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The Sky Is Not Falling—That Which You Feel Is Merely a No. 10 Earthquake—Blakely v. Washington: The Supreme Court Sentences the American Criminal Justice System to Disaster, Bedlam, and Reform

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THE SKY IS NOT FALLING—THAT WHICH YOU FEEL IS MERELY
A NO. 10 EARTHQUAKE. *BLAKELY v. WASHINGTON*: THE SUPREME
COURT SENTENCES THE AMERICAN CRIMINAL JUSTICE SYSTEM
TO DISASTER, BEDLAM, AND REFORM

I. INTRODUCTION

Consider the following scenario:

You are a thirty-six year old African American man, and you earn your living driving a truck. One night you are approached by a drug dealer with an offer of \$5,000 for “making a run,” a one-time delivery job while on your usual route from Los Angeles to Jackson, Mississippi. You have never committed a crime before, but the bank is threatening to foreclose on your home, your wife just lost her job, and your kids are starting school. You reluctantly accept the offer, and the dealer places 100 kilograms of marijuana in your trailer.¹ In route, a police officer pulls you over for a faulty brake light in Western Mississippi. The officer discovers the drugs and arrests you. At trial in federal court in Mississippi, the jury finds you guilty of possession with intent to distribute a controlled substance.² Given your clean criminal record, the Federal Sentencing Guidelines (“Guidelines”) provide for a penalty from five to six years in prison.³ In light of a recent Supreme Court case, however, the Guidelines are no longer constitutional and thus, the judge does not have to adhere to the Guideline recommendation. The judge, instead, reverts to what is known as an indeterminate sentencing scheme; the judge picks whatever sentence he deems fit, provided he stays within the maximum set out by the United States Code, which, in your case, is forty years.⁴ You receive a sentence of forty years in prison; you will be seventy-six years old when you get out. Had you been on trial in the Eastern or the Midwest United States, your sentence would have been lower.⁵ Had you been a white man, your sentence would have been lower.⁶ But you are not; you are a black man on trial in the South and you have just fallen prey to what is known as racial disparity in indeterminate sentencing schemes, a problem the Federal Sentencing Guidelines sought to remedy. The Guidelines, however, are no longer constitutional and as such, you are

1. 100 kilograms is equal to approximately 220 pounds. WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE MS-1 (Bernard Cayne et al eds., Lexicon 1988).

2. 21 U.S.C. § 841(a) (2003).

3. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(3) (2003).

4. 21 U.S.C. § 841(b)(1)(B)(vii) (2003).

5. *Hearings on Sentencing Guidelines Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong. 676–77 (1987) (testimony of Commissioner Ilene H. Nagel) (testifying about statistical studies that demonstrate racial disparity within the judiciary).

6. *Id.*

stuck with whatever sentence the judge imposes upon you. By the way, you have no grounds for appeal, another problem the now-extinct Guidelines solved. Welcome to the post-*Blakely v. Washington* world.

Federal court judges have criticized the Guidelines continuously since the enactment of the Sentencing Reform Act of 1984.⁷ By 2003 the Sentencing Commission had amended the Federal Sentencing Guidelines 662 times.⁸ Despite the criticism and the seemingly constant amending, the Guidelines have stood up to constitutional challenges. The most notable challenge, *United States v. Mistretta*, resulted in only one dissent.⁹ Fifteen years later, however, *Mistretta*'s lone dissenter has delivered what seems to be a fatal blow to the Federal Sentencing Guidelines in a 5-4 opinion striking down Washington State's determinate sentencing scheme in *Blakely v. Washington*.¹⁰

In order to understand the impact of *Blakely*, a basic understanding of how the Guidelines work is required. The Federal Sentencing Guidelines were created by a commission housed in the Judiciary under authority from the Sentencing Reform Act of 1984, a piece of legislation headed by the unlikely duo of Senators Edward Kennedy and Strom Thurmond.¹¹ The

7. See *United States v. Hill*, 943 F.2d 877 (8th Cir. 1991); *United States v. Davern*, 937 F.2d 1041, 1043-45, 1047 (6th Cir. 1991), *reh'g granted, decision and judgment vacated by Order* (Sept. 26, 1991); *United States v. Pimentel*, 932 F.2d 1029, 1032-33 (2d Cir. 1991); *United States v. Stanley*, 928 F.2d 575, 583 (2d Cir. 1991), *cert. denied*, 502 U.S. 845 (1991); *United States v. Kikumura*, 918 F.2d 1084, 1119 (3d Cir. 1990); *United States v. Gutierrez*, 908 F.2d 349, 354-55 (8th Cir. 1990), *vacated on reh'g en banc*, 917 F.2d 379 (8th Cir. 1990); *United States v. Allen*, 873 F.2d 963, 966-67 (6th Cir. 1989); *United States v. Boshell*, 728 F. Supp. 632, 637-38, 641 (E.D. Wash. 1990); *United States v. Roberts*, 726 F. Supp. 1359, 1364-67 (D. D.C. 1989), *rev'd sub nom. United States v. Doe*, 934 F.2d 353 (D.C. Cir.), *cert. denied*, 502 U.S. 896 (1991); *United States v. Curran*, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989), *overruled by United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990); *United States v. Rodriguez*, 724 F. Supp. 1118, 1120-21 (S.D. N.Y. 1989); *United States v. Donatiu*, 720 F. Supp. 619, 624 n. 2 (N.D. Ill. 1989), *aff'd*, 922 F.2d 1331 (7th Cir. 1991); *United States v. Davis*, 715 F. Supp. 1473, 1477-78 (C.D. Cal. 1989), *overruled by United States v. Wilson*, 900 F.2d 1350 (9th Cir. 1990); *United States v. Alafriz*, 690 F. Supp. 1303, 1310-11 (S.D. N.Y. 1988), *overruled by United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989); *United States v. Bogle*, 689 F.Supp. 1121, 1163 (S.D. Fla. 1988) (en banc), *overruled by United States v. Perez-Garcia*, 904 F.2d 1534 (11th Cir. 1990); *United States v. Britzman*, 687 F. Supp. 1329, 1349-54 (E.D. Ark. 1988) (Eisele, C.J., writing for all judges of Eastern District except Judge Reasoner) (holding Guidelines unconstitutional due, in part, to transfer of sentencing discretion to prosecutors), *rev'd*, 872 F.2d 827 (8th Cir. 1989), *cert. denied*, 493 U.S. 865 (1989); *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1513 (C.D. Cal. 1988) (en banc), *overruled by United States v. Brady*, 895 F.2d 538 (9th Cir. 1990); *United States v. Frank*, 682 F. Supp. 815, 817-19 (W.D. Pa. 1988) (Ziegler, J.), *rev'd*, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989).

8. U.S. SENTENCING GUIDELINES MANUAL app. C (2003).

9. *Mistretta v. United States*, 488 U.S. 361 (1989) (Scalia, J., dissenting).

10. 124 S. Ct. 2531 (2004).

11. Jose A. Cabranes, *A Failed Utopian Experiment*, July 27, 2004 NAT'L L.J. 17 (col.

Guidelines operate by providing a “base level” of punishment for each specific statutory offense. The judge then adds “specific offense characteristics,” such as the amount of money taken, and “adjustments,” such as obstruction of justice or acceptance of responsibility, to the “base level.” For example, imagine the case of a bank robber, with one serious prior conviction (for which he was imprisoned more than thirteen months), who robs a bank of \$40,000 while pointing a gun at the teller. The sentencing judge would proceed through the following steps: (1) Look up the statute of conviction in the statutory index, where the index will lead the judge to Guideline section 2B3.1 (robbery); (2) find the base offense level for “Robbery” (Level 20); (3) add “specific offense characteristics,” resulting in the addition of two levels for the money taken and five more levels for the gun; (4) determine if any adjustments from chapter three of the Guidelines apply (they include, for example, adjustments for a vulnerable victim or an official victim, abduction of the victim, role in the offense, efforts to obstruct justice, and acceptance of responsibility); (5) calculate a criminal history score on the basis of the offender’s past conviction record (here, section 4A1.1 assigns three points for one prior serious conviction); (6) look at the sentencing table on the back page of the Guidelines to determine the sentence (here, an offense level of twenty-seven, with three more points for the prior conviction, which results in a range of seventy-eight to ninety-seven months in prison for an armed robbery by a previously convicted felon); (7) impose the Guideline sentence, or, if the court finds unusual factors, depart and impose a non-Guideline sentence. The judge must then give reasons for departure, and the appellate courts may then review the “reasonableness” of the resulting sentence.¹²

The majority holding in *Blakely v. Washington* has called over twenty years of this federal sentencing practice into question. Without a fix, the truck driver hypothetical depicted above could become a reality again, as it was in the pre-Sentencing Guidelines days. Although there is no authority within the lower courts to warrant invalidation at this point (despite what many courts are holding),¹³ the Federal Sentencing Guidelines are unconstitutional in light of *Blakely v. Washington*. The guiding principles and foundations of the Guidelines, however, are salvageable with a minor adjustment to the structure of the scheme and a major adjustments to the way the American judiciary administers criminal justice.

This comment will first provide an overview of the *Blakely* facts, holding and dissents. Section III.A will perform a cursory examination of the

4) (1992).

12. This example, culled from Justice Breyer’s 1988 article, is based upon the 2003 Guidelines Manual. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–7 (1988).

13. See *infra* Part III.A.

Judiciary's response and its treatment of the Federal Sentencing Guidelines in light of *Blakely* while subsections B and C will examine the responses of the Executive branch and the Legislative Branch, respectively. Section IV will then analyze the *Blakely* issue and submit a modest proposal aimed at curing the constitutional defects of the Federal Sentencing Guidelines while preserving its framework and guiding principles.

II. THE BLAKELY HOLDING (THE BOMB)

When a sharply divided Supreme Court dropped the *Blakely v. Washington* bomb on June 24, 2004, the legal community tore into the Federal Sentencing Guidelines like a pack of hungry dogs. Before an examination of the ensuing chaos, a cursory overview of the case that gave rise to the slaughter is in order. This section will provide an examination of the facts of *Blakely v. Washington*, the majority opinion, and the impassioned dissents that prophetically claimed "disastrous" consequences.¹⁴

A. The Facts

1. *The Less Than Tactful Husband*

At dusk on October 26, 1998, in Grant County, Washington, thirteen-year old Ralphy Blakely came home from football practice, expecting a usual evening.¹⁵ What young Ralphy found upon entering his front yard, however, was anything but usual. His father, Mr. Blakely, emerged from behind a tree with a knife and threatened to kill Mrs. Blakely and Ralphy if the boy did not follow his orders.¹⁶ Ralphy could hear his mother screaming from a homemade coffin in the back of Mr. Blakely's pickup truck.¹⁷ Mr. Blakely ordered his young son to follow the pickup in his mother's car, threatening to blow a hole in the coffin with a shotgun if Ralphy "tried any-

14. *Blakely v. Washington*, 124 S. Ct. 2531, 2544 (2004) (O'Connor, J., dissenting).

15. *Blakely v. State*, 47 P.3d 149 (Wash. Ct. App. 2002).

16. Respondent's Brief at 2, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632). In Mr. Blakely's defense, the Supreme Court briefly (under)stated that "he was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia." *Blakely v. Washington*, 124 S. Ct. 2531, 2534 (2004).

17. Respondent's Brief at 2, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632). Mr. Blakely had accosted Mrs. Blakely, his estranged wife, at their home and wrestled her to the ground. *Id.* Kneeling on her ribs, he tied her head and hands with duct tape. *Id.* He demanded she dismiss the pending divorce and trust litigation she had instituted against him. *Id.* He threatened to kill her if she did not cooperate, noting that O.J. Simpson had gotten away with it. *Blakely v. State*, 47 P.3d 149, 152 (Wash. Ct. App. 2002). Mr. Blakely then forced her into a homemade coffin only three inches longer than Mrs. Blakely's standing height. *Id.*

thing.”¹⁸ Ralphy followed his father’s truck for some time but later escaped at a truck stop.¹⁹ Undeterred, Mr. Blakely continued through the night into his state of residence, Montana, with Mrs. Blakely still bound tightly in a homemade coffin.²⁰ Once in Montana, Mr. Blakely sought refuge at his neighbor’s house.²¹ His neighbor, however, was not too keen on Mr. Blakely hiding out there and surreptitiously phoned the police.²² As a result of the phone call, federal agents arrested the petitioner on October 27, 1998.²³

2. *The Doomed Procedure of the Trial Judge*

Washington State charged Mr. Blakely with first-degree kidnapping.²⁴ As a result of a plea agreement, the prosecutor reduced the charge to second-degree kidnapping involving domestic violence and use of a firearm.²⁵ Mr. Blakely pleaded guilty only to the elements of second-degree kidnapping involving domestic violence and use of a firearm.²⁶ Mr. Blakely admitted no other relevant facts, and his case proceeded to sentencing.

18. Respondent’s Brief at 2, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632). Ralphy had already “tried something.” *Id.* While using the restroom before being forced to follow Mr. Blakely’s pickup, Ralphy unsuccessfully searched the house for a gun with which to rescue his mother. *Id.*

19. *Blakely v. State*, 47 P.3d 149, 152 (Wash. Ct. App. 2002). When Ralphy and his father entered the truck stop to pay, Ralphy shouted, “Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!” *Id.* Mr. Blakely tried to drag Ralphy to the car, but truckers shouted to him to leave the boy alone. *Id.* He released Ralphy, ran to the pickup, and left. *Id.* Ralphy jumped on the pickup bumper and tried to release his mother from the box, but was knocked off when Mr. Blakely accelerated. *Id.* Mr. Blakely then sped off, leaving Ralphy behind at the truck stop. *Id.*

20. Respondent’s Brief at 3, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632). As night fell and it became cold, Mr. Blakely put a quilt over his wife in the box. *Blakely v. State*, 47 P.3d 149, 152 (Wash. Ct. App. 2002). Mr. Blakely eventually let Mrs. Blakely out of the box and in the front seat so that she could tell any police that stopped him that she was accompanying him of her own free will. *Id.* Mr. Blakely was angry because “Ralphy ruined everything!” *Id.*

21. Petitioner’s Brief at 5, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632).

22. *Blakely v. State*, 47 P.3d 149, 152 (Wash. Ct. App. 2002). When the officers arrived, Mr. Blakely sent his wife out to them to tell them that she had come there of her own volition. *Id.* Not surprisingly, Mrs. Blakely thwarted Mr. Blakely’s plan and informed the police of her kidnapping. *Id.*

23. Respondent’s Brief at 3, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632).

24. *Blakely v. Washington*, 124 S. Ct. 2531, 2534 (2004).

25. *Id.*

26. Blakely further agreed to an additional charge of second-degree assault involving domestic violence. *Id.* at n.2. This count led to a fourteen-month sentence that ran concurrently and is not relevant for purposes of this comment. *Id.*

Second-degree kidnapping in Washington State is a class B felony for which state law provides a maximum of ten years.²⁷ Washington's Sentencing Reform Act created Washington State's sentencing guidelines and codified them in the Washington Code.²⁸ The guidelines dictate a "standard range" of forty-nine to fifty-three months for second-degree kidnapping with a firearm.²⁹ The Act provided, however, that a judge may impose a sentence above the standard range if he or she finds "substantial and compelling reasons justifying an exceptional sentence,"³⁰ set forth in findings of fact and conclusions of law supporting it.³¹ Washington case law indicates that a judge may justify an exceptional sentence "only if [the exceptional sentence] takes into account factors other than those which are used in computing the standard range sentence for the offense."³²

The State, pursuant to the plea agreement, recommended a sentence within the standard range of forty-nine to fifty-three months, in accordance with the Washington Sentencing Reform Act.³³ Upon hearing Mrs. Blakely's account of the kidnapping, however, the judge imposed an exceptional sentence of ninety months—"37 months beyond the standard maximum."³⁴ The judge justified the sentence by finding that Mr. Blakely had acted with "deliberate cruelty."³⁵ Mr. Blakely objected to this unexpected increase in his sentence of three years.³⁶ In response, the judge conducted a bench hearing, after which he adhered to his initial finding of "deliberate cruelty."³⁷ The judge based this conclusion on what he found to be the defendant's motives and methods.³⁸

27. WASH. REV. CODE ANN. § 9A.40.030(3) (2000).

28. *Id.* § 9.94A (2000).

29. *Blakely v. Washington*, 124 S. Ct. 2531, 2535 (2004). The Washington Sentencing Reform Act dictates a standard range of thirteen to seventeen months with a thirty-six month enhancement for use of a firearm. *See* WASH. REV. CODE ANN. §§ 9.94A.320, 9.94A.310(1) 9.94A.310(3)(b).

30. WASH. REV. CODE ANN. § 9.94A.120(2) (2000).

31. *Id.* § 9.94A.120(3) (2000).

32. *State v. Gore*, 21 P.3d 262, 277 (Wash. 2001).

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

34. *Id.*

35. *Id.* "Deliberate cruelty" is a statutorily recognized basis for upward departure. WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (2000).

36. *Blakely*, 124 S. Ct. at 2535.

37. *Id.* The bench hearing included testimony from the petitioner, Mrs. Blakely, young Ralph, a police officer, and medical experts. *Id.* at 2535. At the conclusion of the bench hearing the judge issued thirty-two findings of fact. *Id.*

38. *Id.* The judge concluded:

[t]he defendant's motivation to commit kidnapping was complex . . . While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits [divorce litigation and an impending trial regarding a trust] and modify title ownerships to his benefit. He used stealth and surprise, and took advantage of the victim's isolation. He immedi-

On appeal, Blakely, relying partly on *Apprendi v. New Jersey*,³⁹ argued that the trial judge's sentencing procedure deprived him of his Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.⁴⁰ The state court of appeals rejected Mr. Blakely's argument, holding that because the judge had not gone beyond the statutory maximum of ten years there was no *Apprendi* violation.⁴¹ The Washington Supreme Court then denied discretionary review.⁴² The United States Supreme Court granted certiorari.

B. The Majority

Justice Scalia, writing for the majority, cited the *Apprendi* rule in the first line of his discussion: "Other than a 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."⁴³ The Court reiterated that the "statutory maximum" for *Apprendi* purposes is the maximum a judge may impose without any additional findings of fact, not the maximum he may impose with additional findings of fact.⁴⁴ Put another way, under the Sixth Amendment as interpreted by *Apprendi*, a judge's authority to sentence derives wholly from the jury's verdict. The *Blakely* Court reasoned that when a judge imposes a sentence beyond what the jury's verdict allows based on a fact the jury has not found (in this case "deliberate cruelty"), the defendant's Sixth Amendment right to a jury trial is violated.⁴⁵

Scalia bolsters his reasoning with two tenets of common law criminal jurisprudence:⁴⁶ (1) "the truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,"⁴⁷ and (2) "an accusation which lacks any particular

ately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others.

Id. at 2535-36.

39. 530 U.S. 466 (2000).

40. *Blakely*, 124 S. Ct. at 2536.

41. *Blakely v. State*, 47 P.3d 149, 152 (Wash. Ct. App. 2002). "*Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not triggered." *Id.* at 159.

42. *State v. Blakely*, 62 P.3d 889 (Wash. 2003).

43. *Blakely*, 124 S. Ct. at 2536 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

44. *Id.* at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

45. *Id.* at 2538.

46. *Id.* at 2536.

47. *Id.* (citing W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason;" every fact that is legally essential to punishment must be charged in the indictment and proved to a jury.⁴⁸

Washington law holds that an exceptional sentence, like the one imposed here, is justified only if it takes into account factors other than those used to determine the standard range (those admitted in the guilty plea).⁴⁹ Therefore, the Court held that the trial judge in *Blakely* could not have imposed the exceptional ninety-month sentence based solely on the facts admitted in the guilty plea. Thus, the Court concluded that the sentencing procedure used to sentence Mr. Blakely did not comply with the Sixth Amendment and thereby rendered his sentence invalid.⁵⁰

Scalia then notes that in reversing the judgment below, the Court is not ruling determinate sentencing schemes unconstitutional, but, rather, is exploring how determinate sentencing schemes can be implemented in accordance with the Sixth Amendment, attempting to give "intelligible content to the right of jury trial, . . . a fundamental reservation in our constitutional structure."⁵¹ "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."⁵² The *Apprendi* rule furthers this design by ensuring that it is the jury's verdict that establishes the boundaries of the sentence.⁵³ Additionally, (and perhaps most importantly) in anticipation of the questions this opinion raised, the Court explicitly reserved comment on the Federal Sentencing Guidelines (a determinate sentencing scheme that allows for an increased exposure to punishment based upon facts found solely by the judge in the post-trial stage of sentencing).⁵⁴

Subsequent to addressing the dissents, the majority encapsulated the pertinent facts: "Petitioner was sentenced to three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed

48. *Id.* (citing J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872)).

49. *Blakely*, 124 S. Ct. at 2537.

50. *Id.* at 2538.

51. *Id.* at 2538–39. "That right," the majority points out, "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . ." *Id.* at 2538.

52. *Id.* at 2539. To bolster this position, the opinion relies on quotes from John Adams and Thomas Jefferson. John Adams said, "The common people, should have complete control . . . in every judgment in a court of judicature as in the legislature." *Id.* (citing John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850)), and Thomas Jefferson: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." *Id.* (citing Letter from Thomas Jefferson to the Abe Arnoux (July 19, 1789) reprinted in 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958)).

53. *Blakely*, 124 S. Ct. at 2539.

54. *Id.* at 2538 n.9. "The Federal Guidelines are not before us, and we express no opinion on them." *Id.*

finding that he had acted with ‘deliberate cruelty.’”⁵⁵ Scalia reemphasized that the Constitution demands that before a man is deprived of three years of liberty, the State’s accusation should be submitted to a jury “rather than a lone employee of the State,” a judge.⁵⁶ The Supreme Court then reversed the decision of the Washington Court of Appeals and thereby threw determinate sentencing schemes into question.

C. The Dissents

Justices O’Connor, Breyer, Kennedy and Chief Justice Rehnquist comprised the minority in *Blakely*, accurately prophesizing disastrous results and a loss of uniformity among the nation’s sentencing systems.⁵⁷ Although their arguments did not fall upon deaf ears (Justice Scalia addressed most of them in the majority opinion), they fell just the same.

Justice O’Connor, in a dissent joined by Breyer and in part by Chief Justice Rehnquist and Justice Kennedy, predicted “disastrous” consequences from the application of *Apprendi* in this context and found them to be “as far reaching as they are disturbing.”⁵⁸ She accused the majority of implicitly holding sentencing guidelines systems, or determinate sentencing schemes, unconstitutional, arguing that the decision would jeopardize the Federal Sentencing Guidelines, among others.⁵⁹ Her dissent expressed concern that the majority opinion would eliminate the “uniformity, transparency, and accountability” that determinate sentencing schemes bring to sentencing and instead lead the judiciary back to regimes under which judges have unfettered discretion to issue sentences falling anywhere within the statutory range.⁶⁰ She further argued that all sentences that were imposed under the federal and state guidelines since *Apprendi* was decided in 2000 are now open to collateral attack by way of habeas petitions, thereby jeopardizing “tens of thousands of criminal judgments.”⁶¹ Additionally, Justice O’Connor points out some of the practical costs that the American justice system will incur as a result of the majority opinion.⁶² Justice Kennedy, in a

55. *Id.* at 2543.

56. *Id.*

57. *Id.* at 2543–62.

58. *Id.* at 2548 (O’Connor, J., dissenting).

59. *Blakely*, 124 S.Ct. at 2550 (O’Connor, J., dissenting). Justice O’Connor found that the structure of the Federal Sentencing Guidelines does not provide any grounds for distinction from the scheme in Washington. *Id.* (O’Connor, J., dissenting).

60. *Id.* at 2545 (O’Connor, J., dissenting). “What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.” *Id.* at 2550 (O’Connor, J., dissenting).

61. *Id.* at 2550 (O’Connor, J., dissenting).

62. *Id.* at 2546 (O’Connor, J., dissenting). Under the majority’s approach, any fact that increases the upper bound on a judge’s sentencing discretion is an element of the offense.

dissent joined by Justice Breyer, commented that in addition to Justice O'Connor's concerns, the majority opinion destroyed decades of collaborative efforts by the judiciary and the legislature.⁶³

Justice Breyer, joined by Justice O'Connor, argues that as a result of the majority opinion, sentencing must now take one of three unacceptable forms.⁶⁴ The first option is for legislators to enact a simple, pure "charge offense" or "determinate" sentencing system in which the indictment would charge a few facts that constitute a crime.⁶⁵ Every person convicted of that crime would receive the same sentence.⁶⁶ This type of system is flawed, Breyer argues, because it results in an injustice and it invites prosecutors to overcharge in order to force a guilty plea to a lesser charge.⁶⁷ The second option is a return to indeterminate sentencing, in which the length of time a person spends in prison could depend on "what the judge ate for breakfast" on the day of sentencing.⁶⁸

Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury. *Id.* (O'Connor, J., dissenting).

63. *Id.* at 2551 (Kennedy, J., dissenting). "[T]he effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators It tells not only trial judges who have spent years studying the problem but also legislators who have devoted valuable time and resources . . . that their efforts and judgments were all for naught." *Id.* (Kennedy, J., dissenting).

64. *Id.* at 2552 (Breyer, J., dissenting). Justice Stephen Breyer served as an author of the federal system when he worked for the Senate Judiciary Committee as its chief counsel in the late 1970's; as a federal appeals court judge he served on the United States Sentencing Commission. Biography of Federal Judges, at http://air.fjc.gov/history/judges_frm.html.

65. *Blakely*, 124 S. Ct. at 2553 (Breyer, J., dissenting).

66. *Id.* (Breyer, J., dissenting).

67. *Id.* (Breyer, J., dissenting). "[S]imple determinate sentencing systems impose identical punishments on people who committed their crimes in very different ways. When dramatically different conduct ends up being punished the same way, an injustice has taken place." *Id.* (Breyer, J., dissenting).

68. *Id.* at 2554 (Breyer, J., dissenting). This idea was explained in a speech by Judge Alex Kozinski of the Ninth Circuit Court of Appeals:

Under this theory, what judges do is glance at a case and decide who should win—and they do this on the basis of their digestion (or how they slept the night before or some other variety of personal factors). If the judge has a good breakfast and a good night's sleep, he might feel lenient and jolly, and sympathize with the downtrodden. If he had indigestion or a bad night's sleep, he might be a grouch and take it out on the litigants. Of course, even judges can't make both sides lose; I know, I've tried. So a grouchy mood, the theory went, is likely to cause the judge to take it out on the litigant he least identifies with, usually the guy who got run over by the railroad or is being foreclosed on by the bank.

Judge Alex Kozinski, Address at Loyola Law School Symposium on the California Judiciary (March 19, 1993) available at <http://notabug.com/kozinski/breakfast> (last visited July 24, 2004). Judge Kozinski followed this explanation with his opinion: "I am here to tell you that this is all horse manure. And, like all horse manure, it contains little seeds of truth from

The third option is to modify current approaches to conform to *Apprendi*, which would require one of two approaches.⁶⁹ The first would be for “legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type of victim, presence of violence, and so on.”⁷⁰ Among the problems with this approach is that it would require prosecutors to charge all relevant facts about the way the crime was committed before many of the facts relevant to punishment are known.⁷¹ Another problem with this approach is that it prejudices defendants who seek trial.⁷² The second way to make current sentencing schemes conform to *Apprendi* would be to require at least two juries for each defendant whenever aggravating facts are present: “one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence.”⁷³ This scheme, he explained, would be costly in both time and judicial resources, and, furthermore, he questioned the result this solution would have on the ninety percent of defendants that do not go to trial, observing that such an approach would result in fewer trials and even more plea-bargaining.⁷⁴

Justice O’Connor predicted disaster. Justice Breyer’s dissent analyzed a list of alternatives for the courts, should they invalidate the Guidelines. It was clear what the dissents thought of the majority opinion. The next question involved what the circuits would think of the opinion. It would not take long to realize that the dissents accurately predicted the consequences of the majority opinion, as proved by the various reactions from the circuits.

III. THE POSTURING (THE FALLOUT)

In 1963 Robert Zimmerman said, “Half of the people can be part right all of the time, some of the people can be all right part of the time. But all

which tiny birds can take intellectual nourishment.” *Id.*

69. *Blakely*, 124 S. Ct. at 2554–55 (Breyer, J., dissenting).

70. *Id.* (Breyer, J., dissenting).

71. *Id.* at 2555 (Breyer, J., dissenting).

72. *Id.* (Breyer, J., dissenting). Justice Breyer argued that this could put defendants in the untenable position of contesting material aggravating facts in the guilt phases of their trials, a notion disallowed by a Constitution that guarantees due process. *Id.* (Breyer, J., dissenting). For example, the defendant would have to argue to a jury “I did not sell drugs, and if I did, I did not sell more than 500 grams,” or ‘I did not kill him, and if I did, I did not use a machete,’ or ‘I did not encourage gang activity, and certainly not as a supervisor.’” *Id.* (Breyer, J., dissenting).

73. *Id.* (Breyer, J., dissenting). This alternative, Justice Breyer pointed out, would be costly in both money and judicial resources. *Id.* (Breyer, J., dissenting).

74. *Id.* at 2556 (Breyer, J., dissenting). Justice Breyer reasons that “90% of defendants will not go to trial even once, much less insist on two or more trials.” *Id.* (Breyer, J., dissenting).

the people can't be all right all the time."⁷⁵ If this holds true, then given the fact that all of the federal courts are everyday interpreting *Blakely* in varying and different ways, somebody is wrong. Who those misguided judges are, however, is yet to be determined. This section surveys the various circuits' interpretations of *Blakely*'s effect on the Federal Sentencing Guidelines. Next, this composition assays the position of the Department of Justice as well as the ongoing response from the United States Congress. This section then turns to an analysis of the way the lower courts are reacting, an interpretation of *Blakely*'s effect, and a modest proposal for salvaging the Guidelines.⁷⁶

A. The Myriad Interpretations of *Blakely*'s Effect on the Federal Sentencing Guidelines

The circuits have been inconsistent in their response to *Blakely*. Some courts have upheld the Guidelines while many have invalidated them. The invalidating courts have disagreed as to issues such as waivers and severability of certain parts of the Guidelines. The courts are in dire need of guidance from their superiors and will eventually receive that guidance, but in the meantime, the courts are forging their own paths.

The Supreme Court has granted certiorari in a case out of the First Circuit Court of Appeals in which the judge refused to impose a sentence outside the standard range of punishment that could be imposed by the jury's verdict.⁷⁷ Oral arguments are scheduled for Monday, October 4, 2004.⁷⁸ The Second Circuit Court of Appeals unanimously agreed to skip the debate and certify to the Supreme Court three detailed questions relating to the issue of the validity of two defendants' sentences in light of *Blakely*.⁷⁹ The first question was a broad question that generally encompassed the heart of the

75. BOB DYLAN, *Talking World War III Blues, on THE FREEWHEELIN'* BOB DYLAN (Columbia Records 1963). This was an obvious misquote of Abraham Lincoln's comment to a visitor to the White House in 1865: "It is true that you may fool all of the people some of the time; you can even fool some of the people all of the time; but you can't fool all of the people all of the time." Brainy Quotes, available at http://www.brainyquote.com/quotes/authors/a/abraham_lincoln.html.

76. See *infra* Part III.B-C.

77. *United States v. Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004).

78. Order in Pending Cases, 542 U.S. 542 (August 2, 2004).

79. *United States v. Penaranda*, No. 03-1055(L), 2004 U.S. LEXIS 14268 (2d Cir. July 12, 2004). The Supreme Court has accepted certified questions from federal appeals courts only four times since 1946, most recently in 1981. Mark Hamblett, *Attempt to Place 'Blakely' on a Fast-Track Is a Rarity*, N.Y.L.J. (July 20, 2004), at <http://www.ussguide.com/members/BulletinBoard/Blakely/NYLJ-07-20-04.html>.

Blakely debate.⁸⁰ The other two questions, although asked in light of *Blakely*, were more fact specific to the actual case before the court.⁸¹

The decisions of the Third Circuit district courts illustrate vast inconsistencies. A district judge in Pennsylvania declared the Guidelines unconstitutional under *Blakely*, but, because the defendant waived any “*Blakely* rights” and chose to proceed under the plea agreement and the Guidelines, the judge imposed a sentence pursuant to the Guidelines.⁸² A district court on the opposite side of Pennsylvania imposed two identical sentences, a 188-month non-Guideline sentence and a 188-month Guideline sentence.⁸³ Meanwhile, a court in the middle district of Pennsylvania declared the Guidelines unconstitutional as applied to the specific case and employed an indeterminate sentencing scheme.⁸⁴

In the Fourth Circuit, a judge for the Eastern District of Virginia declared the Guidelines merely advisory and employed his own judgment for a sentence within the statutorily authorized range.⁸⁵ Federal District Judge Goodwin, after reviewing the divergent *Blakely* decisions of the past few weeks, moved all sentencing hearings to a date after October 2004.⁸⁶ Subsequent to Judge Goodwin’s decision, the Fourth Circuit Court of Appeals upheld the Guidelines in an en banc opinion that instructed lower courts to continue sentencing in accordance with the Guidelines.⁸⁷ The opinion included, however, that “in the interests of judicial economy” the district judge should also announce a non-Guidelines sentence, treating the Guidelines as advisory.⁸⁸

The Fifth Circuit Court of Appeals triggered the circuit split by upholding the Federal Sentencing Guidelines only three days after the Seventh

80. *Penaranda*, No. 03-1055(L), 2004 U.S. LEXIS 14268. “Does the Sixth Amendment permit a federal district judge to find facts, not reflected in a jury’s verdict or admitted by a defendant, that form the basis for determining the applicable adjusted offense level under the federal Sentencing Guidelines and any upward departure from that offense level?” *Id.*

81. *Id.*

82. *United States v. Harris*, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290 (W.D. Pa. July 16, 2004). Judge Schwab observed that although the guidelines “might not be a pure ‘statute,’ . . . they surely are statutory and legislative, and the *Blakely* decision renders them unconstitutional.” *Id.*

83. *United States v. Leach*, Crim. No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (E.D. Pa. July 13, 2004).

84. *United States v. Sweitzer*, No. 1:CR-03-087-01 (M.D. Pa. July 19, 2004).

85. *United States v. Lockett*, Crim. No. 3:04CR017, 2004 U.S. Dist. LEXIS 13710 (E.D. Va. July 16, 2004).

86. *United States v. Thompson*, Crim. No. 2:03-00187-02, 2004 U.S. Dist. LEXIS 13213 (S.D. W. Va. July 14, 2004).

87. *United States v. Hammoud*, Crim. No. 03-4253, 2004 U.S. App. LEXIS 15898 (4th Cir. August 2, 2004).

88. *Id.* at *2.

Circuit invalidated them.⁸⁹ The Fifth Circuit reasoned that the Guidelines operate as a tool to channel the discretion of judges to impose a sentence within the minima and maxima set out by the United States Code; that is, the “statutory maximum” is defined by the United States Code, not the Federal Sentencing Guidelines.⁹⁰ Judge King, writing for the majority, supported this view of “statutory maximum” with Supreme Court rulings that are “founded on the proposition that there are constitutionally meaningful difference[s] between Guidelines ranges and the United States Code maxima.”⁹¹ The opinion began with reference to *Mistretta v. United States*,⁹² which described the Guidelines as follows:

[The Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress.⁹³

The argument in *Mistretta* was that the placement of the Sentencing Commission in the judicial branch violated the separation of powers by placing legislative policymaking authority in the judiciary.⁹⁴ The Court rejected this argument, partly on the reason that the Guidelines do not set maximum sentences but, rather, simply fetter the judicial discretion.⁹⁵ The opinion then referenced *Edwards v. United States*,⁹⁶ in which the prosecutor charged the defendants with conspiring to distribute cocaine powder and crack.⁹⁷ The defendants challenged their sentences, arguing that the Guidelines, the statutes, and the Constitution required the sentencing judge to consider only the powder, which is punished less harshly than crack.⁹⁸ The Supreme Court rejected the defendants’ argument, noting that the argument might have been more persuasive had the defendants’ sentences exceeded the statutory maximum set forth in the United States Code.⁹⁹ The Fifth Cir-

89. *United States v. Pineiro*, No. 03-30437, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004).

90. *Id.* at *16.

91. *Id.* at *17.

92. 488 U.S. 361 (1989).

93. *Pineiro*, No. 03-30437, 2004 U.S. App. LEXIS 14259, at *18 (citing *Mistretta v. United States*, 488 U.S. 361, 396 (1989)).

94. *Id.* at *18–19.

95. *Id.*

96. *Id.* at *19 (citing *Edwards v. United States*, 523 U.S. 511 (1998)).

97. *Id.* at *19.

98. *Id.*

99. *Pineiro*, No. 03-30437, 2004 U.S. App. LEXIS 14259, at *20 (quoting *Edwards v. United States*, 523 U.S. 511, 515 (1998)) (“[P]etitioners’ statutory and constitutional claims

cuit further noted that even the Supreme Court's post-*Apprendi* rulings have continued to treat the United States Code maxima as the relevant consideration for purposes of *Apprendi*.¹⁰⁰ The opinion concluded, "*Blakely* may have weakened the long embraced distinction between the United States Code maxima and the Guidelines range, but we cannot conclude that *Blakely*—which explicitly reserved comment on the Guidelines—has abolished the distinction's importance."¹⁰¹

The Seventh Circuit was the first federal appellate court to rule that, in light of *Blakely*, the Federal Sentencing Guidelines are unconstitutional, another decision on which the Supreme Court will hear argument on October 4, 2004.¹⁰² That case involved a defendant's sentence that was enhanced on the basis of facts (amount of cocaine) that were determined not by the jury but by the district judge based on a preponderance of the evidence.¹⁰³ Judge Posner, writing for the majority, ruled that the defendant had "the right to demand that the quantity be determined by the jury rather than by the judge, and on the basis of proof beyond a reasonable doubt."¹⁰⁴ Judge Posner then espoused several ideas for sentencing procedure in light of *Blakely*, including a sentencing jury or indeterminate judicial sentencing using the Guidelines as recommendations.¹⁰⁵

Judge Easterbrook wrote a fervid dissent on both procedural and substantive grounds—much of which the Fifth Circuit based its *Pineiro* opinion upon—arguing that a "likely consequence" of the majority's opinion would be "bedlam."¹⁰⁶ Judge Easterbrook cited *Edwards* as supportive Supreme Court precedent for upholding the Guidelines and stated "we are not entitled to put . . . [*Edwards*] in a coffin while it is still breathing."¹⁰⁷ He then as-

would make a difference if it were possible to argue that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines.").

100. *Id.* at *21–22 (citing *United States v. Cotton*, 535 U.S. 625, n.3 (2002)) (noting that the defendants challenged the determination that the crime involved 1.5 kilograms of cocaine, which yielded a Guidelines offense level of thirty-eight, but "they never argued that the conspiracy involved less than 50 grams of cocaine base, which is the relevant quantity for purposes of *Apprendi*, as that is the threshold quantity for the penalty of life imprisonment in 21 U.S.C. § 841 (b)(1)(A)").

101. *Id.* at *25.

102. *United States v. Booker*, No. 03-4225, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004).

103. *Id.* at *1.

104. *Id.* at *7.

105. *Id.* at *19–20.

106. *Id.* at *20 (Easterbrook, J., dissenting). "This is the wrong forum for such a conclusion; [] whatever power we may possess should not be exercised to set at naught a central component of federal criminal practice." *Id.* at 22.

107. *Id.* at 22 (Easterbrook, J., dissenting). Judge Easterbrook continued his macabre analogies stating, "Just as opera stars often go on singing after being shot, stabbed, or poi-

tutely points out that the *Blakely* Court did not overrule *Edwards* and, furthermore, it was cited in *Apprendi*, the case on which *Blakely* rests.¹⁰⁸ Additionally, the Seventh Circuit, when faced with a successive 18 U.S.C. § 2255 attack on the defendant's conviction, dismissed "without prejudice to renewing his request should the Supreme Court make the rule announced in *Blakely* applicable to cases on collateral review."¹⁰⁹

The Eighth Circuit joined the fracas on July 23, 2004 in a per curiam decision in which it remanded the defendant's sentence to the district court for consideration of the *Blakely* issues he raised.¹¹⁰ Although remanding for sentencing, the three-judge panel issued a separate opinion instructing the district court how to sentence on remand.¹¹¹ Judges Lay and Bright held that the Federal Sentencing Guidelines are unconstitutional in light of *Blakely* because they violate a defendant's Sixth Amendment right to have a jury find beyond a reasonable doubt any and all of the facts legally necessary to his sentence.¹¹² Those two judges adopted the approach taken by Judge Cassell in *United States v. Croxford*,¹¹³ treating the Guidelines as non-binding but advisory, unless the defendant consents to a Guidelines sentence.¹¹⁴ Judge Murphy, who served for four years as the chair of the United States Sentencing Commission, dissented.¹¹⁵ On August 6, 2004, the court granted a rehearing en banc and vacated the panel's decision in *Mooney*.¹¹⁶

The Ninth Circuit held that "*Blakely*'s definition of statutory maximum applies to the determination of the base offense presumptive ranges under § 2D1.1(c) of the Sentencing Guidelines, as well as the determination of the applicability of an upward enhancement under § 2D1.1(b)(1)."¹¹⁷ Accordingly, the Ninth Circuit held that the defendant's sentence, resulting from the district judge's finding of over one thousand grams of methampheta-

soned, so judicial opinions often survive what could be fatal blows." *Id.*

108. *Booker*, No. 03-4225, 2004 U.S. App. LEXIS 14223, at *22 (Easterbrook, J., , dissenting).

109. *Simpson v. United States*, No. 04-2700, 2004 U.S. App. LEXIS 14650, at *1 (7th Cir. July 16, 2004).

110. *United States v. Mooney*, No. 02-3388, 2004 U.S. App. LEXIS 15301 (8th Cir. July 23, 2004).

111. *Id.* at *40.

112. *Id.*

113. *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004). Judge Cassell was the first judge in the country to rule that *Blakely* renders the Federal Sentencing Guidelines unconstitutional. *Id.*

114. *Mooney*, No. 02-3388, 2004 U.S. App. LEXIS 15301, at *43.

115. *Id.* at *44-51.

116. *United States v. Mooney*, No. 02-3388, 2004 U.S. App. LEXIS 16302 (8th Cir. Aug. 6, 2004).

117. *United States v. Ameline*, No. 02-30326, 2004 U.S. App. LEXIS 15031, at *2 (9th Cir. July 21, 2004).

mine, violated the defendant's Sixth Amendment right to jury trial.¹¹⁸ The court did point out, however, that *Blakely* does not render the Guidelines "facially invalid."¹¹⁹

The Tenth Circuit, and more specifically Utah, was where the fallout began. Judge Cassell was the first judge to declare the Guidelines unconstitutional as a result of *Blakely*.¹²⁰ Admitting that his ruling could have "potentially cataclysmic implications" on federal sentencing practices, he held that "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this"¹²¹ Judge Cassell then observed that he had three choices: (1) empanelling a "sentencing jury," (2) proceeding with a Guidelines sentence without applying the two enhancements requested by the Government, or (3) declaring the Guidelines unconstitutional and sentencing anywhere between the statutory minimum and maximum.¹²² He chose the last option.¹²³ In a subsequent case, however, Judge Cassell found that although the Federal Sentencing Guidelines are unconstitutional in one case, they are not unconstitutional in all cases.¹²⁴ Judge Cassell distinguished the two cases, stating that in the instant case "there is no need for judicial fact-finding beyond the facts necessarily contained in the indictment."¹²⁵

The Eleventh Circuit Court of Appeals has made at least two things clear in two separate per curiam opinions: (1) *Blakely* does not apply retroactively in a federal habeas corpus proceeding to a case on collateral review;¹²⁶ and (2) *Blakely* "does not undermine the validity of minimum mandatory sentences, at least not where the enhanced minimum does not exceed the non-enhanced maximum."¹²⁷ Judge Presnell, a district court judge for the Eleventh Circuit, concluded that *Blakely*, taken to its logical conclusion, renders the Guidelines unconstitutional in any case.¹²⁸ He argued that courts cannot apply determinate sentencing to one defendant whose sentence raises no opportunity for judicial fact-finding and apply an indeterminate, discre-

118. *Id.* at *3.

119. *Id.*

120. *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004).

121. *Id.* at *22.

122. *Id.* at *37-42.

123. *Id.* at 42.

124. *United States v. Thompson*, No. 2:04-CR-00095 (PGC), 2004 U.S. Dist. LEXIS 12582 (D. Utah July 8, 2004).

125. *Id.* at *7.

126. *In Re Dean*, No. 04-13244, 2004 U.S. App. LEXIS 14191 (11th Cir. July 9, 2004).

127. *United States v. Spero*, No. 03-14586, 2004 U.S. App. LEXIS 14118, at *3 (11th Cir. July 8, 2004).

128. *United States v. King*, No. 6:04-CR-35-ORL-31KRS, 2004 U.S. Dist. LEXIS 13496 (M.D. Fla. July 19, 2004).

tionary scheme to another defendant.¹²⁹ Such a result would violate the Equal Protection Clause and “would lead to the perverse result that both Government and criminal defense attorneys would plot to finagle their way into the determinate system or indeterminate system depending on the judge and the various factors relevant to the particular defendant’s sentence.”¹³⁰ The court then noted that instead of returning to indeterminate sentencing, however, it will continue to use the Guidelines as recommendations “worthy of serious consideration.”¹³¹

In the District of Columbia Circuit, Judge Jackson held a resentencing hearing in which he concluded that *Blakely* invalidated a sentence he had imposed seven days earlier.¹³² Judge Jackson resentenced the defendant from the original six years to sixteen months, noting that his sixteen months was essentially time served and he was a free man.¹³³

B. The Department Of Justice Response

Excluding the Supreme Court, Judge Jackson is not the only one in District of Columbia who has an opinion on *Blakely*’s impact on the Federal Sentencing Guidelines. On July 2, 2004, Deputy Attorney General James Comey issued a memorandum to all federal prosecutors articulating the positions and policies of the United States Department of Justice (“DOJ”) in light of *Blakely*.¹³⁴ Four days later Assistant Attorney General Christopher Wray issued another memorandum to all federal prosecutors offering guidance regarding the application of *Blakely*.¹³⁵ The DOJ has also requested that United States Attorney’s offices collect and maintain data about actual sentences imposed in light of *Blakely* and the Guidelines ranges that the judges would have applied in those cases but for *Blakely*.¹³⁶ The DOJ has

129. *Id.* at *25.

130. *Id.*

131. *Id.* Judge Presnell went on to note: “The suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection.” *Id.*

132. *United States v. Watson*, CR 03-0146 (D. D.C. June 30, 2004), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/DCCA/IndexDCCA.cfm>.

133. *Id.* A result Senator Orrin Hatch finds most inappropriate. See *infra* Part III.C.

134. Memorandum from the Deputy Attorney General, James Comey, to All Federal Prosecutors (July 2, 2004) (copy on file with author), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/DOJMemo.pdf> (last visited August 4, 2004).

135. Memorandum from the Assistant Attorney General, Christopher Wray, to All Federal Prosecutors (July 6, 2004) (copy on file with author).

136. Memorandum from Director of the Executive Office for United States Attorneys, Mary Beth Buchanan, to All United States Attorneys, All First Assistant U.S. Attorneys, All Criminal Chiefs, All Civil Chiefs, All Appellate Chiefs (July 15, 2004) (copy on file with author).

also requested that all federal prosecutors notify the Executive Office for United States Attorneys of any case involving “noteworthy outcomes as a result of *Blakely*.”¹³⁷ Finally, the DOJ has issued a sample thirty-eight page brief for federal prosecutors to use in setting out the Government’s position in any *Blakely* related argument throughout the nation’s federal courts.¹³⁸

The official position of the Department of Justice is that *Blakely v. Washington* does not apply to the Federal Sentencing Guidelines and the Guidelines “may continue to be constitutionally applied in their intended fashion, i.e. through fact-finding by a judge under the preponderance of the evidence standard at sentencing.”¹³⁹ The Government contends that (a) lower federal courts are not free to invalidate the Guidelines given the fact that prior Supreme Court precedent has recognized them as constitutional, and (b) the Guidelines are distinguishable from the system invalidated in *Blakely*.¹⁴⁰ If the court does hold *Blakely* applicable to the federal guidelines, federal prosecutors are to argue that judges cannot sever the constitutional aspects of the guidelines from the unconstitutional aspects and, therefore, the guidelines may not be used at all.¹⁴¹ Instead, the judge must revert to an indeterminate sentencing scheme, in which case the federal attorney is to argue that the judge should impose a sentence consistent with what the Guidelines suggest.¹⁴² The memo then sets forth three critical components of this position: (1) if the Guideline sentence can be calculated without the finding of factual issues beyond the admitted facts or the jury verdict, then the Guidelines remain applicable; (2) the Guidelines remain applicable in a case in which a defendant agrees to waive his *Blakely* rights (waivers which may be sought in connection with plea agreements and guilty pleas); and (3) in cases in which there are applicable upward enhancements and the defendant contests the finding of additional facts, then the Guidelines as a whole should not be used if the judge finds *Blakely* applicable, and instead, indeterminate sentencing should be employed.¹⁴³

Comey’s memo also provided “protective procedures in order to safeguard against the possibility of a changed legal landscape”¹⁴⁴ Although the Department does not believe the Constitution requires it, all federal prosecutors are to immediately allege in their indictments all Guideline up-

137. *Id.*

138. Department of Justice Brief Sample *Blakely* Brief (July 15, 2004) (copy on file with author).

139. Memorandum, *supra* note 134.

140. *Id.*

141. *Id.* at 2.

142. *Id.* Indeterminate sentencing is a scheme where the judge, in his or her discretion, imposes a sentence anywhere within the minimum and maximum provided by statute. *Id.*

143. *Id.*

144. *Id.* at 3.

ward adjustment factors that are readily provable and to obtain superseding indictments that allege all provable upward adjustment factors in pending prosecutions.¹⁴⁵ The prosecutor should make clear to courts that he or she is including Guideline factors in the indictments only as a protective measure.¹⁴⁶ The court should also be urged to rule, before trial, whether it will apply *Blakely* to the Guidelines and, if so, how.¹⁴⁷ The DOJ memo also instructs that plea agreements should contain waivers of all rights under *Blakely*, generally stating that the defendant agrees to have his sentence determined pursuant to the Guidelines.¹⁴⁸ Probation officers should be persuaded to prepare pre-sentence reports with Guideline calculations based on all available factual information just as they did pre-*Blakely*.¹⁴⁹ Finally, the memo directs prosecutors to ask district courts to state alternative sentences that may be used if the event that appellate courts reject the sentencing approach the district court employs.¹⁵⁰

In addition to elaborating on the positions set forth in the July 2 memo, the Assistant Attorney General's memo addressed *Blakely* claims raised on direct appeal and *Blakely* claims raised in habeas corpus motions under 28 U.S.C. § 2255.¹⁵¹ Furthermore, Section II of the model *Blakely* brief sets forth the Government's position against the severability of the Guidelines.¹⁵²

C. The Legislative Response

Senator Orrin Hatch opened the *Blakely* hearings of the Senate Judiciary Committee on July 13, 2004.¹⁵³ In his opening remarks, Senator Hatch noted, "[C]riminal justice has begun to run amok."¹⁵⁴ In support of this contention, the Senator noted that Dwight Watson, the man who sat in a tractor last year outside the United States Capitol for forty-seven hours threatening to blow up the area with organophosphate bombs, had his sentence commuted from six years to sixteen months in light of a District of Columbia

145. Memorandum, *supra* note 134.

146. *Id.* at 4.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Memorandum from the Assistant Attorney General, Christopher Wray, to All Federal Prosecutors (July 6, 2004) (copy on file with author).

152. Department of Justice Brief Sample *Blakely* Brief (July 15, 2004) (copy on file with author).

153. *Hearings on "Blakely v. Washington" and the Future of the Federal Sentencing Guidelines*, 108th Cong. (July 13, 2004) (testimony of Senator Orrin Hatch).

154. *Id.*

district court's interpretation of *Blakely*, and because of "time served," Mr. Watson is now a free man.¹⁵⁵

The July 13th hearings consisted of three judges, one United States Attorney, one former United States Attorney, the Commissioner of the United States Sentencing Commission, two professors and one Washington D.C. lawyer who was the former special counsel to the Sentencing Commission.¹⁵⁶ The testimonies reflected a vast range of solutions and recommended courses of action.¹⁵⁷

Among those who testified was Indiana University Law School Professor Frank Bowman.¹⁵⁸ Professor Bowman proposed a legislative response to the crisis that is considered to be gaining steam on Capitol Hill as "the most likely response."¹⁵⁹ The professor proposes, quite simply, that Congress amend the Guidelines to raise all Guideline maxima up to the statutory maxima, but leave Guidelines minima in place.¹⁶⁰ The idea is that because judicial fact-finding would never raise the maximum sentence, *Blakely* would not be implicated.¹⁶¹ This solution is similar to the status quo pre-*Blakely*.¹⁶² Most judges already think the Guidelines as a whole are too harsh and, therefore, depart upwards in less than one percent of their cases.¹⁶³ This solution would possibly provide a stopgap, allowing Congress and the Sentencing Commission some time to enact a more stable resolution to the perceived constitutional infirmity of the Guidelines in light of *Blakely*.¹⁶⁴

The Bowman approach, however, is not without its critics. John Sands, the Chair of the Federal and Community Defenders Sentencing Guidelines Committee, argues that Professor Bowman's approach seeks to evade the rule enunciated in *Blakely* and is unconstitutional.¹⁶⁵ Mr. Sands finds the

155. *Id.* See United States v. Watson, CR 03-0146 (D. D.C. June 30, 2004), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/DCCA/IndexDCCA.cfm>.

156. *Hearings on "Blakely v. Washington" and the Future of the Federal Sentencing Guidelines*, 108th Cong. (July 13, 2004).

157. *Id.*

158. *Id.* (testimony of Professor Frank Bowman). Frank Bowman is the author of a 1700 page treatise on sentencing law. FEDERAL SENTENCING GUIDELINES HANDBOOK (Legal List Publishing, 1998).

159. Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. (forthcoming June 2004).

160. *Hearings on "Blakely v. Washington" and the Future of the Federal Sentencing Guidelines*, 108th Cong. (July 13, 2004) (testimony of Professor Frank Bowman).

161. Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. (forthcoming June 2004).

162. *Id.*

163. *Id.*

164. *Id.*

165. Letter from John Sands, the Chair of the Federal and Community Defenders Sentencing Guidelines Committee, to the United States Sentencing Commission (July 9, 2004)

approach unfair and unbalanced, allowing for discretionary upward departures without a similar provision allowing for discretionary downward departures.¹⁶⁶

Congress issued a concurrent resolution, proposed by Senator Hatch, on July 21, 2004 “[e]xpressing the sense of Congress that the Supreme Court of the United States should act expeditiously to resolve the confusion and inconsistency in the Federal criminal justice system caused by its decision in *Blakely v. Washington*, and for other purposes.”¹⁶⁷

Congress did not simply urge the Supreme Court to act, however, it slipped in at least one of its two cents as well.¹⁶⁸ Paragraph five of the resolution states that “the statutory maximum penalty is the maximum penalty provided by the statute defining the offense of conviction . . . and not the upper end of the guideline sentence range”¹⁶⁹ Paragraph six attempts to resolve the issue of whether the Guidelines are severable or whether they must be used only as a “cohesive and integrated whole, and not in a piecemeal fashion;” the resolution suggests the latter.¹⁷⁰ The resolution goes on to cite the circuit splits, the confusion, the contradictions, and the need for an expeditious review so as to preserve the orderly administration of justice.¹⁷¹

IV. ANALYSIS (THE REGREENING)

In a cable from London to a New York newspaper, Mark Twain pointed out that “[r]eports of my death are greatly exaggerated.”¹⁷² The same could, or at least should, be said of the Federal Sentencing Guidelines. Federal judges do not have the authority to rule the Guidelines unconstitutional, and yet, ironically, federal judges are using a case (*Blakely*) that overturned a judge’s inappropriate extension of his authority to inappropriately extend their own authority to invalidate the Federal Sentencing Guidelines. The reports of the impending death of the Guidelines, however, are less exaggerated. Although it is an abuse of the authority of inferior courts to invalidate the Guidelines without Supreme Court direction on this point, the Guidelines do appear to be unconstitutional in light of *Blakely*. The framework and principles underlying the Guidelines could be preserved, however, with a minor adjustment to the scheme and a major adjustment to the way America sentences her criminals.

(copy on file with author).

166. *Id.*

167. S. Con. Res. 130, 108th Congress, 2d Session (2004).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. THE MERRIAM-WEBSTER DICTIONARY OF QUOTATIONS 94 (1992).

A. No Respect for Authority

The Supreme Court knew what questions the *Blakely* decision would raise, for its decision in *Apprendi* had raised the exact same questions four years prior, as evidenced by the exact same dissenters with the exact same arguments.¹⁷³ In his wisdom, Justice Scalia made it clear that the *Blakely* decision expressed no opinion on the Guidelines.¹⁷⁴ Somehow, Justice Scalia did not make it clear enough. Judges across the country are ignoring Scalia's advisement. In so doing, judges are not only ignoring Scalia's advisement, but they are ignoring a fundamental tenet of American jurisprudence: stare decisis.¹⁷⁵ Supreme Court case law recognizes the Guidelines as constitutional,¹⁷⁶ and "[i]t is [the Supreme Court's] prerogative alone to overrule one of its precedents."¹⁷⁷ Inferior courts must leave to the Supreme Court the authority to overrule its own decisions, even if a decision "appears to rest on reasons rejected in some other line of decisions."¹⁷⁸

Moreover, the Supreme Court has held that the Guidelines bind judges in the exercise of their responsibility to impose sentences in criminal cases.¹⁷⁹ Why would the United States Supreme Court, the final arbiter of constitutional issues, hold judges bound to impose sentences in accordance with an unconstitutional framework? Perhaps the Supreme Court will invalidate the Guidelines as an unconstitutional impingement upon the powers reserved to the jury, but until that day, the lower courts have no authority to contradict Supreme Court precedent and find the Guidelines unconstitutional.

Commentators, however, are not similarly constrained by authority, and, as such, it is no use for commentators to withhold their analysis. The Guidelines do in fact appear to be unconstitutional in light of the reasoning employed in *Blakely*. Justice O'Connor pointed out in her dissent¹⁸⁰ that it flies in the face of common sense to claim that applying a determinate scheme created as a result of a collaborative effort between the legislature and the judiciary based upon twenty years of sentencing reform violates the

173. Compare *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (O'Connor, J., Breyer, J., Kennedy, J., Rehnquist, C.J., dissenting) with *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (O'Connor, J., Breyer, J., Kennedy, J., Rehnquist, C.J., dissenting).

174. *Blakely v. Washington*, 124 S. Ct. 2531, n.9 (2004).

175. "To stand by things decided." BLACK'S LAW DICTIONARY 1414 (Bryan Garner ed., 7th ed. 1999).

176. See *Mistretta v. United States*, 488 U.S. 361 (1989); *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (per curiam); *United States v. Dunnigan*, 507 U.S. 87 (1993).

177. See *State Oil Co. v. Khan*, 552 U.S. 3, 20 (1997).

178. *Agostini v. Felton*, 521 U.S. 203 (1997).

179. *Stinson v. United States*, 508 U.S. 36 (1993).

180. *Blakely v. Washington*, 124 S. Ct. 2531, 2543-48 (2004) (O'Connor, J., dissenting).

defendant's Sixth Amendment right while unrestrained judicial authority poses no constitutional violation. Justice Scalia responded:

First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.¹⁸¹

The legal right of the defendant is the dispositive concern of Justice Scalia's response. It follows that this reasoning is applicable to those schemes that create legal rights. To apply this reasoning to a non-statutory body of rules, such as the Guidelines, it must be assumed that the Guidelines create legal rights. If the Guidelines create legal rights, then, as the majority opinion in *Blakely* ruled, a jury of the defendant's peers must prove those elements which bear upon the defendant's legal rights.¹⁸² So the question becomes: Do the Federal Sentencing Guidelines create legal rights?

If judges are bound to apply the Guidelines and to adjudicate the defendant's rights in accordance with the Guidelines,¹⁸³ then the Guidelines at least create de facto legal rights. Therefore, if a judge finds facts that expose the defendant to a harsher punishment in accordance with the defendant's de facto legal rights, there is at least a de facto violation of the Sixth Amendment. The *Blakely* majority made it clear that determinate sentencing schemes are not unconstitutional, stating that "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."¹⁸⁴ So, how can determinate sentencing schemes be implemented in a way that respects the Sixth Amendment? *Blakely* leaves the American criminal justice system and the legislature with that question unanswered.

181. *Id.* at 2541 (emphasis added).

182. U.S. CONST. amend. VI.

183. *Stinson v. United States*, 508 U.S. 36 (1993).

184. *Blakely*, 124 S. Ct. at 2545.

B. The Ironic Repercussions for the Defense

Presuming that the Guidelines, in their current form, are unconstitutional, defendants are left floating in guideline-void waters. At first blush, defendants across the country appear to desire invalidation of the draconian Guidelines, as they welcome back with open arms unfettered judicial discretion.¹⁸⁵ What looks good at night, however, is often another thing come morning. With the departure of the Guidelines, two dangers re-emerge from the history of sentencing within the American justice system. First, there is a very real possibility that defendants will lose their right to appeal their sentences. If the legal rights provided the defendants by the Guidelines are gone, so too are their grounds for appeal. In the pre-Guidelines days, federal trial judges had a “virtually unreviewable authority” to sentence defendants, and “the unreasonable or inexplicable—or even the bizarre—decision . . . was beyond correction.”¹⁸⁶ This danger has already begun to manifest itself in a federal court in Florida where the Guidelines recommended sentence provided for a twenty-seven month maximum.¹⁸⁷ The judge held that *Blakely* invalidated the Guidelines, reverted to indeterminate sentencing, and sentenced the defendant to twenty-eight months.¹⁸⁸ The defendant has no true ground for appeal other than to argue that the Guidelines should have applied, a hard sell when the defendant has just argued that the Guidelines do not apply. A more extreme example of this *Blakely* side effect can be found in Maryland where District Judge Catherine Blake found the federal Guidelines unconstitutional and then imposed a life sentence on defendant Aaron Foster for operating a drug gang in a housing complex, to which Mr. Foster’s lawyer astutely observed that arguing for invalidation of the Guidelines “wasn’t very helpful to Mr. Foster.”¹⁸⁹ Without the Guidelines as his legal basis, Mr. Foster has little ground for appeal.

Another danger lurking in the guideline-void water originally served as a primary impetus in promoting sentencing reform: disparity in sentencing (particularly of the racial variety). Pre-Guidelines, “the region in which the defendant [was] convicted is likely to change the length on time served from approximately six months more if one [was] sentenced in the South to

185. Federal Public Defenders from various districts, including California, Texas, Wisconsin, and the District of Columbia have argued for application of *Blakely* to the Federal Sentencing Guidelines. Assorted defense briefs, *available at* <http://www.ussguide.com/members/BulletinBoard/Blakely/Index.cfm> (last visited August 1, 2004).

186. Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. REV. 1247, 1251 (1997).

187. United States v. Parson, 6:03-CR-204-Orl-31DAB (M.D. Fla. July 22, 2004)

188. *Id.*

189. Stephanie Hanes, *U.S. Judge Criticizes Sentence Guidelines*, BALT. SUN, July 27, 2004, at 1A, *available at* 2004 WL 84125319.

twelve months less if one [was] sentenced in California.”¹⁹⁰ African-American bank robbery defendants convicted in the South were likely to serve thirteen months longer than similarly situated bank robbers in other regions.¹⁹¹ Research suggests that the Guidelines have enjoyed some success in reducing the disparity that was disturbingly prevalent in the system in the pre-Guidelines days.¹⁹² As such, the dissolution of the Guidelines is not a particularly good thing for many criminal defendants, especially minority defendants.

C. A (Very) Modest Proposal

Professor Bowman’s solution of raising the Guideline maximum to the statutory maximum, mentioned *supra*, can provide a temporary hold. This approach, however, is effectively no different from an indeterminate sentencing scheme and is inconsistent with one of the purposes behind the Guidelines: to fetter judicial discretion. In the event of Supreme Court invalidation of the Guidelines, either in part or in whole, Congress will be charged with developing, or at least revamping, United States sentencing law and policy in a more permanent way. The good news is that most of the Federal Sentencing Guidelines can be reserved. The bad news is that the part that must go, findings of fact solely by the judge that result in increased punishment, is going to result in a terrible inconvenience. Then again, the securities and protections guaranteed to the citizens of the United States in the Constitution never mention convenience.

A modest proposal for salvaging the Federal Sentencing Guidelines (and quashing the errant rulings of federal judges everywhere) can be illustrated in three steps. First, the concept that is embodied by the Guidelines must be maintained so as to preserve years of sentencing reform, insulate (as best it can) the system from disparity, and provide criminal defendants with grounds for appeal of their sentences. Thus, the basic framework of the Guidelines should be preserved. Second, the Guideline minima should be maintained, as courts have specifically upheld them as constitutional.¹⁹³ Third, the upward departure procedures that allow for punishment beyond the Guideline standard maximum (but below the United States Code maximum) should be amended so that the facts upon which the upward depar-

190. *Hearings on Sentencing Guidelines Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong. 676–77 (1987) (testimony of Commissioner Ilene H. Nagel).

191. *Id.*

192. Memorandum from Paul J. Hofer, Senior Research Associate, to the Commissioners of the United States Sentencing Commission, regarding Research Disparity Research (June 1, 1998) (copy on file with author).

193. *Harris v. United States*, 536 U.S. 545 (2002).

tures rely are found by a jury in accordance with the principles set forth in *Apprendi* and *Blakely*.¹⁹⁴

This solution is as simple as it sounds, notwithstanding part three of the proposal, which would require a jury to decide every element crucial to an upward departure (e.g., amount of drugs in possession, presence of violence, use of weapon, etc.) and thereby stretch already extended judicial resources. The Supreme Court has in fact “given intelligible content to the right of jury trial,”¹⁹⁵ and Justice O’Connor was right, it will cost us dearly—especially administratively.¹⁹⁶ In the interests of judicial economy, the jury should determine these upward departure facts at sentencing. Otherwise, there is the risk of wasting an incredible amount of judicial time and resources in certain cases, such as one in which the jury finds each detailed fact at trial only to result in an acquittal. Finding facts would not require of the jury the employment of a new skill but, rather, simply the consumption of more time. One foreseeable critique of this approach is that it would require prosecutors to charge all relevant facts in the indictment about the way the crime was committed “before many of the facts relevant to punishment are known.”¹⁹⁷ Accordingly, federal prosecutors should continue to draft indictments in the usual fashion pre-*Blakely*. At sentencing, however, prosecutors seeking an upward departure should draft a separate post-trial sentencing indictment.

Another foreseeable critique, as evidenced by Congress’s concurrent resolution, is that the Guidelines are not severable in this fashion but, rather, were intended as a “cohesive and integrated whole, and not in a piecemeal fashion.”¹⁹⁸ The Guidelines, in their present form, operate as a sentencing system that incorporates jury findings and judicial findings. Amending another jury determination into the Guidelines does not render them severed; it simply renders them amended.

Although this solution would be terribly inconvenient and quite possibly an administrative nightmare, this would not be necessary in every case. In fact, most cases would continue business as usual. The only times this sentencing trial would be required is when the prosecutor seeks an upward departure from the Guideline maximum sentence that the defendant can receive based on the jury findings alone, and “many federal cases involve only a limited number of enhancements. Often, if a case involves one enhancement, others are not necessary.”¹⁹⁹ Furthermore, the facts necessary

194. As the Kansas legislature did when forced to bring its determinate sentencing scheme in line with *Apprendi*. See KAN. STAT. ANN. § 21-4718 (2004).

195. *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004).

196. *Id.* at 2543 (O’Connor, J., dissenting).

197. *Id.* at 2555 (Breyer, J., dissenting).

198. S. Con. Res. 130, 108th Congress, 2d Session (2004).

199. Letter from John Sands, the Chair of the Federal and Community Defenders Sen-

for sentencing are substantially less complex than those necessary for a charge.²⁰⁰ This administrative tax is not to be suffered in full, however, as such a modified structure of the Guidelines would likely result in more plea-bargaining, as Justice Breyer noted in his *Blakely* dissent.²⁰¹ Fewer trials as a result of more pleas would serve to offset some of the aforementioned administrative costs.

V. THE CONCLUSION

Inferior federal judges lack the authority to find the Federal Sentencing Guidelines unconstitutional. They are doing it anyway, and, despite their defiance of *stare decisis*, their positions are justifiable in light of the reasoning employed by the Court in *Blakely v. Washington*. The Supreme Court will soon hear arguments on this issue and thereby restore some of the uniformity to the federal sentencing system that it stole with its *Blakely* decision. For all practical purposes, the next step for commentators and critics is the development of plans to remedy the constitutional infirmities existent in the Federal Sentencing Guidelines. This can be achieved largely through retaining the status quo, with the exception of requiring sentencing trials and sentencing indictments when upward departures are requested by the prosecution. Although a sentencing trial in a limited number of cases does not conform to the wishes of the judiciary, the legislature, or the citizen who has to miss another day of work for jury duty, it is what the Constitution demands. From search warrants and habeas corpus to school integration and Miranda warnings, the history of the Constitution's Amendments is replete with sacrifices of judicial resources and administrative effort attempting to ensure the protections and liberties that those Amendments guarantee us; the Sixth Amendment is no exception.

*Christopher P. Carrington**

tencing Guidelines Committee, to the United States Sentencing Commission 2 (July 9, 2004) (copy on file with author).

200. *Id.*

201. *Blakely*, 124 S. Ct. at 2557 (Breyer, J., dissenting).

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