation of evidence involving obstruction of justice from evidence directed at other guideline sentencing factors.<sup>91</sup> There is now no provision in federal statutes or rules for bifurcated sentencing proceedings, except in capital cases, and there is at least some doubt that such bifurcated trials would even be legal in the absence of legislation authorizing them.<sup>92</sup>
- If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government's case and of all the evidence,<sup>93</sup> before sending to the jury all guidelines elements that survived the motions to dismiss.
- In either a unitary or bifurcated trial system, serious consideration would have to be given to the application of the Federal Rules of Evidence to sentencing elements. For example, under current law, the Federal Rules of Evidence, by their terms, do not apply to "proceedings for . . . sentencing."<sup>94</sup> In a post-*Blakely* world, this exclusion might be deemed inapplicable to sentencing elements proven in a unitary trial, but it would certainly seem facially applicable to the sentencing phase of a bifurcated trial system. Perhaps, even in a bifurcated system, the evidence rules might be either interpreted or amended to render them applicable to jury sentencing proceedings. On the other hand, such a result is not necessarily constitutionally required and Congress might elect to allow relaxed evidentiary rules for the proof of sentencing elements, particularly if bifurcated sentencing trials became the norm. In any case, the evidentiary problems created by making sentencing facts provable to juries only begin with the basic question of the applicability of the rules. Far more complex

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90. Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the "guilt" phase and which could be relegated to the bifurcated sentencing phase. For discussion of the Justice Department's advice to Assistant U.S. Attorneys on bifurcation of trials in the wake of *Blakely*, see Wray Memorandum, *supra* note 88, at 15.

91. *United States v. Harris*, Criminal No. 03-354 (JBS), 2004 WL 1853920 (D.N.J. Aug. 18, 2004).

92. *See, e.g., United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *amended in part* by 20 F.3d 365 (9th Cir. 1994) (reversing, on mandamus, the district court's attempt to bifurcate a felon-in-possession-of-a-firearm trial); *United States v. Collamore*, 868 F.2d 24, 27-28 (1st Cir. 1989), *overruled in part on other grounds*, 21 F.3d 1 (1st Cir. 1994) (en banc) (same).

93. Unlike other conventional "elements" of a crime, "guidelines elements" would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant's ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity "element" could (and presumably should) be dismissed pursuant to the FED. R. CRIM. P. at the close of the government's case without causing dismissal of the entire prosecution. By contrast, a failure to prove the "intent to distribute" element of a 21 U.S.C. § 841 "possession with intent to distribute" case would require dismissal of the entire prosecution.

94. FED. R. EVID. 1101(d)(3).

problems loom when one begins to think about the applicability of rules regarding character evidence, prior bad acts, and the like.

- In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and concepts, and the jury would have to produce detailed special verdicts. The Justice Department has begun preparing model verdict forms<sup>95</sup> and some judges have begun devising jury instructions.<sup>96</sup>

## 2. Problems with “Blakely-ization”

The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. It is doubtful that judges alone could effect the transformation. Legislation and Sentencing Commission action would almost certainly be required to modify the Sentencing Reform Act, the Guidelines, the Federal Rules of Evidence, and the Federal Rules of Criminal Procedure to accommodate the new constitutional model, a process that would take months or years to accomplish. In the interim, uncertainty would be endemic. Even when the new system settled in, the sheer complexity of a regime that grafted hundreds of pages of guidelines rules onto the trial process would dramatically increase the potential for trial error. One of the many perverse results of such a complex system would be the creation of a powerful new disincentive to trials, and thus a probable diminution of the already rare phenomenon of jury fact-finding that the *Blakely* majority presumably meant to encourage.

A second consequence of treating all Guidelines sentencing enhancements as elements would be to markedly alter the plea bargaining environment. This reading of *Blakely* would transform every possible combination of statutory elements and Guidelines sentencing elements into a separate “crime” for Sixth Amendment purposes, with two consequences for plea bargaining: (a) As a procedural matter, each Guidelines factor that generates an increase in sentencing range would have to be stipulated to as part of a plea agreement before a defendant could be subject to the enhancement. (b) More importantly, negotiation between the parties over sentencing facts would no longer be “fact bargaining,” but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would legally free to negotiate every sentencing-enhancing fact, effectively dictating whatever sentence the government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary, and extraordinarily rarely used, remedy of rejecting the plea altogether.<sup>97</sup>

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95. See Wray Memorandum, *supra* note 88, at 15.

96. **CITES**

97. Even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant’s culpability under Guidelines rules, the judge could not force the government to “charge” the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever

A plea bargaining system that operated in this way might benefit some defendants with particularly able counsel practicing in districts with particularly malleable prosecutors. On the other hand, making sentencing factor bargaining legitimate would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a systemic tilt in favor of prosecutorial power.

In any case, any benefit to defendants would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. Prevention of this outcome was, after all, the point of the Guidelines' "relevant conduct" rules.<sup>98</sup> It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity. However, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that Main Justice cannot meaningfully restrain local U.S. Attorney's Offices from adopting locally convenient plea bargaining practices.<sup>99</sup> Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.

Ironically, if *Blakely* were ultimately determined to require (or at least permit) the Guidelines to be transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and to apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, the interpretation of *Blakely* discussed here would have the perverse effect of exacerbating one of the central judicial complaints about the current federal sentencing system: the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary.

But the biggest problem with trying to *Blakely*-ize the Guidelines is simply that it would be a prolonged and agonizing effort to pound a square peg into a round hole. The Guidelines were designed to be rules used after trial by judges assisted by trained probation officers. They cannot be applied as written through the vehicle of jury trials, and jury trials as we now conduct them cannot accommodate the Guidelines. This is not to say that both the Guidelines and jury trials cannot be twisted, trimmed, and tortured to

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combination of statutory and guidelines elements the government was willing to charge – a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

98. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3. See Steer and Wilkins, *supra* note 32.

99. A number of studies have found evidence of significant local variation in plea negotiation and other sentencing practices among different districts and circuits. See, e.g., Frank O. Bowman, III, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 531-34, 560 (2002) (noting inter-district and inter-circuit disparities in average drug sentences and discussing the "stubborn localism of judicial and prosecutorial behavior").

make them lie down together on *Blakely*'s Procrustean bed.<sup>100</sup> It could, in time, be done. The question is whether anyone is likely to be happy with the offspring of so distorted a union.

### 3. The Waiver Option

One technique the Justice Department has suggested to U.S. Attorney's Offices to avoid the manifold problems of jury fact-finding in a guidelines world is to seek a waiver of "*Blakely* rights" as a condition of every plea.<sup>101</sup> Pursuant to such a waiver, the defendant agrees to have guidelines facts determined by the judge. Indeed, Justice Scalia's opinion in *Blakely* seems to endorse just such an approach.<sup>102</sup> Despite the endorsement, waiver does not seem to have been widely embraced as a practical vehicle.<sup>103</sup> In the first place, it is unclear why a defendant would want to agree to such a blanket waiver rather than simply negotiating with the prosecutor those sentencing enhancements he is willing to accept as part of the plea agreement.

Moreover, because *Blakely* apparently converts sentence-enhancing facts into elements of the crime, even if a defendant were to waive his right to jury trial on such facts, it is doubtful that a defendant can waive his right to have them determined beyond a reasonable doubt. Several district courts have held that the burden of proof cannot be waived,<sup>104</sup> and at least one of these has insisted that the Federal Rules of Evidence would apply to any judicial determination of sentencing facts.<sup>105</sup> If this approach were adopted by the Supreme Court, then waiver would do little to reduce the procedural complexities of *Blakely*-ization. The government would have to take the same steps up to the point of trial. The waiver would provide a change in the identity of the fact-finder, and thus eliminate the necessity of explaining guidelines law to a lay jury, but would provide no relief from the other organizational and evidentiary burdens attendant on a full-blown jury trial.

Even if waiver "worked," in the sense of becoming the national norm, that outcome seems more than a little perverse. *Blakely* purportedly rests on the centrality of jury to the criminal process. Yet, a world in which waivers of jury sentencing fact-finding were a standard plea condition would be unlikely to see more jury trials. Instead, in all but a few

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100. In ancient Greek lore Procrustes, the robber encountered by Theseus on his journey to Athens, forced his victims to lie in a bed, hammering those who were shorter, like a blacksmith forging steel, and removing the limbs of the taller with his saw, so that each would fit the length of the bed. He was killed by Theseus in the same way his victims perished. See MARK MORFORD & ROBERT LENARDON, CLASSICAL MYTHOLOGY 567 (17th ed. 2003).

101. Wray Memorandum, *supra* note 88, at 3-4.

102. *Blakely v. Washington*, 124 S. Ct. 2531, 2541 (2004).

103. One notable exception to this generalization is the plan adopted by Chief Judge Sven E. Holmes of the Northern District of Oklahoma, which requires all pleas of guilty to be accompanied by a waiver of the right to jury trial for both guilt and Guidelines sentencing factors. Under this plan, the court then engages in judicial fact-finding on Guidelines facts applying the Federal Rules of Evidence and using a beyond a reasonable doubt standard of proof. *United States v. O'Daniel*, No. 02-CR-159-H (N.D. Okla. 2004), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/NDOkla-Aug6.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/NDOkla-Aug6.pdf) (last visited Aug. 16, 2004).

104. See *id.*; *United States v. Terrell*, No. 8:04CR24, 2004 WL 1661018 (D. Neb. July 22, 2004) ("Simply put, the standard of proof is not the defendant's to waive; it is the burden placed on the government, without which a conviction cannot be obtained.").

105. *O'Daniel*, No. 02-CR-159-H.

cases, sentencing factors would be determined by unreviewable agreement of the parties or by judges in what would amount to sentencing bench trials. As a statistical matter, the primary advantage such a system would present to defendants would be to increase the evidentiary and procedural protections they enjoy during judicial fact-finding. If that is what the Supreme Court seeks to accomplish, it should impose such protections directly through the Due Process Clause, rather than mucking up the entire criminal justice process with a ruling tenuously grounded in the Sixth Amendment right to a jury trial .

### *C. The Federal Sentencing Guidelines Are Unconstitutional In Toto*

The third possible reading of *Blakely* is that it renders the Federal Sentencing Guidelines, in their present form, facially unconstitutional at least within the existing framework of procedural rules governing criminal trials, sentencing, and appeals. Panels of the Sixth and Eighth Circuits issued early rulings to this effect,<sup>106</sup> although both opinions were later withdrawn.<sup>107</sup> The Sixth Circuit has now joined the Fourth and Fifth Circuits in holding the Guidelines constitutional, for now, but the question of the Guidelines' constitutionality remains pending in the Eighth Circuit.<sup>108</sup> A number of district court judges have written carefully considered opinions finding the Guidelines wholly unconstitutional in light of *Blakely*.<sup>109</sup>

The key issue presented by this third reading is “severability.” Can the Guidelines rules tying sentencing ranges to particular facts be severed from the procedure of post-conviction judicial fact-finding that has been at the heart of the Guidelines system since

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106. *United States v. Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July 23, 2004) (2-1 decision), *vacated and reh'g en banc granted* (August 6, 2004); *United States v. Montgomery*, No. 03-5256, 2004 U.S.App. LEXIS 14384 (6th Cir. July 14, 2004), *vacated and reh'g en banc granted* (July 19, 2004) (finding the Guidelines unconstitutional in their entirety and mandating that they be “displaced by an indeterminate system in which the Federal Sentencing Guidelines in fact become ‘guidelines’ in the dictionary-definition sense . . . . The ‘guidelines’ will become simply recommendations that the judge should seriously consider but may disregard when she believes that a different sentence is called for.”).

107. In the *Montgomery* case in the Sixth Circuit, the government and defendant ultimately joined in a FED. R. CRIM. P. 42 motion to dismiss the appeal. *See* [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/07/more\\_sixth\\_circ.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/more_sixth_circ.html) (last visited Aug. 16, 2004). The panel decision in *Mooney* in the Eighth Circuit was vacated by the Court *sua sponte*. *See* Order, August 6, 2004, *Mooney*, No. 02-3388.

108. As noted above, the Sixth Circuit issued a seven-to-five en banc opinion in *United States v. Koch*, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) (en banc), finding that the Federal Sentencing Guidelines remain constitutional in the Sixth Circuit post-*Blakely* unless and until the Supreme Court holds otherwise. The Eighth Circuit's decision in *Moody* remains pending.

109. Perhaps the best expositions of this view are contained in four district court opinions by Judge Paul Cassell of Utah, *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1521560 (D. Utah June 29, 2004); Judge Nancy Gertner of Massachusetts, *United States v. Mueffleman*, No. 01-CR-10387, 2004 WL 1672320, at \*1 (D. Mass. July 26, 2004), Judge Gregory A. Presnell of Florida, *United States v. King*, No. 6:04-cr-35-Orl-31KRS (M.D. Fla. July 19, 2004); and Judge Gerard Lynch of the Southern District of New York, *United States v. Emmenegger*, Case No. 04 Cr. 334 (GEL), 2004 WL 1752599 at \*17, (S.D.N.Y. Aug. 4, 2004) (declining to find the Guidelines unconstitutional, but noting that, “If it is unconstitutional for the Court to apply sentencing guideline enhancements based on fact findings that go beyond the facts admitted by the defendant in his plea, the entire structure of the Guidelines must fall”). *See also*, *United States v. Einstman*, No. 04 CR 97 (CM), 2004 WL 1576622 (S.D.N.Y. July 14, 2004); *United States v. Medas*, No. 03 CR 1048, 2004 WL 1498183 (E.D.N.Y. July 1, 2004) (adopting the reasoning and conclusions of Judge Cassell in *Croxford*).

its inception? *Blakely* finds it unconstitutional for the maximum sentence to which a defendant is exposed, based purely on the facts found by a jury or admitted in a plea agreement, to be increased based on post-conviction judicial findings of fact.<sup>110</sup> However, the linchpin of the Federal Sentencing Guidelines system is precisely such post-conviction judicial findings. The Guidelines model has five basic components: (1) assignment of a base offense level derived from the fact of conviction of a particular crime; (2) post-conviction findings of fact regarding both offense seriousness and criminal history by district court judges; (3) application of Guidelines rules to those factual findings by district court judges to determine a guideline range; (4) determination by the district judge of an actual sentence within the guideline range or the propriety of a departure from the range; and (5) appellate review of the actions of the district court. Both the Guidelines themselves and important elements of statutes enabling and governing the Guidelines were written to effectuate this judge-centered model.

It is intellectually possible to isolate the Guidelines rules from the web of trial court decisions and appellate review procedures within which the rules were designed to operate. However, in the view of those courts that have struck down the Guidelines as non-severable, with which I concur, doing so does such violence to the language, legislative history, and fundamental conception of the Guidelines structure that one could save them only by transforming them, by judicial fiat, into something that neither the Sentencing Commission nor Congress ever contemplated they would become.<sup>111</sup> It is certainly true that when construing statutes facing constitutional objections that courts will attempt to save as much of the statute as can be saved consistent with the

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110. It is not only judicial fact-finding that offends the Sixth Amendment under *Blakely*, though that alone is surely enough. Recall that under the Washington sentencing scheme, a judge who found the presence of a gun was not legally obliged to sentence the defendant in the aggravated range, but had to make the additional determination that the fact found merited an increase. Justice Scalia found that element of judicial choice present in the Washington statute did not save it from constitutional oblivion. A post-conviction judicial finding of fact that enabled the judge to exercise his judgment to impose a higher sentence was, in Justice Scalia's view, constitutionally impermissible. The fact that an increased offense level is an automatic consequence of most factual determinations under the federal guidelines certainly seems to make them more objectionable, rather than less.

111. Time and space preclude a detailed exegesis of this point, but consider as but two examples the relevant conduct rules, U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003), and the provisions of the Sentencing Reform Act (both in its original form and as amended by the recent PROTECT Act of 2003, P.L. 108-21, 117 Stat. 667 (April 30, 2003)) providing for appellate review. The relevant conduct rules plainly contemplate sentences based on judicial determinations of facts not found by jury beyond a reasonable doubt. Similarly, provisions of the Sentencing Reform Act governing appellate review of guidelines determinations are effectively nullified by a guidelines-as-elements-of-the-offense application of *Blakely* because if all upward guidelines adjustments must be determined either by jury verdict or by stipulation, there is virtually nothing left to review.

As Judge Nancy Gertner said in *United States v. Mueffleman*, No. 01-CR-10387, 2004 WL 1672320, at \*1 (D. Mass. July 26, 2004), "While *Blakely* has gone a long way to make the sentencing system more fair, and to reinvigorate the role of juries in the process, it is inconceivable that the system now required by the decision is at all consistent with anything contemplated by the drafters of the Sentencing Reform Act [citation omitted], or of the Guidelines. To literally engraft a system of jury trials involving fact-finding enhancements onto the Sentencing Guidelines is to create a completely different regime than that comprehensive sentencing system envisioned by the legislation's drafters or the drafters of the Guidelines. If such a system is required to give full effect to the Constitution's jury trial guarantee then the entire sentencing system has to be recast. The constitutional sentencing pieces cannot be cobbled together by judges on a case by case basis."

Constitution.<sup>112</sup> On the other hand, if the reading of a statute required to render it constitutional transforms the statute into something entirely at odds with its original design and conception, courts may properly strike down the statute in its entirety.<sup>113</sup>

It is fairly simple to conclude that severing the Guidelines system so as to substitute unreviewable jury fact-finding for the combination of district court fact-finding and appellate court review written into the Sentencing Reform Act would distort the federal sentencing design to a constitutionally impermissible degree. The much tougher problem becomes figuring out how else one could carve the carcass of the Sentencing Reform Act that would be any more acceptable.

### *I. Advisory Guidelines*

The most common approach of judges who have found the Guidelines “non-severable” has been to find that *Blakely* renders the Guidelines rules advisory; benchmarks to which judges should look in setting sentences, but binding rules no longer. Judges have explored two avenues to this result.

#### *a. The Guidelines as Useful Suggestions*

A number of courts that have found the Guidelines unconstitutional have nonetheless suggested that judges should consider the Guidelines in setting sentences, not because they are legally required to do so, but simply because the Guidelines are potentially valuable sources of information and guidance.<sup>114</sup> For example, in his path-breaking opinion in *United States v. Croxford*, Judge Paul Cassell asks whether district courts “can look at the Guidelines for guidance in determining the appropriate sentence . . . even though the Sixth Amendment forbids giving them the force of law.” He concludes that courts may,

consider the Guidelines as providing useful information on the appropriate sentence. The Sentencing Commission has carefully developed the Guidelines over many years, and the Guidelines generally produce sentences that accord with the public’s views of just punishment. They are a valuable source of information, even though they are not binding in this case. Additionally, implementation of the Guidelines was based largely on the pre-sentence report compiled by a probation officer. . . . [T]hese reports ‘have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.’<sup>115</sup>

Judge Cassell’s position sounds entirely reasonable as a prescription for handling cases in the next few months. However, as a long-term model for federal sentencing, it begs a series of knotty severability questions.

In the first place, it is difficult to see how a sentencing system could operate rationally or consistently for any sustained period if the rules for determining actual sentences were

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112. *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

113. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

114. *See, e.g., Mueffleman*, 2004 WL 1672320.

115. *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1521560 (D. Utah June 29, 2004).

constitutionally void and had no legal status whatever. For example, if judges are no longer bound by the Guidelines, would they be required to hold hearings and make the factual findings necessary to determine how the now-advisory guidelines rules would apply? If so, what would the legal source of that obligation be? Judge Cassell rightly emphasizes the important role of probation officers and pre-sentence investigation reports in sentencing pre- and post-Guidelines, but what form would such reports take if the Guidelines are now advisory? Would probation officers provide the same statements of facts and provisional guideline calculations they now do, or would doing so be necessary or even possible if neither the parties nor the judge were any longer bound by the facts or the guideline rules?

It is even more difficult to understand what continuing role the Sentencing Commission could play if the product of its work, guidelines rules, were deemed void *ab initio*. After sentencing, would judges be obliged to report to the Sentencing Commission their factual findings or their reasons for adhering to or varying from Guidelines prescriptions? If the Guidelines are to be merely useful benchmarks, what function would the Sentencing Commission serve? Would it continue to exist at all? If so, would it continue to promulgate guidelines and amendments in the same way? If judges were neither required to follow the Guidelines' rules nor make the factual findings necessary to ascertain how they would apply, how would the Sentencing Commission obtain the information upon which to determine how the now-advisory Guidelines were operating, propose amendments, or even provide meaningful reports to Congress on the operation of the system?

In short, Judge Cassell's approach seems to envision a world in which the entire sentencing system created by the Sentencing Reform Act of 1984 would continue to buzz along in much the same way it has since 1987, despite the fact that its centerpiece, the Guidelines themselves, has been reduced to a collection of interesting, possibly useful, but non-binding, suggestions. Not only is it difficult to find any warrant in existing law for the continued operation of such a model, but in the medium to long term such an approach may be even less realistic than trying to graft the Guidelines rules onto jury trials. Like *Blakely*-ization, it would require statutory and guidelines amendments to work even in theory. More importantly, however, it would never work in practice so long as the Guidelines maintained anything like their current, highly detailed configuration. The participants in the current system develop and present sentencing facts, perform complex guidelines calculations, litigate and adjudicate sentencing appeals, report and analyze guideline data, and revise guideline rules because these activities matter in the sense of having necessary meaningful effects on sentencing outcomes. If the Guidelines cease to be binding rules and become optional suggestions, soon no one, or only a few, will routinely jump through all the hoops that would be necessary even to determine the true relationship between the sentences imposed and the Guidelines' benchmarks.

Of course, implicit in the foregoing comment is the possibility that a far simpler set of sentencing rules might be able to function meaningfully as advisory guidelines, and many observers would find a regime based on simple advisory rules vastly preferable to the present one. But the point remains that the Guidelines and institutional sentencing arrangements currently in place are exceedingly unlikely to function as purely advisory adjuncts to a system of formally unchecked trial court discretion, and judges, including the Supreme Court, have no power to mandate a simpler advisory system that might work

in the place of the complex system Congress and the Sentencing Commission actually created.

*b. The Section 3553(a) Solution*

Some judges and commentators have noted an anomaly in the Sentencing Reform Act of 1984: the existence of succeeding subsections of 18 U.S.C. § 3553. Section 3553(a), at least standing alone, appears to leave open the possibility that the Guidelines could be advisory, but Section 3553(b) plainly make the Guidelines binding.<sup>116</sup> The

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116. Sections 3353(a) and (b) of Title 18, United States Code, read, in relevant part, as follows:

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines – \*\*\*

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission . . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.–

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) [Subsection (2), which effectively bars non-substantial assistance departures for defendants convicted of child crimes and sexual offenses is omitted.]

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence

opportunity ostensibly presented by this configuration is to solve the severability problem by simply declaring 3553(b) unconstitutional, leaving 3553(a) in place, and thereby presumably also leaving the entire federal sentencing mechanism largely undisturbed. Something of this sort seems to be contemplated by the Fourth Circuit order in *Hammoud* recommending that district courts enter both a guidelines sentence and “a sentence pursuant to 18 U.S.C. §3553(a) treating the Guidelines as advisory only.”<sup>117</sup> The difficulty with this apparently elegant solution is that it cannot be squared with the appellate review provisions of the Sentencing Reform Act. Section 3742(a) permits a defendant to appeal:

if the sentence – (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; or (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.<sup>118</sup>

Section 3742(f)(1) requires the courts of appeals to remand a case for resentencing if “the sentence was imposed in *violation of law* or imposed *as a result of an incorrect application of the sentencing guidelines*,”<sup>119</sup> and Section 3742(f)(2) requires remand for re-sentencing if a judge has departed above the applicable guideline range “based on an impermissible factor.”<sup>120</sup>

The Guidelines and their commentary have been repeatedly held by the Supreme Court to be law and binding on the courts.<sup>121</sup> Therefore, both a district court’s interpretation of the Guidelines<sup>122</sup> and whether the facts require application of a particular guideline<sup>123</sup> have been universally understood to be legal questions subject to de novo appellate review. Not only determination of a proper guideline range, but imposition of

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of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

117. For text of order, see

[http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/the\\_fourth\\_circ.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/the_fourth_circ.html) (last visited Aug. 16, 2004).

118. 18 U.S.C. § 3742(a) (2000).

119. 18 U.S.C. § 3742(f)(1) (2000) (emphasis added).

120. 18 U.S.C. § 3742(f)(2).

121. *Stinson v. United States*, 508 U.S. 36, 43 (1993) (holding Guidelines commentary to be law binding on the courts); *Burns v. United States*, 501 U.S. 129, 133 (1991); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) (“[T]he Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases”).

122. *United States v. Fitzgerald*, 232 F.3d 315, 318 (2d Cir. 2000); *United States v. Colton*, 231 F.3d 890, 911 (4th Cir. 2000); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Blitz*, 151 F.3d 1002 (9th Cir. 1998).

123. *United States v. Huppert*, 917 F.2d 507 (11th Cir. 1990).

any sentence outside of that range, is reviewable on appeal. Pursuant to the PROTECT Act of 2003, both upward and downward departures are now subject to de novo review.<sup>124</sup> Lower standards of review have been applied to district court findings of fact,<sup>125</sup> and for a time to a district court's decision to depart downward from the otherwise applicable guideline range,<sup>126</sup> but the process by which trial courts found facts, applied guideline rules to determine sentencing ranges, and then assigned particular sentences in relation to those ranges has always and indisputably been subject to appellate scrutiny. In short, the Sentencing Reform Act makes the Guidelines a set of mandatory rules enforceable on the district courts by the process of appellate review. Rendering the Guidelines advisory would require not only excision of Section 3553(b), but also significant judicial amendment and reinterpretation of Section 3742. Doing so would require the Court to declare that it has the power to selectively invalidate subsections of statutory provisions to create the federal sentencing system it would prefer in place of the system Congress enacted.

## 2. *The Problem of Appellate Review*

It is perhaps not entirely surprising that the judges who have taken the lead in finding the Guidelines unconstitutional, unseverable, and thus, at best, advisory sit on the district court bench. A regime with guidelines rendered advisory by virtue of their unconstitutionality is also a regime with no meaningful appellate review of district court sentencing choices, except the pre-Sentencing Reform Act review that looked only to imposition of sentences based on unconstitutional factors such as race or religion.<sup>127</sup> If the Guidelines are advisory because they are unconstitutional, there can be no right of appeal by either the defendant or the government based on a judge's failure to find guidelines facts or apply guidelines rules that have no legal force. If, on the other hand, the Guidelines were to be rendered advisory by selective judicial amendment of the Sentencing Reform Act, the Court would have to create out of whole cloth a hitherto unknown model of appellate sentencing review, presumably by stitching together surviving fragments of Section 3742 and various federal common law precedents. Perhaps the surviving subsections of 3742 could be read to require that district judges find guidelines facts and determine a guideline range as a procedural precondition of

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124. PROTECT Act of 2003, P.L. 108-21, 117 Stat. 667 (April 30, 2003), Section 401, codified in 18 U.S.C. § 3742(e).

125. *United States v. Syrax*, 235 F.3d 422 (9th Cir. 2000) (factual findings at sentencing reviewed only for "clear error"); *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999) (same).

126. *Koon v. United States*, 518 U.S. 81 (1996) (applying abuse of discretion standard of review to downward departure decisions). *Koon* was legislatively overruled by the PROTECT Act of 2003, P.L. 108-21, 117 Stat. 667 (April 30, 2003), which mandated a de novo standard of review for departures.

127. *See United States v. Tucker*, 404 U.S. 443 (1972) (remanding for resentencing because lower court's reliance on prior uncounseled convictions violated due process); *Townsend v. Burke*, 334 U.S. 736 (1948) (holding that a sentence based on erroneous information violated due process). Neither before nor after the adoption of the Guidelines could a judge condition his sentencing decision on the race of the offender. *See, e.g., United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995) (holding that a defendant may not waive the right to appeal a sentence based on a constitutionally impermissible factor such as race); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (same); *United States v. Edwards-Franco*, 885 F.2d 1002, 1005-06 (2d Cir. 1989) (pre-Guidelines, remanding for new trial based on "appearance" that district court may have imposed higher sentence because of defendant's nationality).

imposing any sentence. The question would be what right the parties would have to appeal the sentence actually imposed.

Only two possibilities seem to exist. Either a judge's findings of fact and conclusions of law leading to determination of a guideline range would create some presumption of the propriety of a sentence in that range, or the determination of a range would create no such presumption and the guideline calculation would have no legal significance. In the former case, meaningful appellate review of the district court's final sentencing decision would presumably require examination of the correctness of the guideline calculation that generated the presumptively correct range and an evaluation of any decision to sentence outside the resultant range. If so, regardless of the standard used by the appellate court to review the trial court's legal determinations and its ultimate sentencing choice, the resultant regime looks very much like both the current Guidelines and the Washington scheme struck down in *Blakely*. In the latter case, the Guidelines would create no greater legal constraint on district court sentencing discretion than if no guidelines existed at all, and there would be nothing for an appellate court to review. In short, the options seem to be either purely advisory guidelines subject to no appellate review or Guidelines subject to appellate review that cannot survive *Blakely*.

I do not suggest that a *Blakely*-compliant system of advisory guidelines with some form of appellate review could never be created for the federal courts. I do suggest that, if such a system is possible, it could only emerge from new legislation, not from judicial manipulation of the Sentencing Reform Act and the existing Guidelines. Therefore, as the Court considers extending *Blakely* into the federal realm, it must understand that finding the Guidelines unconstitutional and non-severable means installing a regime in which district judges will have unconstrained sentencing discretion, unreviewable as a practical matter by any court of appeals.

### 3. Vaporizing the Sentencing Reform Act

The analytical difficulties plaguing the idea of advisory guidelines would seemingly be avoided by taking a simpler approach. Perhaps, since the Guidelines at the heart of the Sentencing Reform Act cannot survive, then the entire Act must be found unconstitutional. This possibility has been eloquently argued by at least one defendant, but only in order to demonstrate that "non-severability" is a slippery slope leading to unthinkable consequences.<sup>128</sup> And complete judicial repeal of the Sentencing Reform Act is nearly unthinkable because it would mean abandonment not only of the Guidelines, but of truth-in-sentencing, supervised release, the abolition of parole, and a host of other features now integral to the structure of federal sentencing and corrections. Doubtless for this reason, even those judges who have found the Guidelines "non-severable" have expressly or impliedly left large chunks of the Sentencing Reform Act and its ancillary structures and processes intact.<sup>129</sup>

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128. Brief of Defendant, United States v. Abu-Shawish, Case No. 03-CR-211 (JPS), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/blakely\\_severability\\_brief.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/blakely_severability_brief.pdf) (last visited Aug. 16, 2004).

129. See United States v. Mueffelman, No. 01-CR-10387, 2004 WL 1672320, at \*12 (D. Mass. July 26, 2004) (recognizing that abolition of parole and truth-in-sentencing remain features of post-*Blakely* federal sentencing).

The weakness pervading all the opinions that have so far found the Guidelines unconstitutional and non-severable is that they shrink from the inescapable implications of their own premises. It is certainly true that the Guidelines cannot be separated from the process of post-conviction judicial fact-finding set up in the Sentencing Reform Act. But it is equally true that the remainder of the Act only makes sense as part of a structure built around a functioning guidelines system. The Act was designed by Congress and intended to operate as an integrated whole, a point obvious both from the text of the legislation and from a functional analysis of its parts. First, although the Sentencing Reform Act was passed in 1984, Congress decreed that none of its substantive sentencing provisions, including those relating to probation, fines, forfeitures, restitution, and supervised release, would go into effect until the effective date of the sentencing guidelines.<sup>130</sup> In short, Congress never intended the system set up by the Act to operate without the Guidelines.

Second, even brief reflection on the non-guideline sections of the Act reveals why the Guidelines are indispensable to the entire structure. For example, one of the primary objectives of the Sentencing Reform Act was to significantly reduce the unjustifiably wide sentencing disparities thought to be prevalent under the then-existing sentencing regime.<sup>131</sup> The SRA abolished the parole system and substituted a regime of determinate sentences with only small reductions available for good behavior,<sup>132</sup> followed by a term of supervised release.<sup>133</sup> The parole system formerly served several functions, one of which was to ameliorate front-end inter-judge sentencing disparities through the application of uniform parole release guidelines.<sup>134</sup> The congressional decision to eliminate regularized back-end release authority and substitute determinate sentences and supervised release can only be understood in the context of the simultaneous implementation of sentencing guidelines for district judges and of appellate review of guidelines sentencing decisions, which were designed to operate together to drastically reduce front-end inter-judge sentencing disparities. If front-end guidelines are now unconstitutional, a key theoretical prop for federal determinate sentencing has been removed and those sections of the Sentencing Reform Act that implement determinate sentencing should presumably fall with the Guidelines themselves.

One might argue that determinate sentences with only limited good-time reductions should survive even without guidelines because such sentences serve another often-cited purpose of the Sentencing Reform Act: promoting so-called “truth in sentencing.”<sup>135</sup>

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130. Sentencing Reform Act of 1984, Pub.L. 98-473, Section 235, as amended. The Sentencing Reform Act originally made the provisions of the Act now codified in Sections 227 and 229 of Title 18 effective on the first day of the first calendar month beginning twenty-four months after enactment. This date was subsequently extended by one year. Pub.L. 99-217 (Dec. 26, 1985).

131. Justice Stephen Breyer, one of the original Sentencing Commissioners, has identified the elimination of unwarranted disparity as one of the two primary Congressional purposes in enacting the Guidelines. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

132. Sentencing Reform Act of 1984, Section 212(a)(2), codified as 18 U.S.C. § 3624(b).

133. Sentencing Reform Act of 1984, Section 212(a)(2), codified as 18 U.S.C. § 3583.

134. The parole guidelines system enacted in 1976 was intended to provide “a scientific and objective means of structuring and institutionalizing discretion in parole release decisionmaking. . . . It also attempted to minimize the effects of sentencing disparity.” William J. Genego, Peter D. Goldberg & Vicki C. Jackson, project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 823 (1975).

135. See Breyer, *supra* note 129 (listing “honesty in sentencing” as the other main congressional purpose in enacting the Sentencing Reform Act). The movement for truth or honesty in sentencing was prompted by

However, declaring that determinate sentencing without guidelines is a reasonable fulfillment of the legislative design in the Sentencing Reform Act is the rough equivalent of declaring that a shiny sports car chassis with no engine is a reasonable fulfillment of design specifications that the car look good and go fast. Just as a car buyer would have no interest in a nicely painted engine-less shell, the Congress that enacted the Sentencing Reform Act would never have considered a sentencing regime that made sentences determinate while at the same time conferring complete, unreviewable sentencing discretion on district court judges. Indeed, such an outcome would convert a system consciously designed to curb the front-end power of sentencing judges into one that rendered trial court sentencing power absolute.

It is difficult to find a path out of this box. If the Guidelines must fall, then the system built around them ought to fall as well because it was never intended to function without guidelines. But if the entire Sentencing Reform Act falls, then all the current rules for imposing incarcerative sentences, limiting credits for good behavior, imposing and revoking probation and supervised release, fines, and restitution fall with it. The result would be a legal void, without even the pre-1987 system to fall back on. Although the Supreme Court can find current laws unconstitutional, it has no power to resurrect laws repealed by Congress.

It is therefore unsurprising that judges finding the Guidelines unseverable have not ventured very far down the path they began to blaze. The farther one goes into the thicket, the clearer it becomes that the unpalatable choices are: (a) complete paralysis of federal criminal law as a result of striking down the Sentencing Reform Act in its entirety; or (b) a federal sentencing system cobbled together by the judiciary from selected fragments of the Act and general Sixth Amendment and due process doctrines, featuring as its centerpiece completely unfettered trial court sentencing discretion.

#### IV. THE SUPREME COURT'S OPTIONS WITH RESPECT TO THE FEDERAL SENTENCING GUIDELINES

These, then, are the choices the Supreme Court faces as it looks forward to October argument on the implications of *Blakely* for the federal sentencing system. First, it can distinguish the federal sentencing system from the Washington state system at issue in *Blakely* on the, frankly specious, ground that Washington's sentencing ranges were set by statute while the federal guidelines were drafted by a sentencing commission. However, to do so would not only expose the Court to ridicule for indulging in a transparent evasion of precedent on which the ink is scarcely dry, but would enable Washington and any other state so inclined to reinstitute a system just found unconstitutional by the simple expedient of having a sentencing commission re-promulgate the old rules.

Second, the Court could *Blakely*-ize the Guidelines, holding that the sentencing rules survive, but substituting a system of jury trials and jury waivers for the procedural structure of post-conviction judicial fact-finding and appellate review created by the Sentencing Reform Act. This course condemns the federal criminal justice system to

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the fact that the sentences pronounced by judges in the pre-Sentencing Reform Act era often bore only a tenuous relationship to the amount of time actually served by defendants after good-time reductions and release decisions by the parole board.

years of turmoil. The lower courts will first be consumed with resolving the thousands of pending cases affected by *Blakely* and its successor opinions, dealing with issues of retroactivity, double jeopardy, proper preservation of claims, standards of review, endless factual variations, and an array of as yet unanticipated legal arguments developed by creative counsel. They will then have to process the flood of habeas petitions from both federal and state prisoners seeking to raise *Blakely* issues. At the same time, in order to deal with newly arriving defendants, the courts, lawyers, Sentencing Commission, and Congress will have to reconfigure the entire process of adjudicating and sentencing criminal cases, from the Guidelines themselves to indictment and grand jury practice, discovery, plea negotiation practice, trial procedure, evidence rules, and appellate review. Even with reasonably prompt congressional and Commission action, this incredibly complex restructuring could not be fully accomplished anytime soon. Nor would it be likely to emerge as a coherent whole from a process of thoughtful consultation between the institutional stakeholders in the federal criminal justice system. Rather, the ultimate shape of a *Blakely*-ized guideline system would have to be determined by a slow, contentious, issue-by-issue process attended by litigation at every step.

Third, the Court could hold that *Blakely* applies to the Federal Sentencing Guidelines, but that the Guidelines' sentencing rules cannot be severed from their procedural moorings and are thus either wholly void or at most advisory. As a matter of statutory interpretation, this outcome seems more persuasive than a forced union of jury trials and the current guidelines. Nonetheless, its practical ramifications are scarcely better because the Court would have to either: (1) find the entire Sentencing Reform Act unconstitutional, which would in effect send the federal system swirling back through a time tunnel to the stroke of midnight on October 31, 1987, a moment when the old rules for determining sentences had been repealed and the Guidelines had not yet come into effect; or (2) void the Guidelines, confer unlimited and effectively unreviewable sentencing discretion on district court judges, but leave the rest of the Sentencing Reform Act intact. The first option is logically sound but practically unsupportable because it would paralyze federal criminal justice. The second might be moderately less complicated to figure out than *Blakely*-ization, but it would be markedly more antithetical to the design and purpose of the Sentencing Reform Act since it would remove all controls from sentencing judges and create by default a sentencing system that never existed: unlimited judicial sentencing discretion at the front end uncontrolled by parole board action at the back end.

As unattractive as these options are, others still less desirable are possible. It would be unrealistic to assume that Congress and the Executive will meekly acquiesce in the distortion or destruction of the Sentencing Reform Act or that they will happily cooperate in drafting legislation to create a new sentencing system conforming to whatever preferences the Court expresses in its *Blakely* sequel. Completely voiding the Sentencing Reform Act would, of course, require instantaneous congressional action, but a legislative response to judicially mandated *Blakely*-ization or unlimited judicial discretion would be only fractionally less certain. As I will discuss in detail below, such legislation is likely either to evade *Blakely* altogether by countering *Blakely*'s formalism with formalism of its own, or, as the *Blakely* dissenters warned,<sup>136</sup> to take a form such as a system of harsh

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136. *Blakely v. Washington*, 124 S. Ct. 2531, 2558 (2004) (J. Breyer, dissenting).

mandatory sentences even more repugnant to most members of the Court than the existing Guidelines.

Before the Court chooses from this unappetizing menu, it should sit back for a moment, take a deep breath, and reflect both on what it has done and what it is about to do. The federal criminal justice system has come to a virtual halt for over two months, will remain in suspension until the Court rules in the fall, and will, if the Court presses forward with *Blakely*, spend years figuring out how to accommodate whichever choice the Court makes. The states are somewhat less affected, but variations on the same theme are playing out in twenty or more states.<sup>137</sup> The Court should be asking itself three questions: First, exactly what is the transcendent constitutional principle that justifies all the disruption caused by *Blakely*? Second, will extending *Blakely* actually vindicate that principle in a meaningful, practical way? And third, will pressing on with *Blakely* produce better, fairer sentencing systems in American courts, or will continued pursuit of whatever principle *Blakely* stands for be just as likely to exacerbate those features of sentencing that most disturbed the federal judiciary before *Blakely*?

## V. WHAT DOES BLAKELY STAND FOR?

During the July 13, 2004 hearing on *Blakely* before the Senate Judiciary Committee, one of the Senators asked if the witnesses could think of another Supreme Court case “in the history of American criminal law” with as big an impact “on the practical working-out of justice” as *Blakely*.<sup>138</sup> The witnesses were essentially stumped. Someone mentioned *Miranda v. Arizona*,<sup>139</sup> but of course it applied only to cases involving confessions. Someone else was heard to mutter “*Mapp v. Ohio*,”<sup>140</sup> but it, too, only applied to cases with illegally obtained evidence, and then only to state cases. The closest any of us could come to a case of comparable universality was *Gideon v. Wainwright*,<sup>141</sup> with its guarantee of counsel to the indigent. In retrospect, this moment in the Judiciary Committee hearing room highlights two important points about *Blakely*. First, it really is unprecedented in effect. No Supreme Court opinion in living memory, perhaps no opinion in American history, has caused near-paralysis of either state or federal criminal justice systems by placing the outcome of every case in doubt. Second, each of the landmark cases to which *Blakely* was compared announced a bedrock principle of American constitutional criminal procedure and an easily explained rule to ensure that the

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137. John Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington - Practical Implications for State Sentencing Systems*, POL’Y & PRAC. REV., Aug. 2004 (Vera Institute of Justice) (estimating that *Blakely* may impact the sentencing systems of about half the fifty states), available at [http://www.vera.org/section3/section3\\_4.asp](http://www.vera.org/section3/section3_4.asp) (last visited Aug. 20, 2004).

138. Senator Sessions asked if the panel could “think in the history of American criminal law of decision that has had more impact on the practical working-out of justice than this one.” *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (Webcast and written witness statements available at <http://judiciary.senate.gov/hearing.cfm?id=1260> (last visited Aug. 16, 2004)).

139. *Miranda v. Arizona*, 384 U.S. 436 (1966).

140. *Mapp v. Ohio*, 367 U.S. 643 (1961).

141. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

principle was honored,<sup>142</sup> but the principle of *Blakely* is obscure and its rule is highly unlikely to ensure anything but confusion.

Justice Scalia tells us that the extension of *Apprendi* to the Washington State Guidelines proceeds from “the need to give intelligible content to the right of jury trial.”<sup>143</sup> While there may be such a need, *Blakely* has not met it. What Justice Scalia seems to be searching for is an appropriate role for the jury, not only in finding facts that subject a defendant to criminal liability, but in finding facts that determine the type and degree of punishment resulting from conviction. The holding in *Apprendi* merely reaffirmed a traditional understanding – namely that a judge could not impose punishment greater than that authorized by statute for the offense of which a defendant was convicted by a jury or admitted by plea. In *Blakely*, through a semantic sleight of hand, Justice Scalia extends the jury’s role from determining facts that set a defendant’s statutory maximum exposure to determining facts that trigger rules designed to reduce a defendant’s sentence below that maximum. The trick is accomplished by redefining “statutory maximum sentence.” Formerly one would have understood that a statutory maximum sentence was the maximum sentence to which the class of defendants convicted of a particular crime or class of crime might be sentenced. Facts that constrained judges either to impose a minimum sentence less than the possible maximum, or to impose a sentence no higher than a figure below the maximum, were considered sentencing factors. Justice Scalia, however, says 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.”<sup>144</sup>

The problem with *Blakely* is not the general principle that juries ought to have an important role in setting the parameters of criminal punishment, but the absurd consequences of the particular rule announced in Justice Scalia’s opinion, with its focus on the newly defined “statutory maximum.”

#### A. *The Directional Bias in Blakely’s Sixth Amendment Right to Trial by Jury*

*Blakely*’s exclusive focus on facts that increase the redefined statutory maximum creates a peculiar directional bias in the Sixth Amendment jury trial right. Apparently, the Sixth Amendment confers upon juries the exclusive right to find facts that increase a

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142. *Gideon* announced the principle that a criminal trial cannot be fair unless a defendant has access to counsel; it therefore construed the Sixth Amendment to require appointment of counsel to the indigent. *Mapp* announced the principle that the Fourth Amendment prohibition against unreasonable searches and seizures was a meaningless form of words if states could use illegally obtained evidence to obtain criminal convictions; it therefore construed the Fourth Amendment to require the exclusion of illegally seized evidence in state criminal trials. *Miranda* announced the principle that custodial police interrogation of criminal suspects implicates the Fifth Amendment’s prohibition against compelled self-incrimination; it therefore announced a procedure of warning and waiver that must be followed before such interrogations may proceed.

143. *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004). In the same sentence, Justice Scalia also claims that *Blakely* stems from “respect for longstanding precedent.” *Id.* Discussion of this debatable point will be reserved for another occasion.

144. *Blakely*, 124 S. Ct. at 2537 (citations omitted) (emphasis in original).

defendant's maximum theoretically possible sentence, but confers no right to jury determination of facts that set a defendant's minimum sentence or of facts that would mitigate a defendant's punishment.

### *1. The Surviving Judicial Power to Increase Minimum Sentences*

*Blakely* prohibits increasing a defendant's maximum possible sentence based on post-conviction findings of fact. However, the Supreme Court held in *McMillan v. Pennsylvania*,<sup>145</sup> and reaffirmed after *Apprendi* in *Harris v. United States*,<sup>146</sup> that post-conviction judicial findings of fact can increase minimum sentences, so long as the raised minimum does not increase the statutory maximum. To put the point more graphically, assume that the State of Washington adopted a system in which conviction of second degree kidnapping produced an "old law" statutory maximum sentence of ten years and a sentencing range of 0-17 months, with the range raised to 0-53 months for a post-conviction judicial fact-finding that a weapon was employed in the kidnapping and a further increase in the range to 0-90 months for a finding that the kidnapping was committed with deliberate cruelty. *Blakely* would render this system unconstitutional, even though the findings of weapon use and deliberate cruelty would have no necessary aggravating effect on the actual sentence imposed by the judge. That is, a judge would be obliged to impose a sentence of between zero and seventeen months for the kidnapping conviction alone, but would have no legal obligation to impose a sentence higher than seventeen months even if he found weapon use and deliberate cruelty. By contrast, despite *Blakely*, Washington apparently could adopt a system in which conviction of second degree kidnapping produced a sentencing range of 17-120 months, and post-conviction judicial findings of weapon use and deliberate cruelty generated ranges of 53-120 months and 90-120 months. Even though the judge's post-conviction findings of fact would require increases in the actual amount of prison time the defendant would be required to serve, such a system does not offend the *Blakely-Harris* regime.

In short, it is now apparently unconstitutional for judicial findings of fact to produce an increase in a defendant's theoretical maximum sentence, but not for the very same findings of fact to increase the same defendant's actual, unavoidable, real minimum sentence. Or to put it terms of giving "intelligible content to the right of jury trial,"<sup>147</sup> a defendant now has a right to have a jury find facts that determine the theoretical maximum sentence he will almost surely never receive, but no right to have the jury find facts that will mandate the minimum sentence he must serve.

### *2. The Jury's Absence in the Application of Mitigating Factors*

The oddity of the directional bias in *Blakely* extends beyond the fact that *McMillan* and *Harris* seemingly preclude extending the *Blakely* rule to facts establishing mandatory minimums. Presumably, the principle on which *Blakely* rests is the constitutional right of a defendant to have a jury, rather than a judge, determine facts critical to determining the

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145. 477 U.S. 79, 81 (1986).

146. 536 U.S. 545, 567 (2002).

147. *Blakely*, 124 S. Ct. at 2538.

sentence.<sup>148</sup> But if it is the defendant's right to jury fact-finding that *Blakely* protects, why is that right not just as important if the fact at issue is one that would lower, rather than raise, the sentence? Why is the defendant forced to have the judge be the arbiter of mitigation? If juries are the voice of the community, its conscience, its reservoir of commonsense, why is the defendant entitled to drink of that reservoir only as to aggravating facts?

The essential absurdity of this rule is illustrated by the Guidelines' rules on role adjustments. Under Section 3B1.1, a defendant's offense level can be increased by two, three, or four levels if he is found to have an aggravating role in some form of group criminality.<sup>149</sup> The next section, 3B1.2, provides for offense level reductions of two, three, or four levels if the defendant's role in group criminality was minor, minimal, or somewhere in between.<sup>150</sup> Thus, a defendant's offense level may vary by eight levels and his sentence be increased or decreased by more than fifty percent depending on a fact finder's assessment of his role in a criminal group.<sup>151</sup> Under *Blakely*-ized guidelines, the government would have to prove aggravating role to a jury beyond a reasonable doubt, but the defendant would be entitled to no finding from the jury on mitigating role and would be required to make his case on that question to a judge alone.

One might say that this arrangement benefits the defendant because the government's burden of proving aggravators before the jury would be beyond a reasonable doubt, while the defendant's burden of proving mitigators to the judge would be only a preponderance. But *Blakely* is not, except incidentally, concerned with burdens of proof. Rather, it concerns the identity of the sentencing fact finder. In any case, there is no bar to asking juries finding sentencing facts to apply different burdens of proof to aggravating and mitigating factors. Indeed, in the penalty phase of federal capital cases, no standard of proof for mitigating factors is specified and jurors need not even reach unanimous agreement about the existence of a mitigator in order to include that fact in their determination about whether the death penalty should be recommended.<sup>152</sup> If jury fact-finding is a central principle of the American system, presumably one should submit the undivided question of the defendant's role to the jury, with instructions that a finding of aggravating role must be beyond a reasonable doubt but that a finding of mitigating role may be by a preponderance.

### *B. The Federal Subtext of the Blakely Case*

The directional bias in *Blakely* is a telling marker of the influence of the federal sentencing situation on the Court. Focusing so intensely on upward adjustments makes sense if the sentencing model in your mind's eye is the federal guidelines in which the

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148. As Justice Scalia wrote in his *Blakely* peroration, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S. Ct. at 2543 (emphasis in original).

149. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2003).

150. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2003).

151. Each two-level increase in a defendant's offense level produces a twenty-five percent increase in the bottom of the applicable sentencing range. U.S. SENTENCING GUIDELINES MANUAL § 5A (Sentencing Table) (2003). Because the increases are logarithmic, a four-level increase would produce an increase in the bottom of the guideline range slightly exceeding fifty percent.

152. 18 U.S.C. §§ 3593(c), (d).

fact of conviction alone usually generates a very low base offense level, which is almost always increased by enhancements triggered by multiple judicial findings of fact. In such a system, trials seem devalued because the sentencing level triggered by conviction alone is often *de minimis* and the effect of most subsequent judicial fact-finding is to increase sentences to meaningful levels. Likewise, in the federal system, there are relatively few pre-defined mitigating facts with necessary sentencing consequences. As a result, giving the jury a role in deciding mitigating facts is not an idea that leaps readily to mind.

If, by contrast, your mental model of a sentencing system is one that imposes meaningful presumptive sentencing ranges based solely on the fact of conviction and then sets out meaningful classes of both aggravating and mitigating facts which trigger eligibility for sentences above or below the presumptive range, then the one-way bias of *Blakely* makes a good deal less sense. Consider once again our friend Mr. Blakely. The judge enhanced Blakely's sentence thirty-six months above the fifty-four month maximum of the otherwise applicable Washington guideline range because of a finding of deliberate cruelty to the victim.<sup>153</sup> Suppose, although there is no indication that this was so in the actual case, that Blakely had a colorable claim that "to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident," a statutory mitigator under Washington law which, if found, would entitle the defendant to consideration for a departure below forty-nine month minimum of the otherwise applicable range.<sup>154</sup> In such a case, why should a jury be required to address the deliberate cruelty question but not be allowed to consider the conduct of the victim? In effect, the Washington law defines three grades of second degree kidnapping with a weapon, but *Blakely's* directional bias means that the jury may not participate in fact-finding regarding the applicability of the lowest, least severely punished grade.

### *C. The Endorsement of Purely Discretionary Judicial Sentencing*

The obsession with facts creating theoretical sentencing exposure rather than facts mandating actual sentencing outcomes is also manifest in *Blakely's* endorsement of purely discretionary judicial sentencing. For example, if Washington were to adopt a sentencing scheme in which judges could sentence anywhere within statutory minimum and maximum sentences in the unfettered exercise of their discretion, that would apparently be acceptable under *Blakely*. However, under such a system, a judge would be free to impose on Mr. Blakely precisely the same ninety- month sentence he got, and for precisely the same reasons enunciated in the original sentencing. For example, the judge could decide that mere conviction of second degree kidnapping by somebody with Blakely's criminal history should result in a roughly thirteen to seventeen month sentence, that the use of a firearm should add approximately three years, and that the defendant's deliberate cruelty should boost the sentence another three years. And voila – ninety months! Moreover, it would apparently be acceptable for a judge to arrive at these conclusions without explaining them publicly, without making any public findings of fact to any pre-established standard, and without facing the scrutiny of a court of appeals.

According to Justice Scalia's rather odd logic, what made the ninety-month sentence imposed in *Blakely* unconstitutional is that a legislature (a) designated weapon use and

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153. WASH. REV. CODE ANN. § 9.94A.535(2)(a) (West 2000).

154. WASH. REV. CODE ANN. § 9.94A.535(1)(a) (West 2000).

deliberate cruelty in advance as important factors; (b) assigned them particular values in the sentencing calculus; (c) required that the judge make on-the-record findings of fact based on a preponderance of the evidence before relying on them to enhance a sentence; and (d) gave the defendant a right of appellate review of the judge's fact-finding and application of sentencing law. In short, according to the *Blakely* majority, the same sentence can be imposed on the same defendant based on the same facts, and with no jury fact-finding, so long as the parties are given no notice that the facts will matter, no advance specifications of how much the facts will matter, no due process in litigating the existence of those facts, and no appellate review of either the fact finding process or the sentence outcome.<sup>155</sup>

My good friend Dan Freed insists that the importance of *Blakely* lies not in the identity of the fact finder, but in the opinion's imposition on sentencing proceedings of due process standards applicable to trials by jury. I agree with him that the Court's focus *should* be on due process at sentencing, but *Blakely* as written is irretrievably tangled in its Sixth Amendment roots. For Justice Scalia, any due process benefits accruing to defendants under *Blakely* arise only as incidents of the jury's involvement in deciding a particular fact. By simultaneously endorsing purely discretionary judicial sentencing and insisting on jury trials for all facts that increase theoretical maximum punishments, the Court has created a weirdly bipolar universe in which only two types of process are available for finding facts that determine how nearly a sentence can approach the pre-*Blakely* statutory maximum -- either full jury trial rights or no rights at all. Meanwhile, legislatures may, but need not, devise intermediate levels of due process protection for adjudication of facts that determine minimum sentences or mitigate penalties.

#### *D. Trying to Rationalize the Blakely Rule Would Only Make Things Worse*

The most obvious response to the undoubted oddities and logical inconsistencies of the *Blakely* rule would be to expand the reach of the jury trial right it announces. Should the Court strike down the Federal Guidelines as violative of *Blakely*, it will doubtless

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155. Indeed, if the Court truly intends to remain faithful to *Blakely*'s insistence that any finding of fact that actually increases a defendant's maximum punishment must be found by a jury, it may be obliged to strike down all or portions of parole systems that employ guidelines to determine prison release dates. For example, the federal parole guidelines, which served as a model for the Federal Sentencing Guidelines, set presumptive release dates for convicted federal prisoners based, among other things, on findings by the parole board of aggravating and mitigating aspects of a defendant's offense behavior. 28 C.F.R. § 2.20(d) (2003). A growing number of states are using predictive instruments that employ factual determinations to set release dates. Not all parole board determinations create a liberty interest, but the Supreme Court and some lower federal courts have found that the use of guidelines to set release dates may create legally enforceable liberty interests. *See*, Board of Pardons v. Allen, 482 U.S. 369, 378 (1987). If post-conviction judicial application of administratively created guidelines to increase theoretical maximum sentences at the front end violates *Blakely*, it is hard to see how post-conviction parole board application of the same sorts of guidelines to increase actual maximum sentences at the back end does not.

A defender of parole guidelines against a *Blakely* attack might say that the parole guidelines do not set statutory maximum sentences because the real maximum sentence is the one imposed by the judge at sentencing. But, of course, in systems with parole eligibility guidelines that are both legally enforceable and based on post-conviction findings of fact, the parole eligibility date bears much the same relationship to the judge-imposed sentence as the top of a guideline range does to pre-*Blakely* statutory maximum sentences. Each defines the actual maximum term to which the defendant can be subjected without further fact-finding.

soon be urged to reverse *Harris* and require jury findings on facts that set minimum sentences. And if the Court were to go that far, it would seem no great leap to complete the transformation of non-capital sentencing to the capital sentencing model and bring facts that mitigate penalties within the jury's ambit. While such steps would produce a more internally consistent Sixth Amendment doctrine, they would also spell the end of structured sentencing in both state and federal courts.

Leaving aside jury sentencing schemes in which the jury actually selects a defendant's punishment, there are only three basic sentencing models possible in the American system: (1) The legislature specifies a specific penalty that must be imposed upon conviction of a particular crime. (2) The legislature sets a range of penalties to which a defendant is exposed upon conviction, and within which the sentencing judge may freely select the defendant's sentence as an exercise of judicial discretion. (3) The legislature sets a broad range of penalties to which a defendant is exposed upon conviction, and then the penalty actually imposed is cabined within a smaller range by rules whose application depends upon post-conviction findings of fact.

The third model, usually referred to as "structured sentencing," has been a pillar of the sentencing reform movement of the past quarter century. In structured sentencing, the rules constraining judicial sentencing discretion can be created by the legislature, a sentencing commission, a parole board, or even by judges through common law development, and the findings of fact that trigger the rules can be made by either judges or parole boards. But in every sentencing model of this type, *there must be post-conviction findings of fact by somebody other than a jury.*

The *Blakely* rule standing alone makes structured sentencing exceedingly difficult because it eliminates the option of reducing a defendant's maximum sentencing exposure through the mechanism of fact-dependent rules that generate sentencing ranges with tops lower than the maximum permitted by statute for conviction of the underlying crime. But so long as *Harris* stands, sentencing reformers still have the option of constraining judicial discretion at the low end through minimum sentences. And so long as the jury trial right for non-capital cases is not extended to mitigating sentencing factors, structured sentencing schemes can still have rules reducing sentences based upon judicial findings of fact. In short, if both *Blakely* and *Harris* remain good law, structured sentencing is not impossible, just very awkward and one-sided.

Reversal of *Harris*, in combination with *Blakely*, would inflict on structured sentencing a nearly mortal wound because there would no longer be a mechanism for generating legally binding sentencing ranges within pre-*Blakely* statutory minima and maxima. So long as mitigating factors were not consigned to juries, one could, in theory, create regimes in which conviction generated a high presumptive sentence that could be reduced upon proof of mitigating factors. But as will be discussed below, such a regime is repugnant in theory and would be remarkably unwieldy in practice.<sup>156</sup>

In the end, unless the Court repudiates *Blakely* altogether, its choices are to leave *Blakely* as an odd and destructive jurisprudential outcropping, a sort of legal boulder around which the law will have to build its sentencing structures, or to complete the *Blakely* revolution by making structured sentencing constitutionally impossible.<sup>157</sup>

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156. See *infra* note 171, and accompanying text.

157. It might be suggested that structured sentencing would not be impossible even if *Harris* were reversed and juries given authority over mitigating facts because legislatures and sentencing commissions could

As noted above, neither Congress nor the Justice Department is likely to remain quiescent in the face of a judicial demolition of the Guidelines. Some have seen in *Blakely* a long-awaited opening, a moment to be seized offering the prospect of profound reforms of federal sentencing. In a perfect world, this might well be so, and I do not rule out the possibility that it could be so.<sup>158</sup> However, two factors – the recent history of federal sentencing and the odd shape of *Blakely*'s rule – make me very skeptical.

The recent history of the federal sentencing enterprise has been one of growing institutional tension. A guidelines sentencing system that was, perhaps, unduly complicated to begin with has become ever more so.<sup>159</sup> As but one indication, the Guidelines Manual has literally doubled in length since 1987.<sup>160</sup> The sentences commanded by honest application of the Guidelines' rules have, with only a few notable exceptions, crept ever higher.<sup>161</sup> The process of making sentencing rules by commission,

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nonetheless draft non-binding guidelines suggesting appropriate sentencing outcomes for pre-defined classes of cases. I do not contend that a system of voluntary or purely advisory guidelines would be worthless. Indeed, some jurisdictions use such guidelines to the apparent satisfaction of many lawyers and judges. Nonetheless, a system of completely unenforceable suggestions is not structured sentencing in any meaningful sense. And, as noted above, *supra* note 126, and accompanying text, one of the great unanswered questions about *Blakely* is whether any form of appellate review of trial court application of Guidelines rules can be created that does not offend the Constitution.

158. As this Essay goes to press, I have enlisted as co-reporter with Professor David Yellen of a sentencing initiative sponsored by the Constitution Project, the purpose of which is precisely to explore how American criminal sentencing might be improved in the wake of the *Blakely* decision. If by destroying or at least unsettling so many established regimes and practices, *Blakely* presents an opportunity for meaningful reform, persons of good will should unite to make the most of it. The thesis of this Essay, however, is that the damage *Blakely* has done and will surely continue to do is not outweighed by the speculative possibility that good will in the end come of it.

159. The Guidelines have long been criticized for their complexity. *See, e.g.*, KATE STITH AND JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3, 91-93 (1998); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180 (1995); Gerald Uelman, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 902 (1992). As I have argued elsewhere, many of these criticisms, particularly the claim that the Guidelines are too complicated for judges or litigants to understand, are ill-founded. Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and State of the Federal Sentencing Guidelines*, 44 ST. LOUIS UNIV. L.J. 299, 327-32 (2000); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679, 705-07 (1996). However, the Guidelines' substantial and growing complexity is an important contributor to some very real problems with the Guidelines regime, most particularly growing prosecutorial control over sentencing outcomes and the persistent and growing tendency of Congress to micro-manage the Sentencing Commission's work and the Guidelines themselves. I have explored this theme in greater detail in a report to the American Bar Association's Justice Kennedy Commission, *The Crisis in Federal Sentencing: Draft Report to the ABA Justice Kennedy Commission* (on file with author) and in a forthcoming article in the COLUMBIA LAW REVIEW.

160. The main body of the revised draft of the first Sentencing Guidelines, circulated in January 1987 by the United States Sentencing Commission, included 201 pages, exclusive of appended material. Sixteen years later, the main body of the 2003 Manual included 491 pages, exclusive of appended material.

161. For example, in 2001, Michael Heise and I found that, "With a single notable exception, since the effective date of the Guidelines in 1987, every one of the numerous changes in federal statutory law governing narcotics sentences has either defined more conduct as criminal or lengthened prescribed terms of imprisonment." Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly Decade of*

which was designed, perhaps overoptimistically, to minimize the influence of narrowly political concerns, has become a one-way upward ratchet. Raising Guideline sentencing levels is common and easy. Lowering them is difficult and scarcely ever done.

The result is a system which remains for many cases an excellent vehicle for determining a proper sentence, but which, more often than it should, generates sentences that seem to judges, prosecutors, and defense counsel alike to be unjustly severe, or at least higher than necessary to achieve the utilitarian ends of criminal punishment. It is thus no surprise to find, as many studies have done, that judges, prosecutors, and defense counsel routinely collude to evade the Guidelines' constraints.<sup>162</sup> However, the response of national policymakers, particularly Congress and the political appointees at Main Justice, to this quiet rebellion by front line legal professionals has not been to significantly moderate the Guidelines' rules. Instead, the trend has been to seek tougher guideline rules and to enforce compliance by restricting judicial discretion and imposing greater centralized control on the charging and plea-bargaining decisions of line prosecutors. The most recent manifestations of these general trends were the statutory and guidelines amendments mandated by the Sarbanes-Oxley Act of 2002 and, more notoriously, the Feeney Amendment to the PROTECT Act of 2003.<sup>163</sup>

Judges have chafed at these developments for a long time. But the events of the last two years have been particularly distressing to judges and non-judges alike. It has been hard to avoid the conclusion that the political elements of the Justice Department have formed an alliance with the more conservative elements of Congress to impose ever-longer sentences and accrue ever more sentencing authority to the prosecution at the expense of the judiciary. Matters have reached such a pass that the Justice Department and some in Congress seem at times to deny that judges have any legitimate role to play in determining criminal sentences,<sup>164</sup> and that even the Sentencing Commission, an allegedly independent agency of the judicial branch, exists only as a conduit for the commands of Congress.<sup>165</sup> I believe, and have said on more than one occasion, that

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*Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1069 (2001). We also catalogued Guideline amendments that both raised and lowered drug sentences. *Id.* at 1074-82.

162. *Id.*, at 1126-34; Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002) (further analyzing the decline in the average federal narcotics sentence between 1992 and 2000 and concluding that the discretionary choices of prosecutors, judges, and defense counsel were a significant factor in causing the decline). *See also*, Letter from Francesca Bowman, Chair, First Circuit Probation Officers Advisory Group, to Richard P. Conaboy, Chairman, United States Sentencing Commission (Jan. 30, 1996), in *Probation Officer' Survey*, 8 FED. SENT. REP. 303 (1996) (reporting the results of a national survey of probation officers that suggested prosecutors commonly withheld facts from probation officers "to protect a plea agreement").

163. Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Guidelines Amendments that Followed*, 1 OHIO ST. J. OF CRIM. LAW 373, 435-40 (2004) (describing the implications of the Sarbanes-Oxley Act and the Feeney Amendment to the PROTECT Act for the future of the U.S. Sentencing Commission).

164. *See, e.g.*, F. James Sensenbrenner, Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 16, 2004), available at <http://www.house.gov/judiciary/news031604.htm> (impliedly threatening impeachment of judges who impose "illegal" sentences).

165. *See, e.g.*, Larry Thompson, Testimony Before U.S. Sentencing Commission (Mar. 19, 2002), available at <http://www.ussc.gov/hearings/031902.htm> ("In our constitutional system, we believe the sentencing commission exists to effectuate the express will of Congress.").

*Blakely* can only be fully understood in the context of this recent history.<sup>166</sup> The leaders of a judiciary feeling itself *in extremis* did an extreme thing in response.

If we lived in an era of more inter-branch comity and respect, an opinion as startling and disruptive as *Blakely* might serve as a signal to the legislature and the executive that some fundamental collaborative rethinking of current sentencing rules and practice was in order. Of course, if we lived in such an era, the Supreme Court might seek ways of engaging the political branches in such a discussion less disruptive than shutting down the federal criminal justice system. The problem is that *Blakely* happened because we do not live in such an era. Congress and the Justice Department have consciously, and quite successfully, been wresting ever more sentencing authority from judges. In *Blakely*, the judiciary fought back, even if, at least in my view, they chose a terrible vehicle for doing so.

These inter-branch dynamics have important ramifications for the next battle of what is, sad to say, more a war than a conversation. If the Supreme Court either *Blakely*-izes the Guidelines or strikes them down entirely, the most likely congressional-executive response will be legislation aimed either at restoring a system as close as possible to the *status quo ante* or at imposing a system far more harsh, far less advantageous to defendants, and far less hospitable to judicial discretion. Because of the peculiarities of *Blakely*'s rule, there will be ample opportunities to do all of those things. There are three leading models for potential post-*Blakely* revisions of federal sentencing law.

#### A. *Topless Guidelines*

Because *Blakely* is only triggered by post-conviction judicial findings of fact that raise maximum sentences, while *Harris* permits such findings to increase minimum sentences, it appears that the Guidelines could be rendered constitutional by the simple expedient of eliminating the tops of the current ranges on the sentencing table and substituting the maximum statutory sentence available for the crime or crimes of conviction. In effect, this approach would convert the Guidelines into a system of permeable mandatory minimums. That is, the Guidelines would continue to function exactly in the way they always have, except that the sentencing range produced by guidelines calculations in any given case would have the same lower value now specified by the Chapter Five sentencing table, while the upper value would be set at the statutory maximum. Judges would still be able to depart downwards using the existing departure mechanism, but would not have to formally "depart" to impose a sentence higher than the top of the ranges now specified in the sentencing table. I have explained this approach, which has received some support in Congress,<sup>167</sup> in more detail elsewhere, including refinements designed to provide protections against judges abusing the additional

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166. *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary* (2004) (testimony of Frank O. Bowman, III), available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=647](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647) (last visited Aug. 16, 2004).

<sup>167</sup> See, e.g., Statement of Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, on July 13, 2004: "Although we do not have any legislative language, we are looking at a proposal that is similar to one that Professor Frank Bowman, one of our witnesses today, proposed to the Sentencing Commission a couple of weeks ago." *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004), available at <http://judiciary.senate.gov/testimony.cfm>.

discretion the plan would afford for sentences at the high end.<sup>168</sup> Its advantages are that it appears to be constitutional and that it would restore the federal criminal system to full function with minimal disruption. Aside from the risk that some judges will abuse their high-end sentencing discretion,<sup>169</sup> the plan's disadvantages are, in the eyes of some, identical to its advantages. It would restore the federal Guidelines virtually intact and, because it appears to be constitutional under *Harris*, it could easily be adopted as a permanent solution, thus strangling any *Blakely*-spawned reform effort aborning.<sup>170</sup>

### B. Guidelines Turned Upside Down

Because *Blakely* applies only to factors that raise sentences and not to sentence mitigators, it would appear that one could reconfigure the federal sentencing system by decreeing that all defendants are presumptively subject to the maximum sentence prescribed by statute absent proof of mitigating factors. Under this plan, which was suggested by Justice Breyer as one theoretically possible method of constructing a sentencing system to comply with *Blakely*,<sup>171</sup> the Guidelines would be rewritten to work downward from the statutory maximum. This scheme seems so counterintuitive that one can hardly believe that it would be seriously contemplated. Among other peculiarities, it

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168. Frank O. Bowman, III, *A Proposal for Bringing the Federal Sentencing Guidelines Into Conformity with Blakely v. Washington*, 16 FED. SENT. REP. 364 (2004) [hereinafter "Bowman, Proposal"]; *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004, Hearing on H.R. 4547 Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Frank O. Bowman, III) [hereinafter "Bowman, House Testimony"], available at <http://www.house.gov/judiciary/bowman070604.pdf> (last visited Aug. 16, 2004); *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Frank O. Bowman, III) [hereinafter "Bowman, Senate Testimony"], available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=647](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647) (last visited Aug. 16, 2004). As presently envisioned, the plan would include a right of appellate review on an abuse of discretion standard for any sentence between the guideline minimum and the statutory maximum. Either by statute or guideline policy statement, the court of appeals would be directed to consider the degree to which the sentence imposed exceeded the guideline minimum as one element of the abuse of discretion analysis. Debate continues about whether such a directive should include a numerical or percentage benchmark (such as 25% greater than the guideline minimum) for assessing whether the sentence imposed is perhaps too high. The obvious difficulty of including a benchmark figure is the risk that doing so would offend *Blakely*.

169. As I have explained elsewhere, the evidence of judicial sentencing practice during the Guidelines era suggests that few judges would impose greater sentences than they now do under a system in which the top of the range was removed. See Bowman, *Proposal*, *supra* at 168; Bowman, *House Testimony*, *supra*; Bowman, *Senate Testimony*, *supra*. If some form of judicial review of sentences above the guideline minimum can be instituted without offending *Blakely*, then the risk of judicial abuses at the high end would be reduced still further.

170. For critiques of the proposal, see *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (testimony of Rachel Barkow), available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=3684](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3684) (last visited Aug. 16, 2004); *Id.* (testimony of Ronald Weich), available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=3685](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3685) (last visited Aug. 16, 2004). See also, Douglas Berman, "The 'Bowman Proposal': White Knight or Force of Darkness?," available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/07/white\\_knight\\_or.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/white_knight_or.html) (last visited Aug. 16, 2004), and other critiques posted or referenced on Professor Berman's invaluable blog, Sentencing Law & Policy, <http://www.sentencing.typepad.com>.

171. *Blakely v. Washington*, 124 S. Ct. 2531, 2558 (2004).

would seem to require that the ordinary burdens of proof be reversed, with the government enjoying a presumption of the statutory maximum sentence and the defendant assuming the burden of proving facts reducing the sentence. As odd as it may seem, I can assure the reader that it is the favored option of important decision-makers in the Justice Department and among some key congressional staff.

### *C. More Mandatory Minimums*

If Congress were to be unsuccessful in reinstating the Guidelines regime by removing the tops of the ranges, and was dissuaded from the bizarre experiment of turning the Guidelines upside down, its most likely fallback position would be enacting a regime that relied far more heavily than is now the case on statutory mandatory minimum sentences. Whether the facts triggering the minimums would be found by judges or juries would depend on the ultimate fate of *Harris*, but the determination of many in Congress not to relax their grip on the sentencing practices of “soft” federal judges is patent.

Of course, if the Court were to go ahead and strike down the Guidelines, replacements other than these three might be devised. Some of these alternatives might be more congenial to the interests of the judiciary than the three under active consideration; others might be even less so. I merely report what seems likely based on my work with congressional staff and others in the period since *Blakely*. The particular merits and demerits of these plans will be the subject of intense debate if the Court extends *Blakely* to the Guidelines. However, for purposes of the present argument, the most important point about all these proposals, particularly topless guidelines and guidelines turned upside down, is the illustration they provide of how *Blakely*'s peculiar formalism can be trumped by equally formalistic responses.

### CONCLUSION

Most of those who admire *Blakely* do so not because of any intrinsic merit of the opinion itself, but because they see it as a vehicle for dismantling a system they hate and for long years saw no hope of destroying. They admire *Blakely* in much the same way that a householder tired of an old dwelling admires a wrecking ball. What they forget is that the wrecking ball carries with it no blueprint for replacement of the structure it demolishes. The hopeful view of *Blakely* is that it provides an occasion for reform, for careful redesign of a flawed federal sentencing system. The less hopeful, and I fear more realistic, view is that *Blakely* will destroy the federal system we have and lead to an even worse replacement. At best, *Blakely* provides no guarantee that the replacement will be an improvement. Indeed, the Court's apparent disregard for the easily foreseeable chaos the *Blakely* decision has caused is likely to further poison the relations between Congress, the Justice Department, and the Court. At a minimum, the massive disruption caused by *Blakely* will only reinforce the congressional view that the federal judiciary cannot be trusted and must be carefully controlled by the people's representatives.

Even if the concussive effects of *Blakely* create an opening for reform of federal sentencing, the peculiar formalism of *Blakely* will make sensible sentencing architecture harder to achieve for both states and the federal government. Justice Scalia was right that

*Blakely* does not find structured sentencing unconstitutional per se.<sup>172</sup> But if *Blakely* is extended to the federal guidelines, the country will lose not only an arguably flawed federal sentencing system, but also an important subset of the procedural tools that the national experiment in structured sentencing has employed, largely to good effect, for the last two decades. And, if the Court tries to rationalize the oddities of *Blakely* by requiring jury fact-finding for both minimum sentences and mitigating factors, structured sentencing will indeed be dead. Perhaps the greatest irony of the *Blakely* saga is that a court with the federal guidelines on its mind took down a state sentencing scheme with which no one other than Mr. Blakely seems to have had much quarrel. In doing so, the justices may have talked themselves into accepting a new constitutional principle whose doubtful logic will lead inexorably to the demolition or distortion of other state sentencing initiatives that have been bright spots of innovation in the landscape of American criminal law. It is not too late to turn back, to admit a mistake, to slam the brakes on the runaway train. The problems with federal sentencing are real and the need for reform is great. But if, as I think is the case, the real bee in the Court's bonnet is the federal system, it should find a theory and a vehicle to address the problems particular to the federal system without writing into constitutional law a set of peculiar rules that will hobble the sensible administration of criminal justice until some future court has the sense and courage to cast *Blakely* aside.<sup>173</sup>

Breathe deeply, and say it – “Never mind.”

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172. *Id.* at 2540.

<sup>173</sup> In my view, the current federal sentencing system may be subject to a renewed constitutional challenge based on violations of separation of powers principles in light of recent events and trends in federal sentencing lawmaking. Striking down the Federal Sentencing Guidelines on that basis would force reconsideration of the federal sentencing structure without unnecessarily writing into constitutional doctrine an odd Sixth Amendment rule that impacts state sentencing systems which have been working fine. At the same time, the court should be developing an intermediate model of due process for sentencing proceedings that would address perennial concerns about procedural unfairness common to both state and federal structured sentencing systems. For some preliminary observations on the latter point, see Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedures in the Guidelines Era*, 12 FED. SENT REP. 187 (2000). I anticipate developing these themes in a forthcoming article.