Notre Dame Law Review

Volume 80 | Issue 4 Article 7

4-1-2005

What I Have Feared Most Has Now Come to Pass: Blakely, Booker, and the Future of Sentencing

Katie M. McVoy

"WHAT I HAVE FEARED MOST HAS NOW COME TO PASS": *BLAKELY*, *BOOKER*, AND THE FUTURE OF SENTENCING

*Katie M. McVoy**

INTRODUCTION

In her dissenting opinion to the Supreme Court's decision in *Blakely v. Washington*,[1] Justice O'Connor echoed her prophetic statements in *Apprendi v. New Jersey*,[2] lamenting the far-reaching and disturbing repercussions of the Court's opinion. "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."[3] *Blakely* is the most important sentencing decision in over fifty years and in just a few short months has wreaked havoc on sentencing schemes.[4] Justice O'Connor's words are ringing true in the ears of trial judges, prosecutors and legislators across the country as they begin to face the practical realities of working within a legal system with an ever-increasing role for the jury.

While *Blakely* focused specifically on a guidelines system in the state of Washington, *United States v. Booker*[5] has revealed its far-reaching impact on both state and federal systems. Part I of this Note will address the case law that ultimately led to *Blakely* and its results, and Part II will discuss viable sentencing options that remain for legislatures after the *Blakely* decision. Ultimately, this Note will argue that

---

* Candidate for Juris Doctor, Notre Dame Law School, 2006; B.A., Philosophy and Theater, Saint Mary's College, 2003. I would like to extend thanks to all of those who helped with the writing process of this Note, especially Professor Jimmy Gurulé, who encouraged me to tackle such a difficult topic and provided invaluable guidance throughout the entire process.

1 124 S. Ct. 2531, 2550 (2004) (O'Connor, J., dissenting).

2 530 U.S. 466, 523–24 (2000) (O'Connor, J., dissenting).

3 *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting).

4 *Id.* (O'Connor, J., dissenting); *see also* Josh Jacobson, Blakely v. Washington: *Off the Judicial Richter Scale*, BENCH & B. MINN., Sept. 2004, at 24 (arguing that *Blakely* has indeed caused great doubt and disturbance on the national and state levels).

5 125 S. Ct. 738 (2005).

Blakely's treatment of jury power has held unconstitutional any judicial factfinding. Upon close inspection, even indeterminate sentencing schemes and advisory guidelines schemes may suffer from constitutional infirmity, while fully mandatory systems are unduly harsh to defendants. What remain are jury sentencing and real offense systems, and although these schemes pass the test of constitutionality, they suffer from serious practical and economic constraints. Although this Note concludes that a real offense system based on jury factfinding is the most constitutionally firm system, the Supreme Court's recent decisions suggest a return to indeterminate sentencing and the failed experiment of guideline sentencing. In short, in passing down the holding in *Blakely*, the Supreme Court may have caused more damage than even Justice O'Connor realized.

I. HISTORY'S WARNINGS: *BLAKELY* AS THE INEVITABLE RESULT OF PRECEDENT

In 1984, Congress enacted the Sentencing Reform Act.[6] In the years that followed the advent of the Federal Sentencing Guidelines, states began adopting similar guideline systems. By 2001, more than twenty-five states had enacted systems with elements of mandatory sentencing and guided judicial discretion.[7] However, starting with its decision in *Jones v. United States*,[8] the United States Supreme Court began to cast doubt on the constitutionality of guidelines systems under its interpretations of the Sixth Amendment. That line of decisions culminated with *Blakely v. Washington*,[9] which found unconstitutional a section of the state of Washington's guideline system that authorized an increase in a defendant's sentence based on judicial

6 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

7 *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentencing Enhancements Based on Deliquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1118 n.17 (2003) (quoting JOAN PETERSILIA & SUSAN TURNER, GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES 1 (1985)).

> By 1985, at least 25 states had enacted determinate sentencing statutes, 10 states had abolished their parole boards, and 35 states had mandatory minimum sentence laws . . . . [M]any states and jurisdictions had established formal guidelines for sentencing decisions (e.g., prison vs. probation, length of sentence), for determining supervision levels for parolees and probationers, and for parole release.

JOAN PETERSILIA & SUSAN TURNER, GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES 1 (1985).

8 526 U.S. 227 (1999).

9 124 S. Ct. 2531.

factfinding. That decision tolled the death knell for guideline sentencing. *United States v. Booker*[10] brought the first mourner.

The Supreme Court began its march towards *Blakely* in 1999,[11] when it decided *Jones v. United States.*[12] The defendant in *Jones* was convicted of violating the federal carjacking statute,[13] which had three distinct sections.[14] Depending on resulting bodily injury or death, the defendant's sentence could increase from fifteen years to life in prison. The question presented to the Supreme Court was whether the statute defined three distinct crimes or if each section of the statute merely named sentencing factors that could increase a defendant's sentence upon conviction.[15] The Court, construing the statute in such a way so as to avoid serious constitutional problems, found

---

10 125 S. Ct. 738 (2005).

11 The Court had, of course, previously discussed the jury's role and definitions of elements of crimes. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986). However, *Jones* began the line of cases that formed the jurisprudence allowing, even demanding, the decision in *Blakely.* For a more comprehensive look at the Court's jurisprudence regarding juries and defining the elements of offenses, see Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence,* 117 HARV. L. REV. 1236, 1236–49 (2004) (discussing the Court's jurisprudence beginning with *In Re Winship,* 397 U.S. 358 (1970)).

12 526 U.S. 227. Prior to *Jones,* the Court heard arguments in *Almandarez-Torres v. United States,* 523 U.S. 224 (1998), considering the constitutionality of a federal deportation statute that allowed for an increase in the statutory maximum of two years if a judge found, by a preponderance of the evidence, that the defendant had been deported subsequent to a criminal conviction. *Id.* at 226–27 (citing 8 U.S.C. § 1326(a)–(b) (2000)). The Court found that prior convictions were sentencing factors, not elements of the offense, and could be found by a judge using a preponderance of the evidence standard. *Id.* at 231–35. The Court suggested that a finding requiring a jury to find all facts regarding an increased sentence would call into question the Court's death penalty jurisprudence, which allowed judicial factfinding of aggravating factors. *Id.* at 247. However, that jurisprudence was directly overruled in *Ring v. Arizona,* 536 U.S. 584 (2002). *See infra* notes 34–38 and accompanying text.

13 18 U.S.C. § 2119 (2000).

14 Whoever, with the intent to cause death or serious bodily harm, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Id.

15 *Jones,* 526 U.S. at 231–32.

that the statute in fact created three separate crimes.[16] In short, the Court held that the statute would be constitutionally infirm if it allowed a judge to find the sentencing factors that would increase a sentence from a maximum of fifteen years to life.

The Court included in its language a warning to legislatures about the constitutional problem of removing the jury from the factfinding process. "The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled."[17] This language already suggests two key concerns that the Court continues to return to: the weakened role of the jury in criminal trials and the questionable constitutional nature of judicial factfinding. Although *Jones* raised the first serious doubt as to the validity of judicially found sentencing factors using a preponderance of the evidence standard,[18] common usage of the words "statutory sentencing range" prevented serious consideration that *Jones* would have any effect on guideline schemes.

In its next term, the Court used the language that would find its way into *Blakely* and disrupt the thus far unhindered path of judicial factfinding during criminal sentencing. In *Apprendi v. New Jersey*,[19] a case that sent thousands of defendants back into courts of appeals,[20] the petitioner pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb.[21] Under New Jersey law, a second-degree count carried with it a maximum penalty of five to ten years and a third-degree offense carried with it a maximum pen-

16 *Id.* at 235 ("Here, on the contrary, the search for comparable examples more readily suggests that Congress had separate and aggravated offenses in mind when it employed the scheme of numbered subsections in § 2119.").

17 *Id.* at 248.

18 "The principle that the jury were the judges of the fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke." *Id.* at 248 n.8.

19 530 U.S. 466 (2000).

20 Ring v. Arizona, 536 U.S. 584, 620 (2002) (O'Connor, J., dissenting).

> As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*. These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide.

Id. (O'Connor, J., dissenting).

21 *Apprendi*, 530 U.S. at 469–70.

alty of three to five years.[22] However, the State requested an enhanced sentence based on a judicial finding by a preponderance of the evidence that one count of second-degree possession was committed with a racially biased purpose.[23] The judge found the racially biased purpose and sentenced the petitioner to twelve years on one count of second-degree possession. The Supreme Court granted certiorari on the issue of whether the "finding of bias upon which [Apprendi's] hate crime sentence was based must be proved to a jury beyond a reasonable doubt."[24] The Court found that a jury finding was required.

Citing language from *Jones*, the Court held that

> "under the Due Process Clause of the Fifth Amendment and the notice and *jury trial guarantees of the Sixth Amendment*, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, *submitted to a jury*, and proven beyond a reasonable doubt."[25]

The Court based its holding, in large part, on its "elements jurisprudence" reasoning: although a state may define a crime as it sees fit, if an element labeled a "sentencing factor" in fact increases the penalty that a defendant may face, it is improperly labeled. "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[26] If the fact does indeed expose the defendant to greater punishment, judicial factfinding is constitutionally infirm. Those facts need to be submitted to the jury. In short, the *Apprendi* Court raised two key issues: first, that "constitutional limits exist to States' authority to define away the facts necessary to consti-

---

22 *Id.* at 470.

23 *See* N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000). The statute states that a hate crime can lead to an extended sentence if "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*

24 *Apprendi*, 530 U.S. at 471. The Court looked at the adequacy of New Jersey's procedure in addition to the facts of the case to determine that judges were given the authority to find facts that increased a sentence based on a preponderance of the evidence standard. Therefore, if the Court found the procedure inadequate, it was not simply the procedure in this case, but the procedure in all similar cases. *See id.* at 475.

25 *Id.* at 476 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

26 *Id.* at 494.

tute a criminal offense,"[27] and second, "'that a state scheme that keeps from the jury facts that expos[e] [defendants] to greater or additional punishment,' may raise a serious constitutional concern."[28]

This second key issue provides a direct link to the Court's reasoning in *Blakely*. Writing for the *Apprendi* majority, Justice Stevens raised concern over the waning role of the jury.[29] His opinion reinforces the role of jury as factfinder.

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes from the jury the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected by the jury verdict alone.[30]

It is the jury verdict that authorizes sentencing, and these words find their way, nearly verbatim, into *Blakely*.[31] The opinion reinforces the role of the jury as the lone factfinder with a reference to Blackstone: "'*[T]he truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's]

---

27 *Id.* at 471. The Court's discussion of the right to a jury trial included an analysis of *United States v. Gaudin*, 515 U.S. 506 (1995), and *In re Winship*, 397 U.S. 358 (1970). *Apprendi*, 530 U.S. at 471. *In re Winship*, which was the pinnacle case in elements jurisprudence, guaranteed a jury determination of every element of a crime. 397 U.S. at 361. *Gaudin* reinforced that guarantee, reminding states that a defendant is guaranteed a jury determination beyond a reasonable doubt of every element of a crime. 515 U.S. at 510.

28 *Apprendi*, 530 U.S. at 486 (alteration in original) (quoting McMillan v. Pennsylvania, 479 U.S. 79, 88 (1986)). The first issue—what the state chooses to define as an element—is the issue that has created the most abundant scholarship. For discussions about the elements jurisprudence of *Apprendi* and its progeny, see Adam Thurschwell, *After* Ring, 15 FED. SENT. R. 1 (2002).

29 We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt.

Apprendi, 530 U.S. at 483 (quoting Jones v. United States, 526 U.S. 227, 247–48 (1999)). The possibility of the jury's role being slowly pulled away by erosion, while intimately related to elements jurisprudence is, in fact, a separate concern that becomes more central in the *Blakely* decision.

30 *Id.* at 482–83.

31 Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004).

equals and neighbours . . . .'"[32] Use of this language suggests that it is not only elements that must be proven beyond a reasonable doubt, but any accusation that increases the defendant's sentence.[33]

In *Ring v. Arizona*, the Supreme Court extended its thinking to death penalty cases, requiring that a jury find each necessary aggravating factor beyond a reasonable doubt.[34] The petitioner in *Ring* was convicted of felony murder, the penalty for which was either life imprisonment or death. However, before a death sentence could be issued, the judge was required to find an aggravating factor.[35] Using *Apprendi* language that the question was one not of form but of effect, the Court found that Arizona's statute "'authorize[d] a maximum penalty of death only in a formal sense.'"[36] "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact—no matter how the State labels it—it must be found by a jury beyond a reasonable doubt."[37] What constitutes a statutory maximum is that which is imposed *without* the finding of additional facts. Although, statutorily, felony murder carried with it a maximum sentence of death under Arizona law, because that sentence could not be imposed without the finding of additional facts, it did not serve as the "statutory maximum" for *Apprendi* purposes, but rather as an enhanced sentence. This broad reading makes a statutory maximum not the sentence included in the statute itself, but the maximum allowed by that statute coupled with exceptions and limitations put forth in other legislative pronouncements.[38]

The final stroke fell in *Blakely*.[39] Blakely pled guilty to second-degree kidnapping in Washington, a felony that carried with it a possi-

---

32 *Apprendi*, 530 U.S. at 477 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343).

33 For discussion of the failure of indeterminate sentencing in the light of *Blakely* jurisprudence, see *supra* notes 90–112 and accompanying text. Justice O'Connor's dissent predicted this very problem.

34 536 U.S. 584 (2002).

35 *Id.* at 592 n.1.

36 *Id.* at 604 (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting)).

37 *Id.* at 602.

38 *See id.* at 610 (Scalia, J., concurring).

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Id. (Scalia, J., concurring). It is language of this type that threatens even indeterminate sentencing. *See infra* notes 90–112 and accompanying text.

39 124 S. Ct. 2531 (2004).

ble sentence of ten years. The Washington sentencing scheme, however, gave a range of fifty-three months for second-degree kidnapping. During sentencing, the judge found an aggravating factor and increased the sentence to ninety months.[40] On appeal, the Court considered whether the judge's finding by a preponderance of the evidence of an aggravating factor that increased the range from fifty-three months to ninety months violated *Apprendi.* The Court found that it did.

Finding that the sections of Washington's sentencing scheme that would increase a defendant's "sentencing range" based on judicial factfinding were violative of the Sixth Amendment, the Court reinforced the new definition of "statutory maximum" that surfaced in *Ring.*[41] "[T]he '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.*"[42] Justice Scalia, writing for the majority, reasoned that if the judge had imposed a ninety-month sentence without the finding of additional facts, he would have been reversed. Therefore, the finding of fact was essential to the length of punishment, in effect making it an element of the crime.[43] But again, it is not simply the elements jurisprudence that troubles the Court; it is also the waning role of the jury. Not only does giving the judge factfinding capabilities in the sentencing phase violate a defendant's right to a jury determination of all relevant facts, it also violates the rights of jurors to be factfinders.[44]

The Supreme Court reinforced the long reach of *Blakely* in the first case it heard this term. Jointly hearing *United States v. Booker* and *United States v. Fanfan,*[45] the Court applied *Blakely*'s Sixth Amendment jurisprudence to the Federal Sentencing Guidelines. Booker was charged with possession with intent to distribute at least fifty grams of cocaine, putting him in a sentencing range of 210 to 265 months. At his sentencing hearing, however, the judge determined by a preponderance of the evidence that he had possessed an additional 566 grams of cocaine, increasing his sentencing range to between 360

40 *Id.* at 2535.

41 *Id.* at 2537.

42 *Id.*

43 *Id.* at 2538.

44 *See id.* at 2537 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." (citation omitted) (quoting 1 JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872))).

45 United States v. Booker, 125 S. Ct. 738 (2005).

months and life.[46] Fanfan was convicted of conspiracy to distribute at least 500 grams of cocaine. His sentencing range was increased from seventy-eight months to a 188-to-235-month range based on judicial factfinding that held him responsible for an additional 2.5 kilograms of cocaine and 261.6 grams of crack cocaine.[47] In overturning both defendants' sentences, the Court held that the Federal Sentencing Guidelines were not meaningfully different from the Washington guidelines scheme it overturned in *Blakely*. "This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges."[48] Any discussion about distinguishing the federal system from Washington's ended.

III. FEAR MADE MANIFEST: WHAT CAN SURVIVE THE HOLDING IN *BLAKELY*?

As prosecutors, judges and legislatures look to their own sentencing schemes, there is a recognition that sentencing, as it has been known in this country for the last twenty years, is a failed experiment. The constitutional restraints on guideline sentencing requires a second look at old sentencing regimes as well as creative thinking about new sentencing alternatives. Each alternative must first pass the *Blakely* test and then withstand the practical considerations of efficiency, accuracy and use of limited judicial resources. Ultimately, no alternative offers the efficiency of guideline sentencing while meeting the original goal of a sentencing scheme that treats similarly situated defendants similarly.

A. Determinate Sentencing

A first alternative is a determinate system that does not include any additional sentencing factors. *Blakely*'s holding does not suggest that determinate sentencing schemes are, in and of themselves, unconstitutional.[49] Despite the constitutional firmness of various determinate sentencing schemes, these kinds of schemes suffer from practical infirmities.

---

46 *Id.* at 746.

47 *Id.*

48 *Id.* at 742.

49 *Blakely*, 124 S. Ct. at 2540 ("We are not, as the State would have it, 'finding determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." (internal citation omitted)).

1. Mandatory Systems

There is currently no state that employs an entirely mandatory sentencing scheme, a scheme in which each offense carries with it a certain sentence regardless of any mitigating or enhancing factors. In a strictly mandatory system, the offense itself creates the sentence. For example, all defendants convicted of aggravated assault receive ten years, regardless of the circumstances surrounding the crime or the characteristics of the offender. Constitutionally, this kind of scheme would not draw successful Sixth Amendment challenges. The only facts relevant to conviction and sentencing are the elements of the crime, leaving no room for judicial factfinding. *Blakely* issues are thus not raised.

However, on a policy level, mandatory sentencing is not a response that either defense attorneys or most legislators would choose. A preliminary examination of mandatory sentences suggests not only constitutional firmness but also simple accuracy—defendants who commit the same crime receive the same punishment. However, this shallow analysis fails to recognize a more complex problem. Not every offender who commits a particular crime has the same level of culpability.[50] For example, take two defendants *A* and *B*, both of whom committed a robbery. Defendant *A* has a long criminal history and robbed the store for the sole purpose of seeing if he could. Defendant *B* has never been in trouble with the law and robbed the store to feed his family who have been suffering since he lost his job. While defendant *B* cannot present any affirmative defense based on those circumstances, his culpability is clearly not the same as defendant *A*.

The law has long recognized this fact: the character of the defendant and the circumstances of the crime play an important role in culpability. Traditional discretionary sentencing allowed flexibility to ensure that laws made sense in the case of any particular defendant.[51] When the discretionary system failed to meet the goal of similar treatment for similarly situated defendants, Congress and state legislatures responded with a system of guidelines to decrease disparity.[52] A sentencing scheme that fails to take into account these aggravating and

50 Even prosecutors recognize this to be the truth. For a discussion of varying levels of culpability in the prosecution of crime, see Amie N. Ely, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 268–78 (2004).

51 *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 37 (2003).

52 S. REP. NO. 98-225, at 37–39, 161–62 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3220–22, 3244–45.

mitigating circumstances results in identical sentences for the same statutory crimes but also results in decidedly unequal treatment for defendants who are not similarly situated. This kind of sentencing scheme is simply too harsh.[53] It seems unlikely that the interpretation of the Sixth Amendment requiring jury factfinding would lead legislators to overlook the problems of disparity and harshness in a mandatory system.

In addition, a mandatory system may increase prosecutorial power and encourage sentencing gamesmanship.[54] Already, ninety-six percent of cases settle before going to trial.[55] With a mandatory system, a defendant who is facing a particular charge cannot hope for leniency in sentencing when deciding whether to take a case to trial. His best hope for a more lenient sentence is a deal with the prosecution that would reduce the number of charges or their severity. This kind of plea bargaining can cut the other way as well. "As the Commission's report and other studies have explained, prosecutors and judges can and will sometimes evade mandatory sentencing provisions when they seem unjust."[56] So whether it be to encourage plea bargaining or in order for a prosecutor to avoid the harshness of certain laws, mandatory minimums call out for gamesmanship when it comes to charging and plea bargaining.

2. Mandatory Minimums

Mandatory minimums, which have not been found to violate Sixth Amendment jury trial guarantees, may be a response to *Blakely*. The same day the Supreme Court decided *Ring*, it also passed judgment on *United States v. Harris*.[57] Harris was sentenced to a mandatory minimum of seven years after a judge found at sentencing that he had brandished a weapon during a drug offense.[58] The Supreme Court granted certiorari to determine whether the fact that Harris brandished a firearm was a separate crime or if it was a sentencing factor

53 *See* Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 108 (1999) (discussing the continued imposition of harsh mandatory sentencing schemes).

54 Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter Blakely *Hearing*] (testimony of Ronald Weich), *available at* http://judiciary.senate.gov/hearing.cfm?id=1260.

55 Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Justice Statistics*, *at* http://www.ojp.usdoj.gov/bjs/fed.htm (last modified Jan. 27, 2005).

56 Berman, *supra* note 53, at 99.

57 536 U.S. 545 (2002).

58 *Id.* at 550.

that could be found by the judge. Upholding the finding in *McMillan v. Pennsylvania*,[59] *Harris* held that the facts that create a mandatory minimum, so long as they do not extend a defendant's sentence beyond the statutory maximum, need not be submitted to a jury and found beyond a reasonable doubt.[60] In *Blakely*, the Court only discusses those facts that increase the defendant's sentence beyond the statutory maximum. What is clearly absent from the Court's opinion is any mention of facts that would raise the statutory minimum, the exact purpose mandatory minimums serve. Therefore, so long as the mandatory minimum does not extend the defendant's sentence beyond its statutory length, *Harris* remains good law and a defendant can be given a mandatory minimum sentence based on judicially found facts.[61]

However, this view of mandatory minimums is inconsistent with the fear about judicial infringement on the role of juries. Although there are those who claim that the only role of a jury is to protect a defendant from sentences above the statutory maximum,[62] the jury's role as factfinder does not stop at facts essential to statutory maximums. As the dissenters in *Harris* pointed out, *Apprendi*'s reasoning should apply to any fact that changes the range of punishment, including mandatory minimums.[63] There is an inherent inconsistency in finding that the Sixth Amendment requires the jury to find facts relevant to the statutory maximum but denies them the right to find facts that decrease a defendant's ability to serve a shorter sentence.[64]

However, a system of mandatory minimums is inherently inconsistent with the goals of guideline sentencing. As Senator Orrin Hatch observed:

> [T]he general approaches of the two systems are inconsistent. Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines pro-

59 477 U.S. 79 (1986).

60 *Harris*, 536 U.S. at 557.

61 However, it is important to recall the definition of statutory maximum: the maximum sentence that can be imposed based on the facts found by the jury alone. A mandatory minimum that would extend a defendant's sentence beyond a mandatory guidelines range would exceed the statutory maximum as defined by *Blakely*. Therefore, facts triggering statutory minimums exceeding guidelines ranges would need to be found by a jury beyond a reasonable doubt.

62 Note, *supra* note 11, at 1246.

63 *Harris*, 536 U.S. at 574 (Thomas, J., dissenting).

64 *See* Barkow, *supra* note 51, at 106 (discussing the danger of allowing juries to only find the facts relevant to statutory maximums but not minimums).

> vide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[65]

Hatch's commentary raises three important points regarding the failure of mandatory minimums. First, mandatory minimums are not individual to different defendants in different circumstances. They suffer from the same infirmities as a strictly mandatory system in that they fail to account for the fact that defendants committing the same crime may have differing levels of accountability. Second, mandatory minimums, while failing to take into account varying levels of culpability, overemphasize criminal history. Minimal differences in criminal history can trigger a mandatory minimum and treat very similar defendants quite differently. Finally, the charge-specific nature of mandatory minimums can result in the kind of prosecutorial gamesmanship that results from any kind of mandatory system.

However, since *Blakely* there has been considerable talk in Congress and in academic circles that the destruction of the Federal Sentencing Guidelines may bring about an increase in mandatory minimums for certain crimes.[66] If the Supreme Court sees fit to limit legislative intervention into sentencing through guidelines, it is possible that legislatures will try to assert their influence through the use of mandatory minimums. There is nothing to suggest that some legislators, who are already concerned about judges providing sentences that are too lenient even within sentencing systems, will rest easy with the destruction of such a system or encourage a return to discretionary sentencing.[67]

---

65 Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194–95 (1993).

66 *See* Jason Hernandez, Blakely*'s Potential*, 38 COLUM. J.L. & SOC. PROBS. 19, 36 n.66 (2004) (suggesting that mandatory minimums may be a congressional response).

67 *See, e.g.*, 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney) ("Unfortunately, judges in our country all too often are arbitrarily deviating from the sentencing guidelines enacted by the United States Congress based on their personal biases and prejudices, resulting in wide disparity in sentencing."). Comments such as these by Representative Feeney highlight Congress's unease about leaving sentencing in the hands of judges.

But mandatory minimums fail as a matter of policy. Despite the ever-increasing use of mandatory minimums, some members of the legislature, academia and the Supreme Court itself have begun to attack the practice. For example, during its ninety-first legislative session, the legislature of the state of Michigan voted to overturn the state's mandatory minimum laws.[68] In a recent address to the American Bar Association (ABA), Justice Kennedy berated the wisdom of a system of mandatory minimums. "By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[69] The ABA has joined Justice Kennedy in his disapproval of mandatory minimums, calling for an end to such sentencing schemes.[70] Mandatory minimums, called by some the "sledgehammers of sentencing," lay down a base level for certain crimes regardless of the circumstances.[71] These cliffs of sentencing compromise ideas of proportionality and culpability.[72] Whereas guideline sentencing has touted ideals of sentencing that matches culpability, mandatory minimums, most often based on drug amounts, do little to take into consideration the varied culpabilities and situations of defendants convicted of similar crimes. The overturning of guideline systems, while calling for some legislative response, does not call for an increase in harsh sentences which result in unequal treatment of defendants.

3. Downward Departures

As a response to the harshness of mandatory systems, the legislature could consider a modified mandatory system: one that starts with a base sentence and then allows for downward departures based on mitigating factors. This kind of system would be constitutional under *Blakely*. The dicta in *Apprendi* stated that a judge is authorized to look at mitigating factors not found by the jury to decrease a defendant's

68 Bill McConico, *Mandatory Minimums: Drug Sentencing Gets an Overhaul*, MICH. B.J., Nov. 2003, at 44.

69 Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

70 STANDARDS FOR CRIMINAL JUSTICE ON SENTENCING ALTERNATIVES AND PROCEDURES 18-3.21(b) ("A legislature should not proscribe a minimum term of imprisonment for any crime.").

71 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2483 (2004).

72 John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 314 (2004).

sentence.[73] This language suggests that the power of the jury rests in the determination of a statutory maximum and does not stretch to the area of minimum sentences. Although factfinding is the jury's province, the *Apprendi* dicta limits this reservation of factfinding power to facts that would increase a defendant's sentence, not those that would reduce it. *United States v. Ameline* champions this view, where mitigating factors can be found by a judge but enhancing factors must be submitted to a jury and found beyond a reasonable doubt.[74] In arguing for the severability of the sentencing guidelines, the *Ameline* court found no violation of the Sixth Amendment right to a jury trial when a defendant submitted and a judge found facts that would reduce a defendant's sentence.[75]

However, downward departures without enhancements do not meet the goals of sentencing: to ensure sentences are equitable between defendants and to ensure sentences are adequate to fit the crime.[76] Instead, downward departures without corresponding enhancements create a "one-way street" from which defendants would benefit, but society as a whole would suffer. "Essentially the defendant would be arguing 'what's mine is mine, what's yours is negotiable.'"[77] Arguments made by courts, such as the *Ameline* court, which try to prove that congressional intent would be served by requiring jury determination of aggravating factors but not for downward departures, are simply unpersuasive.[78] Because guideline systems served as a re-

---

73 Apprendi v. New Jersey, 530 U.S. 466, 490 n.16 (2000).

> If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon a defendant a greater stigma than the accompanying verdict alone.

Id.

74 376 F.3d 967, 981–82 (9th Cir. 2004). *But see* United States v. Mueffelman, 327 F. Supp. 2d 79 (D. Mass. 2004) (holding that unconstitutional segments were not severable from Federal Sentencing Guidelines because congressional intent would be thwarted by a severed system).

75 *Ameline*, 376 F.3d 967; *see also* United States v. Swan, 327 F. Supp. 2d 1068 (D. Neb. 2004) (allowing for a downward departure where the defendant's criminal history score overrepresented the seriousness of his crime but refusing to allow judicially found enhancements).

76 *See* S. REP. No. 98-225, at 37–39, 161–62 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3220–22, 3244–45.

77 United States v. Croxford, 324 F. Supp. 2d 1230, 1245 (D. Utah 2004).

78 *Ameline*, 376 F.3d at 981–82.

> Although severance would change how those facts are determined, and by whom, severance would have no effect on the Congressional goal of achieving consistency of sentences in cases that involve similar offense conduct. In

sponse to perceived increases in crime, raising the bar for prosecution but keeping the bar consistent for the defense would obviously undermine intent to provide sentences that fit the crime. However clearly within the dictates of *Blakely* this kind of regime would fall, its practical failures make it simply unworkable.

B. Sentencing Guidelines—Literally

Justice Breyer, in his majority opinion in *United States v. Booker*, offered a solution to the problem of *Blakely* by instituting advisory guidelines. The second part of the Supreme Court's most recent decision regarding guidelines and *Blakely* held that severing 18 U.S.C. § 3553(b)(1), which makes the guidelines mandatory, would result in a constitutional advisory guidelines system. This kind of system "requires a sentencing court to consider the Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well."[79] The opinion argued that congressional intent would be upheld with this kind of an advisory system.[80]

Prior to this decision, Utah, Maryland, Delaware, Virginia, Arkansas and Missouri had all adopted guideline systems that are explicitly "voluntary" and not subject to appeal.[81] For example, Missouri code section 558.019, which creates a Missouri sentencing commission, explicitly states the voluntary nature of any guidelines promulgated by that body: "Courts shall retain discretion to lower or exceed the sentence recommended by the commission as otherwise allowable by law, and to order restorative justice methods, when applicable."[82] Similarly, Arkansas's sentencing scheme explicitly states in its purpose the voluntary nature of the guidelines: "Though voluntary, the purpose of establishing rational and consistent sentencing standards is to seek to ensure that sanctions imposed following conviction are proportional to the seriousness of the offense of conviction and to the extent of the offender's criminal history."[83] When determining a sentence, the sentencing judge uses a system of calculations to determine the "pre-

---

fact, were we to hold that *Blakely* precludes application of the Guidelines as a whole, we would do far greater violence to Congress' intent than if we merely excised the unconstitutional procedural requirements.

Id.

79 United States v. Booker, 125 S. Ct. 738, 757 (2005).

80 *Id.*

81 Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 428 (2000).

82 *Id.*

83 ARK. CODE ANN. § 16-90-801(b)(1) (Lexis Supp. 2003).

sumptive sentence."[84] However, the statutorily prescribed maximum and minimum retain precedence over the presumptive sentence and the judge retains discretion to sentence within the range prescribed by statute.[85] The other states and Washington, D.C., contain similar provisions for sentencing.

A guidelines system that is not mandatory would not suffer from the same infirmities that the Washington system in *Blakely* did. In the case of a literal guideline sentencing scheme, the statutory maximum and minimum are those described in the statute defining the offense.[86]

As a policy matter, actual guideline sentencing brings with it several positives. It would keep intact the original goals of the Sentencing Reform Act and similar reforms in the states—namely, uniformity in sentencing similarly situated defendants.[87] In addition, it would provide some consistency for judges who have come to feel more comfortable sentencing defendants based on a committee's determination of societal beliefs regarding sentencing and statistical analysis.[88] However, there are internal oddities with a sentence that uses advisory guidelines. Although judges may, in almost all circumstances, rely on a set of guidelines, if the system were based on an underlying indeterminate sentence, there would likely be no right of appeal if the "guidelines" in their strictest sense were not applied properly. In fact, guideline sentencing, in a true sense, would not ever *require* proper application.[89] Without a right of appeal, what results is not actually a guidelines system, but a simply indeterminate system with some suggested rules that federal judges may or may not follow. Federal

84 *Id.* § 16-90-803(a)(2)(A).

85 *Id.* § 16-90-803(b)(3)(A)(i)(c).

86 *See* United States v. Booker, 125 S. Ct. 738, 756 (2005).

87 S. REP. No. 98-225, at 37–39, 161–62 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3220–22, 3244–45.

88 *See, e.g.*, Jim Felman, *An Interview with Sol Wachtler: A Former Judge Speaks Out About the Federal Sentencing Guidelines*, FED. LAW., May 1999, at 40, 46 (stating that many judges take comfort in the use of sentencing guidelines, especially those appointed after the guidelines were instituted).

89 *See* Blakely *Hearing*, *supra* note 54 (testimony of Ronald Weich) (claiming that a system that views guidelines as guidelines would need to include some kind of right to appeal the sentence, unlike indeterminate regimes where the judge's sentence, so long as it is within the statutory range, is virtually unappealable). Any kind of right to appeal that would be included in a guideline system, in its true sense, would contradict the nature of the guideline as discretionary. If a judge is required to implement the guideline unless he has some finding of fact that makes a defendant's case extraordinary, there is no difference from the current guideline schemes, which provide for exactly that kind of departure.

judges, many of whom were dissatisfied with both the reduction in judicial discretion and the difficult computation of sentences using the guidelines, are unlikely to embrace the difficult task of computing guideline ranges when these ranges are merely suggested, not required. In addition, an advisory scheme would not give defendants notice of the likely sentence they will receive; while they may be relying on the guidelines, a judge could, without notice, decide not to use the guidelines and sentence the defendant to something entirely different.

The biggest obstacle, however, for a guideline system is that the underlying system to which it gives guidance must also pass the *Blakely* test. An advisory guideline system still allows a judge, not a jury, to determine the facts relevant to sentencing. As discussed in Part II.D below, indeterminate sentencing, which would be the most logical choice for a system underlying guideline sentencing, is in tension with the holdings in both *Blakely* and *Booker*. Without a constitutionally firm underlying sentencing scheme, advisory guidelines cannot serve.

C. *Indeterminate Sentencing: Still Not Passing the Test*

In his opinion for the *Blakely* majority, Justice Scalia discussed indeterminate sentencing, suggesting that it may be the answer for legislatures looking at new sentencing schemes. In *Apprendi*, *Blakely*, and *Booker*, the Court stated that it found no conflict between indeterminate sentencing—allowing judges to take into account offense and offender characteristics—and the Sixth Amendment.[90] So long as a judge's discretion is qualified by legislative determination of mandatory minimums and maximums, there was no conflict with the right to a jury trial.[91] However, careful analysis of the Court's language uncovers a tension between indeterminate sentencing with judicial factfinding and the Sixth Amendment.[92]

---

90 *Booker*, 125 S. Ct. at 750 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury trial determination of the facts that the judge deems relevant."); United States v. Blakely, 124 S. Ct. 2531, 2540 (2004) (holding that indeterminate sentencing "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"); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing judgment *within the range* prescribed by statute.").

91 *Apprendi*, 530 U.S. at 481.

92 *Apprendi* undertakes a thorough discussion of the historical development of sentencing. Previously, all criminal proceedings were submitted to a jury that found

A footnote in the *Apprendi* decision raised for the first time constitutional doubt about judicial factfinding even in indeterminate systems. There the Court writes: "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."[93] As stated in *Blakely*, "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict."[94] This sentiment implies that the judge's role is to implement the verdict of the jury. The judge, who is restrained by the jury verdict, is not allowed, even in indeterminate sentencing schemes, to consider facts that were not found by the jury in coming to its conclusion.

Justice Scalia's opinion makes the claim that indeterminate sentencing that allows judicial factfinding would not fail a Sixth Amendment challenge. What Justice Scalia argues is different in indeterminate sentencing than in a determinate system such as the Federal Sentencing Guidelines. Under indeterminate sentencing, judicial factfinding does not infringe on a defendant's *right* to a lower sentence.[95] Whereas a determinate sentencing scheme guarantees a defendant a right to a particular sentence, indeterminate sentencing allows judicial factfinding that does not affect the defendant's right to a sentence, which is set out in the statutory charge itself. As the Court stated in *Booker*, consideration of information about the defendant's character and the facts of the crime do not result in punishment for any crime other than the one the defendant commited.[96] However, this argument is inconsistent with Justice Scalia's discussion of the role of the jury. Because the Sixth Amendment is a reservation of jury power,[97] that power should remain with the jury regardless of what the legislature determines is the sentence to a crime. If, as *Blakely* suggests, it is the province of the *jury* to determine the facts, that power resides with the *jury* for any fact necessary to the sentence, even if those facts are part of an indeterminate scheme. Even if these facts do not result in changing the crime the defendant committed, they

---

all the facts and circumstances constituting the offense. The facts found by the jury were so specific that there was no doubt which sentencing judgment was to be given. "'[T]he court *must pronounce that judgment, which the law hath annexed to the crime.*"' *Id.* at 479 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *369–70). At common law, judges had very little discretion. The judgment, although pronounced by the judge, was not determined by the judge; it was determined by law. *Id.* at 480.

93 *Id.* at 483 n.10.

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

95 *Id.* at 2540.

96 United States v. Booker, 125 S. Ct. 738, 751 (2005).

97 *Blakely*, 124 S. Ct. at 2540.

do affect sentencing and may cause a judge to impose a sentence greater than the one he would impose based on the facts found by the jury alone. There is no easy way to avoid *Blakely*'s constitutional requirements, and a simple indeterminate sentencing scheme is no exception.

Those who would argue that indeterminate sentencing passes the *Blakely* test rely, first, on the distinction between "essential" and "nonessential" facts. Justice Scalia writes those facts that are "legally essential" must be found by a jury.[98] He tries to distinguish indeterminate sentencing by writing that, although indeterminate sentencing does involve judicial factfinding, "the facts do not pertain to whether a defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement on the traditional role of the jury is concerned."[99] The argument is that some facts taken into consideration by a judge—for example, offender characteristics—do not change the circumstances of a crime.[100] If those factors increase what a judge believes the sentence should be, it does not infringe on the role of the jury, which exists to punish a defendant for a crime as Congress chooses to define it. Determinate sentencing labels, in effect, create new crimes, which is what infringes on the jury's power.[101]

As a second argument, supporters refer to the pre-guideline jurisprudence of *Williams v. New York*[102] and *United States v. Tucker*.[103] *Williams* held that there was no violation of the Constitution when a judge took into account information outside of the jury verdict.[104] However, the *Williams* case involved the death penalty, allowing a judge to overrule a jury decision of life imprisonment and impose the death sentence. In the light of the Court's decision in *Ring v. Arizona*,[105] any reference to *Williams* is very weak. *Tucker* allows the judge to conduct a broad inquiry into a defendant's history. However, it relies on language that has come into question with *Blakely*. So long as the sentence is within the statutory range, the decision states, the judge may consider anything he wishes.[106] But if the statutory range is the sen-

98 *Id.* at 2543.

99 *Id.*

100 Note, *supra* note 11, at 1247–48.

101 *Id.* at 1253.

102 337 U.S. 241 (1949).

103 404 U.S. 443 (1972).

104 337 U.S. at 252.

105 536 U.S. 584 (2002) (holding that the Sixth Amendment requires any aggravating factors necessary for the imposition of the death penalty to be found by a jury).

106 *Tucker*, 404 U.S. at 446–47.

tence the judge may impose without the finding of any additional facts,[107] how much discretion does the judge really have?

Legally, both of these arguments fail. The mere existence of *Apprendi* and its progeny undermine any real argument based on *Williams* and *Tucker*. The more difficult argument is the argument based on essential and nonessential facts. *Williams* itself contradicts this distinction between legally essential facts that must be found by the jury and nonessential facts that can be found by a judge during sentencing. The *Williams* Court wrote that information regarding the defendant's life and character (offense and offender characteristics) was not only relevant, but possibly essential to the determination of an appropriate sentence.[108] Where, then, does one draw the line? The indistinct "line" between essential and nonessential facts cannot be drawn without leading judges toward a slippery slope. Restated, the problem is not that the line cannot be drawn, but that, in fact, there is no line between essential and nonessential elements. It is the province of the jury to find facts, any facts, that may affect a defendant's sentence. It is the judge's province to look at those facts and impose a proper sentence. Despite the Supreme Court's defense of indeterminate schemes, there is tension between *Blakely* and indeterminate schemes.

Speaking in terms of policy, a return to indeterminate sentencing is simply a bad idea. Problems with indeterminate sentencing were the reason the Federal Sentencing Guidelines and its corrollaries in the states came into existence in the first place. The indeterminate schemes had become vehicles for disparity,[109] permitting "the whims, personal philosophies and biases" of judges, rather than the actual nature of the offense, to serve as the basis for sentencing.[110] The point of guideline sentencing was to sentence similarly situated defendants similarly.[111] And ironically, if legislatures are allowed to return to indeterminate sentencing regimes, judges will be able to look at the same kind of information that was thrown out in *Blakely*.[112]

---

107 Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004).

108 *Williams*, 337 U.S. at 247.

109 Blakely *Hearing*, *supra* note 54 (testimony of William Mercer).

110 *Id.* (testimony of Ronald Weich).

111 S. REP. No. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3225.

112 United States v. Croxford, 324 F. Supp. 2d 1230, 1247 (D. Utah 2004).

D. Jury Sentencing

Criminal juries both find facts and apply the law,[113] and in six states, legislatures have put the jury to work on sentencing.[114] All six states keep the same jury for both trial and sentencing.[115] As the full ramifications of *Blakely* and its progeny come to light, states may be wise to take their cue from Virginia and Kentucky—two states that have already adopted jury sentencing schemes.

Blakely, while possibly unfriendly to guideline sentencing and even indeterminate sentencing, would not find itself in contention with a system of jury sentencing. In fact, jury sentencing would respond, at least academically, to each of the problems with sentencing that Justice Scalia's majority opinion raises. The Sixth Amendment reserves power to the jury.[116] Regardless of any argument regarding the more objective standards of a judge, the common law traditions entrenched in the Sixth Amendment right to a jury trial do not allow that contention. Facts are not better discovered by "judicial inquisition than by adversarial testing before a jury."[117] The Constitution enshrines a strict division between the authority of the judge and the authority of the jury. It is the jury's role to find the essential facts.[118] What *Apprendi*, and presumably *Blakely*, will do, Justice Scalia's opinion argues, is to return some of that power, which has been eroding away, back to the jury.[119] And sentencing juries do precisely this—they take the factfinding power of a judge and return it to the jury box.

1. Sentencing by Juries

Four states currently use bifurcated "sentencing juries." Of these states, Kentucky's system has remained least affected by reforms in guideline sentencing and remains truest to its original form at adoption.[120] Kentucky's system has no guidelines in effect for judicial or jury sentencing. The defendant must serve at least twenty percent of the term before being eligible for parole—in some instances the de-

113 Barkow, *supra* note 51, at 35–36.

114 Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia all use jury sentencing of some variety. Nancy J. King, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004).

115 *Id.*

116 Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004).

117 *Id.* at 2543.

118 *Id.*

119 *Id.* at 2541–42 (citing Kansas's adoption of a bifurcated jury sentencing scheme in response to *Apprendi*).

120 King, *supra* note 114, at 892–93.

fendant must serve upwards of fifty percent before being eligible for parole.[121] After a defendant is convicted, at a separate sentencing hearing the prosecution and the defense can present evidence regarding the circumstances of the crime, the defendant's criminal history and evidence that may suggest the jury should be lenient. The jury, based on this information, chooses a sentence from within a broad statutory range.[122]

Virginia has retained jury sentencing for defendants who actually go to trial, but has adopted judicial sentencing after a plea. While judges are "encouraged" to follow sentencing guidelines that have been adopted by the Virginia state legislature, Virginia juries are not exposed to guidelines and may sentence anywhere within a broad statutory range.[123] Arkansas, which also has recommended guidelines for judges but not for juries, allows defendants who have been found guilty pursuant to a plea to request a jury for sentencing.[124]

In addition to these states that use jury sentencing for all felonies, federal and State courts have long used bifurcated juries in capital cases and courts have approved of such sentencing schemes. As the Seventh Circuit noted, "[t]here is no novelty in a separate jury trial with regard to sentences, just as there is no novelty in a bifurcated jury trial . . . . Separate hearings before a jury on the issue of sentence is the norm in capital cases."[125] More important than the historical use of such a system is its obvious compatibility with *Blakely* and the requirements of the Constitution.[126]

The rules of evidence, however, suggest some serious procedural problems with a bifurcated system. Questions involving factors—such as previous conduct—might be outlawed by the statute of limitations. For example, Federal Rule of Evidence 403 prohibits the introduction of a defendant's prior bad acts unless they are directly related to an element of the crime. Therefore, in a bifurcated case, that evidence

121 KY. REV. STAT. ANN. § 439.340-3402 (Banks-Baldwin 2000); King, *supra* note 114, at 893.

122 King, *supra* note 114, at 892.

123 *Id.* at 893.

124 *Id.* at 893–94, 929–30.

125 United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004).

126 There are those who might argue who a separate sentencing jury could result in double jeopardy—a second trial for the same crime. However, as all elements of the offense should be tried in the original trial, a sentencing hearing would only raise issues traditionally raised in guideline sentencing hearings. *See* United States v. Ameline, 376 F.3d 967, 984 (9th Cir. 2004); *Booker*, 375 F.3d at 514. As a note of caution, a prosecutor who wants to include something in sentencing that might be related to offense conduct, perhaps a racially biased motivation, may run into problems of double jeopardy.

could not be included in the original trial stage. The question remains whether these rules should apply at a separate sentencing hearing.

The real problem with a jury that determines a sentence, however, is inexperience. Judges, even new judges, have years of experience working with the justice system. A sentencing jury has one experience with sentencing—jurors face one defendant who has been convicted in one trial. They have no other defendants with whom to compare the one that stands before them, removing the ability, at least among themselves, to offer comparable sentences for comparable defendants. In fact, several states' experiences with jury sentencing systems show that defendants often prefer judicial sentencing to jury sentencing.[127] Juries who sentence defendants tend to impose higher sentences than do judges in drug cases, but often impose significantly lower sentences than those given in bench trials or in plea bargains in nondrug felony cases.[128]

The problem, then, is two-fold: inability to compare and insufficient knowledge about sentencing. The first problem is clear. A jury has one experience with sentencing, not years of experience with various defendants, experience that can temper at least some judges.[129] While indeterminate sentencing may lead to serious disparity among defendants sentenced by different judges within a district, at least among the defendants sentenced by a single judge there is a higher level of consistency than when each defendant faces a different sentencing jury. Therefore, a defendant facing a sentencing jury has little indication of what his sentence will be. While television often depicts defendants as eager to "see what a jury has to say about this," actual jury sentencing is so unpredictable, and often so severe, that defendants would rather accept prosecutorial deal than take their chances in front of a jury.[130] And while judges in all the states that employ this kind of system have the ability to reduce a defendant's jury-imposed sentence, most judges, elected by the populace, choose not to do so.[131]

---

127 *See, e.g.*, King, *supra* note 114, at 927–28 (showing that sentences imposed by juries in Arkansas are generally longer than sentences imposed by judges who can be guided by a voluntary range).

128 *Id.* at 931.

129 In Arkansas, at least, defendants who have pled face a sentencing jury that is empanelled for approximately six months at a time. *Id.* at 932. However, in most felony cases where a defendant faces the same jury at sentencing as he did at trial, he will not face a jury that is even seasoned by six months of experience.

130 *Id.* at 910.

131 *Id.* at 933.

The second problem is a direct result of the first. Because a jury has not had extensive experience with sentencing, and because what can be used to inform it is limited by statute, most juries are ignorant of alternatives to a specific term of imprisonment. In Virginia, for example, sentencing juries are not given information on the recommended guideline range—which is often lower than the jury sentence—or the effect of probation.[132] The alternatives are far fewer for a sentencing jury than a judge or a prosecutor seeking a plea agreement. This ignorance of options leads to disparity among defendants as well as limited availability of restorative or rehabilitative alternatives to prison.

Although a sentencing jury would meet the standards of *Blakely*, it does little to address the problems Congress sought to correct when it passed the sentencing guidelines. With juries determining the length of sentences, the problems of disparity between similarly situated defendants are likely to be perpetuated, not abated.

2. Jury Factfinding for Judicial Sentencing

It is possible for the jury to find facts necessary for sentencing while the judge retains the right to use or not use those facts when determining a sentence. Defendants in Kansas face this kind of a system. Wary of the implications of *Apprendi*, the Kansas state legislature codified the Court's dictates.[133] Kansas statutes section 21-4716 requires a judge to impose the presumptive sentence laid out by the state's guideline system unless he finds a compelling reason for a downward departure.[134] Should the prosecution seek an upward departure, the sentencing scheme requires: "Subject to the provisions of subsection (b) of K.S.A. 21-4718, and amendments thereto, any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt."[135]

Upon motion by the prosecution, the statute requires the judge to determine whether the factor affecting sentencing will be determined at trial or following the decision of the defendant's innocence or guilt.[136] If the court finds that it is "in the interest of justice," it can order a separate sentencing hearing to determine the facts of the up-

132 VA. CODE ANN. § 19.2-298.01(A) (Lexis 2004).

133 KAN. STAT. ANN. § 21-4718 (Supp. 2003).

134 *Id.* § 21-4716(a).

135 *Id.* § 21-4716(b). The language derives directly from *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

136 KAN. STAT. ANN. § 21-4718(b)(2).

ward departure.[137] The jury at any sentencing hearing remains the same as that which served during the trial phase.[138] Once the jury has unanimously found the sentencing factor beyond a reasonable doubt, the judge *may* grant the upward departure.[139] Once the jury has recommended that a particular sentencing factor be taken into consideration, the judge is under no obligation to do so. The jury finds the facts but the judge imposes the sentence.

The very language of the Kansas statute highlights its unique ability among states to pass muster under *Blakely*.[140] Because it uses the language of *Apprendi* that "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt,"[141] it was unaffected by *Blakely*. Such a system, if adopted by other states or the federal government, would not face the constitutional issue raised by guideline systems.

The benefit of a system such as this is that it can be modified in such a way that does not infringe on judicial discretion.[142] The jury's role remains to find the facts. It is not necessary that the judge actually use that fact and apply it to sentencing.[143] The problems that

137 *Id.* § 21-4718(b)(4).

138 *Id.* The statute provides:

> If any person who served on the trial jury is unable to serve on the jury for the upward durational departure sentence proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the upward durational departure sentence proceeding, the court may conduct such upward durational departure sentence proceeding before a jury which may have 12 or less jurors, but at no time less than six jurors. Any decision of an upward durational departure sentence proceeding shall be decided by a unanimous decision of the jury.

Id.

139 *Id.* § 21-4718(b)(7).

140 Randall L. Hodgkinson, *A* Blakely *Primer: The Kansas Sentencing Guidelines*, CHAMPION, Aug. 2004, at 20.

141 KAN. STAT. ANN. § 21-4716(b).

142 Any system that does not infringe on judicial discretion is one that is more likely to be welcomed by seasoned federal judges who were less than happy when the sentencing guidelines went into effect.

143 *See* Ring v. Arizona, 536 U.S. 584, 612–13 (2002) (Scalia, J., concurring).

> What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of an aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Id. (Scalia, J., concurring).

come with jury sentencing—inexperience and ignorance of options—do not result in a real offense system with jury factfinding. The jury finds the facts but the judge actually applies those facts to the sentence. Therefore, the jury reserves its right to determine the facts, but the judge can use experience to determine an appropriate punishment based on those facts.

Additionally, this kind of a system would heighten notice to the defendant. Because the prosecutor would be required in some way—whether in indictment or by another means[144]—to notify the defendant about what charges and facts will actually be alleged, the defendant finds himself in a better position when making decisions about trial. This kind of early warning about sentencing factors would increase a defendant's knowledge of the actual charges he faces and provide him with better tools during the plea bargaining process.[145]

There are those who would argue that a system of additional charged facts would increase prosecutorial power, providing more facts with which to bargain. However, prosecutorial power already exists with regard to sentencing factors—including the substantial assistance departure in the Federal Sentencing Guidelines. The benefit to a defendant of a real offense system is that if he refuses to stipulate to certain facts, it is less likely that a jury of twelve will find that fact beyond a reasonable doubt than that a judge will find that fact by a preponderance of the evidence.[146] The offense conduct itself will not be a serious additional burden.[147]

There are, however, evidentiary problems that would accompany this kind of a system. A jury that is required to find all facts relevant to sentencing may be called on to determine facts that may be prejudicial to a defendant.[148] Most of the facts that have traditionally been

144 The Kansas system requires a motion filed thirty days before the proceeding. *See* KAN. STAT. ANN. § 21-4718.

145 Note, *supra* note 11, at 1258.

146 *See* Blakely v. Washington, 124 S. Ct. 2531, 2541–42 (2004) (discussing that any change in bargaining power that would result from replacing a guideline system with a real offense system would benefit the defendant).

147 A large amount of the offense conduct is already included in the prosecution of the underlying offense, so to simply require a special jury verdict form with findings of fact would not be entirely problematic. Blakely *Hearing*, *supra* note 54 (testimony of Alan Vinegrad).

148 Although both *Blakely* and *Apprendi* set aside a special category for prior convictions, the fifth member of the majority in *Almanderez-Torres*, Justice Thomas, subsequently determined that case was wrongly decided. Prosecutors may soon find that the jury will have to determine, beyond a reasonable doubt, the existence of prior convictions. This kind of evidence of prior bad acts is, as demonstrated by Federal Rules of Evidence 403 and 404, prejudicial.

included in sentencing would be eliminated as either prejudicial or irrelevant in the trial phase.[149] A possible response is to institute a system similar to Kansas's, where the judge determines whether the facts be determined at trial or in a post-trial sentencing proceeding. In that way, there is the possibility both of limiting the amount of money spent simply by using a special verdict form at trial and the possibility of introducing evidence to the jury that would be prejudicial at trial.

The real problems with any kind of jury sentencing system lie in the practical and economic realities of requiring a jury to find all facts relevant to sentencing. There are distinct difficulties in (1) instructing the jury and (2) having the jury come to unanimous agreement on each and every fact necessary to determine sentencing.[150] It is often difficult enough to get a jury to agree on a verdict, "let alone the Herculean task of getting them to unite behind each factual finding relevant to the sentencing."[151] It will be, practically speaking, impossible to get a jury to unite behind every finding of fact that a prosecutor would like to include in a sentence.[152] But these practical technicalities may not be sufficient to overrule the good done by this kind of system. A more limited number of sentencing factors, properly found by an empanelled jury of twelve, may give a more accurate sentence and reduce the disparities that still exist in states and the federal system using guideline systems.

The more pressing issue is economic expense. Requiring juries to find all sentencing factors would obviously increase the amount of time that a jury would remain empanelled, increasing the expense of

149 *See* United States v. Ameline, 376 F.3d 967, 983 n.20 (9th Cir. 2004) (suggesting that a court "may elect to give the jury a special verdict form if the introduction of evidence related to sentencing is not excluded as unduly prejudicial or irrelevant"). Language similar to this in *Ameline* suggests an openness to a real offense system, but a brief look at the rules of evidence suggests that a significant number of sentencing factors would be excluded as prejudicial or irrelevant. *See* FED. R. EVID. 403.

150 I think it is clear that a real offense system could not take into consideration the number of factors included in systems such as the Federal Sentencing Guidelines. "While juries generally are adept at determining the guilt or innocence of a defendant, the list of findings contemplated by the Guidelines is extensive and nuanced, modified and interpreted regularly in numerous court opinions. Making such findings is a task much assigned to judges, not juries." United States v. Croxford, 324 F. Supp. 2d 1230, 1242 (D. Utah 2004).

151 *Id.* at 1244.

152 *Ameline*, 376 F.3d at 982 (citing the government's brief, which argued that "it would likely be impossible, as a practical matter, to charge and prove to a jury beyond a reasonable doubt *all* enhancing factors in *all* cases").

reimbursing them for their time and removing possible jurors from their jobs longer than is currently necessary in most states. However, states such as Kansas—which use this real offense system—and states such as Virginia—which have sentencing juries—manage the expense without serious problem. In addition, a defendant can always waive the right to have the jury determine the necessary facts. Well-crafted plea bargains can save both the defendant and the prosecution the time and money associated with jury factfinding for judicial sentencing. But the simplest response to the economic analysis is simply that additional spending is a small price to pay for the proper implementation of justice.

In summary, both kinds of jury sentencing would pass muster under *Blakely*, but both suffer from serious problems of judicial economy and economic efficiency. Although either would retain the jury as factfinder, the increase in time commitment and commitment of economic resources may be impractical. An actual sentencing jury, with its requirements that a twelve-person panel with no experience with the complexities of sentencing choose the sentence, will result in pre-guideline problems of disparity and lack of notice. However, a system that allows a jury to find the facts and a judge to apply those facts at sentencing may be the best option.

CONCLUSION

In conclusion, the most constitutionally firm option is for states and the federal government to create a bifurcated, real offense system that requires juries to find the facts and allows the judge discretion in applying those facts. This kind of a system meets the strictures of *Blakely* and avoids the tension that resides even in a return to an indeterminate sentencing scheme. However, based on the Supreme Court's language and its suggested severance of the mandatory nature of the federal guidelines, this option may be rejected by legislatures. In the end, it is likely that the advisory guidelines suggested by Justice Breyer will remain just that—a suggestion. What has resulted, then, is a return to where Congress started twenty years ago—indeterminate sentencing. The twenty-year experiment of guideline sentencing has finally failed. What remains is a number of questions that will be the topic of legal and political argument for years to come.

In trying to highlight the Sixth Amendment right to a jury trial, did the Supreme Court go too far? Do the Sixth Amendment and the Due Process Clause really require such an extreme result, or did the Supreme Court start down a road that led to an undesired destination? Is there no option left to courts but to turn to the long, compli-

cated process of sentencing juries? And if indeterminate sentencing schemes really do fail under *Blakely* because a jury must find *all* facts relevant to sentencing, then how many defendants have been unjustly sentenced in the existence of the American judicial system?