Preserving the Constitutionality of Federal Sentencing Guidelines

Professor Michael Goldsmith: Outline of Remarks before the U.S. Sentencing Commission, November 16, 2004

1. An adverse Supreme Court decision will require joint Commission-Congressional Action
   a. The Commission must ensure that Congress is fully informed of the extent to which the guidelines have achieved the goals of the Sentencing Reform Act.
   b. This means correcting the common misperception that the guidelines have failed to achieve these goals.
   c. Public Relations Campaign
      ---- educate Congress about recent surveys demonstrating generally favorable judicial attitudes towards the guidelines.
      ---- American Bar Association’s Blakely Task Force draft report states that “the federal criminal justice system is better off with sentencing guidelines than without sentencing guidelines.”
      ---- Head off enactment of new mandatory minimums by ensuring Congressional awareness of existing severe guideline penalties.
      ---- Commission should take advantage of legislative lame duck lull to prepare staff reports documenting the degree to which the guidelines have (1) reduced unwarranted sentencing disparity; (2) improved sentencing fairness by promoting proportionality of penalties, and certainty and openness in sentencing.

2. Potential Options

   Threshold Consideration: The Need for Commission Unanimity!

   a. The “Bowman Fix” – raising the top of each guideline range to the current statutory maximum.
      This approach technically conforms to Blakely by ensuring that no specific offense characteristic can increase the statutory maximum (as defined by Blakely). However, it creates unduly broad sentencing ranges within many guideline offense levels. In some cases, the range can exceed 20 years. Further, it’s really a one way street in favor of the prosecution. Finally, it invites the Supreme Court to revisit its decision in Harris, which approved increasing minimum penalties without a jury determination.

   b. Redefine the Guidelines working from the top down.
Rather than establishing base offense levels (BOL) subject to upward adjustments based upon aggravating specific offense characteristics, substitute maximum offense levels (MOL) subject to reduction for mitigating specific offense characteristics.

Burden of proof on mitigating factors can be placed on defendant. This approach would not violate Blakely, and finds substantial support in Supreme Court precedent, which allow the defendant to carry the burden of proof for affirmative defenses. See Patterson v. New York, 432 U.S. 197, 206-07 (1977).

However, it too would unduly favor the prosecution and also requires the Supreme Court’s continued adherence to Harris.

c. Blakelyize the guidelines – require a jury finding for each specific offense characteristic potentially producing an increased guideline level,

This will produce enormous complexity:
  i.e., in effect, it absorbs the guidelines into the federal criminal code.

Need to include soc’s and adjustments in grand jury indictments

Need to instruct grand jurors on soc’s and adjustments

Complex Rule 29 Motions to Dismiss

Complex jury instructions, incorporating the guidelines, at trial

Potential prejudicial effects from admitting evidence of relevant conduct at trial --> bifurcated criminal trial becoming matters of routine

d. Blakelyize the guidelines partially
  Option (1) -- Require a jury finding for (1) the most frequently employed specific offense characteristics and (2) those crimes in which quantity determinations drive the sentence (i.e. drug quantity and monetary loss).

  Reduce the remaining specific offense characteristics to discretionary status (i.e. recommended rather than mandatory adjustments within the guideline range).

  Option (2) – Don’t just Blakelyize the guidelines; Simplify!
Seek a statutory amendment increasing the 25% rule to 33% - 50%. This will reduce the number of offense levels, allow courts to exercise broader discretion, and likely decrease the rate of judicial departures.

Identify the most commonly used soc’s and build them into the base offense levels. This will produce an increase in sentences commensurate with the value of these soc’s. (The Commission has previously employed this approach for other guidelines.)

Treat the absence of these soc’s as mitigating factors warranting reduced guideline levels.

Blakelyize the remaining less frequently used soc’s that are sufficiently important to retain; discard the rest.

Benefits of Above:
- Simplifies
- Expands judicial discretion
- Sentence increases may dissuade Congressional enactment of mandatory minimums
- Still provides some opportunity for mitigation.
Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner’s Perspective

Michael Goldsmith*

Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.
—United States Supreme Court **

On June 24, 2004, the United States Supreme Court issued a 5–4 decision that called into question the constitutionality of the federal sentencing guidelines. *Blakely v. Washington* ruled that a trial court’s upward departure from the penalty range ordinarily prescribed by state law deprived defendant Ralph Howard Blakely Jr. of his Sixth Amendment right to have a jury determine all facts essential to his sentence beyond a reasonable doubt.¹ Observing that “[p]etitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with ‘deliberate cruelty,’”² Justice Scalia’s majority opinion concluded that “[t]he Framers would not have thought it too much to demand that, before

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Professor Goldsmith also wishes to thank the BYU Library reference staff (Ron Fuller and Galen Fletcher, in particular) for providing outstanding support. Additionally, Todd Jenson worked tirelessly researching and compiling an almost daily compendium of post-*Blakely* cases. Finally, special thanks to Ellen Basian, Ph.D.


2. Id. at 2543.
depriving a man of three more years of his liberty, the State should
suffer the modest inconvenience of submitting its accusation to the
'unanimous suffrage of twelve of his equals and neighbours . . . .'\textsuperscript{3}

\textit{Blakely}'s immediate impact proved to be more than a "modest
inconvenience." Because Washington's determinate sentencing
scheme contained features facially comparable to the federal
sentencing guidelines, \textit{Blakely} threatened the legal foundation upon
which federal courts have sanctioned offenders since the Sentencing
Reform Act of 1984\textsuperscript{4} ("the SRA") took effect. The decision
provoked an "avalanche"\textsuperscript{5} of motions challenging the
constitutionality of the federal sentencing guidelines, and judicial
opinions nationwide characterized its effects as "cataclysmic."\textsuperscript{6}

The majority of federal district courts ruled that \textit{Blakely} rendered
the federal sentencing guidelines unconstitutional insofar as the SRA
required judges to impose sentences based on facts beyond those

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3. \textit{Id.} (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343). The reference to Blackstone is both ironic and inapt. Blackstone wrote during a period in which most felonies were punishable by death or banishment and the jury played no role in sentencing. See John H. Langbein, \textit{Shaping the Eighteenth-Century Criminal Trial: A View from the Ruder Sources}, 50 U. CHI. L. REV. 1, 36-37 (1983); Jenia Iontcheva, \textit{ Jury Sentencing as Democratic Practice}, 89 Va. L. REV. 311, 316 (2003); see also infra note 168 and accompanying text.


The response from the legal community has involved even more colorful adjectives. See, e.g., Laurie P. Cohen & Gary Fields, \textit{Legal Quagmire: High Court Ruling Unleashes Chaos Over Sentencing}, WALL ST. J., July 14, 2004, at A1; Dan Eggen & Jerry Markon, \textit{ High Court Decision Looms Confusion on Sentencing Rules}, WASH. POST, July 13, 2004, at A1 ("[\textit{Blakely}] is like an earthquake . . . . "); (quoting Professor Berman); Carol D. Leonnig & Neely Tucker, \textit{U.S. Judge Cuts Farmer's Sentence in Mall Standoff}, WASH. POST, July 1, 2004, at A01 ("[The Supreme Court decision \textit{Blakely} . . . . ] has been a bombshell for federal prosecutors across the country . . . ."); Adam Liptak, \textit {Justices' Sentencing Ruling May Have Model in Kansas, N.Y. TIMES}, July 13, 2004, at A12 ("The decision \textit{[Blakely]} has caused 'the legal equivalent of a 40-

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necessarily contained in the jury's guilty verdict; the circuit courts, however, divided sharply. The Supreme Court granted certiorari to address this issue and, because of its importance, placed the matter on an expedited briefing schedule.

As a former member of the United States Sentencing Commission, I viewed these developments with special interest and concern. The Supreme Court had sustained the constitutionality of the federal guidelines well before I became a commissioner in 1994 and several times afterwards as well. Nevertheless, the post-Blakely fallout caused me to reexamine this issue. Although concerned that the Commission on which I had served might be found constitutionally untenable, I approached this reassessment buoyed by Justice Jackson's historic display of wisdom in acknowledging error on a prior occasion:

Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable . . . . Chief Justice

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8. Compare Pirani, 2004 WL 1748930, Amelina, 376 F.3d at 980 (striking down guidelines as applied), and Booker, 375 F.3d at 515 (same), with United States v. Resce, No. 03-13117, 2004 WL 1946076, at *4 (11th Cir. Sept. 2, 2004) ("We decline to conclude that Blakely compels an alteration of the established view . . . [that the] minimum and maximum sentence[s] provided in the United States Code . . . [is] the only Constitutionally relevant maximum sentence."); United States v. Koch, No. 02-6278, U.S. App. 2004 WL 1899930, *2 (6th Cir. Aug. 26, 2004) (en banc) ("We now join . . . in determining that Blakely does not compel the conclusion that the Federal Sentencing Guidelines violate the Sixth Amendment."); United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004) ("[U]nless the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines."); United States v. Hammond, 378 F.3d. 426 (4th Cir. 2004) (noting that Blakely does not invalidate sentences imposed under the Guidelines), aff'd, No. 03-4253, 2004 WL 2005622 (en banc) (Sept. 8, 2004); United States v. Pincero, 377 F.3d 464, 470-71 (5th Cir. 2004) (declining to rule the guidelines unconstitutional and awaiting Supreme Court review).


11. See infra Part IV.A.
Taney recant[ed] views he had pressed upon the Court . . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." . . . And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . . ."12

If these pillars of our jurisprudence could confess error, surely I could candidly reexamine the legality of a sentencing system that I had helped to implement. This Article represents the product of that review. It advances the position that, notwithstanding Blakely, the federal sentencing guidelines are constitutional. Rather than focus exclusively on the Blakely majority opinion, this conclusion is based on both the full spectrum of Supreme Court sentencing precedent and systemic differences that distinguish the federal sentencing guidelines from Washington's statutory scheme.

Part I briefly describes the origin of federal sentencing reform and examines the oft-misunderstood relationship between the federal guidelines and mandatory minimum sentences. Part II.A explains how institutional tensions between the legislative and judicial branches of the federal government may have contributed to the Blakely controversy; Part II.B sets forth the legal grounds underlying Blakely and discusses a high-profile district court decision illustrative of many of the opinions applying Blakely to the federal sentencing guidelines. Part III reviews Supreme Court precedent upholding the constitutionality of various federal guideline provisions and concludes, based on more than a decade of Supreme Court jurisprudence, that structural and other differences distinguish the federal guidelines from the Washington statutes found problematic in Blakely. For those who look forward to the Supreme Court striking down the guidelines under Blakely, Part IV considers life


Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-deprecat[ing] was taken by Lord Wombury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

Id.
without the federal sentencing guidelines. It suggests that Congress would probably fill the void with a strict regime of mandatory minimum sentences likely to make critics of the current federal system wax nostalgic for “the good old days” of guideline sentencing.

Notwithstanding the many post-Blakely decisions that have declared the federal guidelines unconstitutional as applied, the Supreme Court’s resolution of this issue remains uncertain. As at least one federal judge has observed in addressing post-Blakely issues, in law almost nothing is a “sure thing”:

The predictions of the Guidelines’ demise are many and they may well be true. It is difficult to read Blakely and not see the same wrecking ball heading directly for the sentencing features of the [Sentencing Reform] Act of 1984. But predictions don’t always hold; even sure things sometimes surprise us. Just last October, thousands of Chicago Cubs fans were certain of their team’s first World Series appearance in ninety-five years, with a mere five outs to make against the Florida Marlins. Then one of the Cubs’ own fans interfered with the catch of a foul ball, and the unraveling began.... [T]he Sentencing Guidelines may similarly defy... expectations.... A distinction, however fine, may be drawn between the[mat]... and the State of Washington’s Guidelines. Other issues could become involved. ... And so on.13

With this in mind, I set out to explain why the federal guidelines’ constitutional critics will likely meet the same fate as fans of the Chicago Cubs.

I. FEDERAL SENTENCING REFORM LIMITS JUDICIAL DISCRETION

Prior to 1984, federal judges enjoyed wide discretion in sentencing offenders.14 A judge could impose any punishment within the statutory maximum and still stand virtually immune from appellate review.15 Unlimited judicial discretion, however, produced unwarranted disparities—both nationwide and even within judicial districts—in sentences imposed upon similarly situated offenders.16

15. Id. at 364 (noting that sentencing determinations received “virtually unconditional deference on appeal”).
16. Id. at 366; see, e.g., Anthony Partridge & William B. Eldridge, The Second Circuit Sentencing Study: A Report to the Judges 1–3 (1974) (stating “the absence of consensus is the
For a nation grounded in equal justice, this situation proved intolerable. After extensive review, Congress responded by enacting the Sentencing Reform Act of 1984.\textsuperscript{17}

The SRA had two goals: (1) removing unwarranted disparities in sentencing, and (2) producing “truth in sentencing” by eliminating parole, which had allowed most violators to serve only one-third of their sentences.\textsuperscript{18} The SRA also established the United States Sentencing Commission as an independent agency within the judicial branch.\textsuperscript{19} Congress directed the Commission to produce a sentencing system that would curtail judicial discretion. The new system would provide an imprisonment range for each crime subject to adjustments only for the crime’s severity, the offender’s criminal history, and relatively few extraordinary circumstances.\textsuperscript{20}

\textsuperscript{17} See S. Rep. No. 98-223, at 33–62 (1983). After reviewing extensive evidence of disparate sentencing and parole practices nationwide, the report concluded:

The shameful disparity in criminal justice sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

The bill, as reported, meets the critical challenge of sentencing reform. The bill’s sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders.


\textsuperscript{19} Mistretta, 488 U.S. at 368 (citing 28 U.S.C. § 991(a) (1982)).

\textsuperscript{20} Id. at 374–77; see also U.S. SENTENCING GUIDELINES MANUAL ch. 3 (1988) (providing adjustments for, inter alia, hate crimes, crimes against public officials, crimes in which the defendant abused a position of trust, obstruction of justice, and other extraordinary circumstances).
Based on a comprehensive review of prior federal sentencing patterns for virtually every crime in the federal code, nationwide hearings, extensive additional public comment, and numerous staff studies, the Commission promulgated sentencing guidelines that took effect in 1987. The guidelines established a base offense level for most federal crimes and authorized adjustments based on specific offense characteristics (reflecting the magnitude of the crime itself and the manner in which it occurred) and the defendant’s criminal history. After accounting for these adjustments, the guidelines produce a final offense level containing a sentencing range within which the court ordinarily must impose sentence.

Despite their statutory designation as “guidelines,” the guidelines had a mandatory effect. Once a court determined the final offense level for the crime of conviction, the SRA required federal judges ordinarily to sentence within offense level’s corresponding penalty range—the SRA permitted judges to depart from this range only if “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”

Notwithstanding the federal guidelines’ mandatory effect, it is important to distinguish them from statutes imposing mandatory minimum sentences. Mandatory minimums, which have become increasingly popular with crime control legislators, represent

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The Commission’s initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. . . .

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. Id.; see also U.S. SENTENCING COMM’N, SUPPLEMENTARY REP. ON THE INITIAL GUIDELINES AND POLICY STATEMENTS, ch. 2 (June 18, 1997).

22. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1–1.7.

23. See id. at 111–12 (providing the sentencing table used to determine the guideline range).


26. For example, one article notes:

Even the guidelines weren’t tough enough for many members of Congress. So on occasion over the past two decades, Congress has passed laws setting mandatory minimum sentences for specific crimes, especially those involving drugs. In those cases, judges have absolutely no discretion. The mandatory-minimum laws are
everything that sentencing guidelines are not. Rather than impose
punishment after considering all of the various factors underlying the
crime and the criminal, mandatory minimums impose an automatic
minimum penalty based on the presence of one or two factors that
the legislature deems especially pernicious (e.g., use of a weapon or
distribution of a particular quantity and type of drug, such as five
grams of crack cocaine).27 In contrast, the federal guidelines
individualize each sentence according to the offender’s criminal
history and the way in which the crime of conviction occurred.28 The
final offense level contains a sentencing range designed to reflect
these complex factors rather than just one salient feature.29

As statutory mandatory minimums trump any conflicting
sentencing guidelines, the Sentencing Commission has always
structured the guidelines to conform to statutory mandatory

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especially popular in election years, when legislators can use them as evidence that
they are tough on crime.
Laurie P. Cohen & Gary Fields, Legal Quagmire: High Court Ruling Unleashes Chaos over
Sentencing, WALL ST. J., July 14, 2004, at Al; see Brian D. Boreman, Campbell v. Georgia:
Mandatory Minimum Sentencing Survives Separation of Power Attack: Remaining a Viable
the popular pressure on state legislatures to enact mandatory minimum sentencing legislation);
see also Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory
Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 AM. CRIM. L. REV.
87 (2003) (reviewing the recent rise in mandatory minimum sentencing in federal narcotics
laws); Families Against Mandatory Minimums, Sensenbrenner Bill Pushes for More, Tougher
Federal Mandatory Minimum Sentences; Action Needed to Stop Bill from Advancing, at
21, 2004); Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child

27. See U.S. SENTENCING COMM’N, SFRC. REP. TO CONG.: MANDATORY MINIMUM
PENALTIES IN THE FED. CRIMINAL JUSTICE SYSTEM 4, 28 (1991) [hereinafter MANDATORY
MINIMUM PENALTIES REPORT]. As of 2003, approximately sixty percent of drug cases
involved mandatory minimum sentences. LINDA D. MAXFIELD, UNITED STATES SENTENCING
COMMISSION, OFFICE OF POLICY ANALYSIS, FINAL REPORT—SURVEY OF ARTICLE III JUDGES
judsuv/jpdfull.pdf. [hereinafter COMMISSION 2003 SURVEY]. As Chief Justice Rehnquist
observed: “One of the best arguments against any more mandatory minimums, and perhaps
against some of those that we already have, is that they frustrate the careful calibration of
sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were
intended to accomplish.” Hearing Before the House Reform Subcomm. On Criminal Justice,
Drug Policy and Human Res., 106th Cong. (2000) (statement of John R. Steer, Member and
Vice-Chair of the U.S. Sentencing Comm.) (internal quotation marks omitted) (quoting
Remarks of Chief Justice, Nat’l Symposium on Drugs and Violence in Amer., June 18, 1993
[hereinafter Statement of John R. Steer].

28. See MANDATORY MINIMUM PENALTIES REPORT, supra note 27, at 20–27.
29. Id.
minimum terms. Thus, many of the harsh penalties contained in the guidelines represent congressional mandatory minimums rather than Commission policy. Indeed the Commission has repeatedly opposed mandatory minimums and was responsible for "safety valve" legislation, which provided some relief against mandatory minimum sentencing.

In contrast to statutory mandatory minimums, the federal sentencing guidelines attempt to ensure that each individualized punishment fits the underlying crime. However, at least initially after the guidelines' inception, federal judges did not see it that way. When the guidelines took effect in 1987, most federal judges criticized the new system as unduly rigid and mechanistic. Their views provided fertile grounds for the first challenges to the federal guidelines' constitutionality.

II. SENTENCING WARS: THE JUDICIARY STRIKES BACK

The judiciary's initial response to Blakely cannot be fully understood in isolation. Although Congress established the Sentencing Commission as an independent agency within the judicial branch, neither Congress nor the judiciary completely accepted the sentencing guidelines. At different times, both of these branches of government attempted to override the Sentencing Commission's authority. The judges initially reacted to their loss of control by
invalidating the guidelines. The Supreme Court rejected these rulings, but Congress increasingly attempted to assert control over sentencing policy by enacting sentencing directives for the Commission to raise penalties, by enacting more mandatory minimum penalties, and, ultimately, by directing the Commission to implement reforms to reduce judicial downward departures from the guidelines. To the extent possible, the Commission resisted these competing pressures and eventually began to win favorable responses from sentencing judges. As set forth below, however, competing pressures from Congress and the judiciary created a constant state of conflict in sentencing policy. Although Blakely was not necessarily the product of that conflict, these ongoing tensions may account for the district courts’ initial response to the Blakely decision.

35. See infra notes 42–44 and accompanying text.
36. See infra notes 45–48 and accompanying text.


While there were no amendments in 1999, 1999 U.S. SENTENCING COMM’N ANN. REP. 7, Congress directed the implementation of seven amendments in 2000, 2000 U.S. SENTENCING COMM’N ANN. REP. 9. Finally, in 2002, the latest year for which the annual report is available, Congress directed the Commission to make three amendments. 2002 U.S. SENTENCING COMM’N ANN. REP. 7, 10.

39. See infra notes 60–74.
40. MANDATORY MINIMUM PENALTIES REPORT, infra note 27.
41. See infra notes 55–59 and accompanying text.
A. The Institutional Context Preceding Blakely

Soon after the guidelines took effect, defense counsel attacked them on a variety of constitutional and statutory bases.42 Ironically (in light of Blakely), the argument that the guidelines' fact-finding procedures violated the Sixth Amendment right to a jury trial scarcely received attention.43 The district courts, however, embraced these alternative challenges, as more than 200 trial judges ruled the SRA and guidelines unconstitutional in whole or in part.44

Before the Supreme Court, however, the guidelines easily survived constitutional scrutiny. In Mistretta v. United States,45 the Supreme Court concluded (1) that the formation of the Sentencing Commission did not violate the separation of powers doctrine and (2) that Congress did not exceed its authority in delegating the task of establishing new guidelines to the Commission.46 With only Justice Scalia dissenting, the Court issued a broad ruling sustaining the SRA. The majority found that, "although the Commission is located in the Judicial Branch, its powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-

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43. Indeed, one of the few cases to consider this argument characterized it as "folly." United States v. Sheffer, 700 F. Supp. 292, 293 (D. Md. 1988) (noting also that "'[t]he Sixth Amendment entitles a criminal defendant to a jury's determination of guilt and innocence, not punishment" (citation omitted)).


46. Id. at 371, 374, 412.
powers analysis.” Based on extensive jurisprudence allowing Congress to delegate authority to federal agencies, the Court found that “Congress’ delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.”

After Mistretta, however, federal district judges accepted the guidelines grudgingly at best. Judges resented the guidelines’ intrusion on their traditional discretionary authority to punish defendants within a wide sentencing range. Two major developments, however, softened judicial attitudes toward the guidelines. First, the Commission made concerted efforts to work closely with the Judicial Conference to identify and remedy those guideline provisions that courts considered most problematic. Second, the Supreme Court’s decision in Koon v. United States strengthened the authority of district judges, pursuant to the SRA, to depart from specified guideline ranges in unusual cases. Koon instructed appellate courts not to apply a de novo standard of review to district court departure decisions. In typical cases, Koon gave appellate courts the power to reverse district court departures only

47. Id. at 393. Rather, the Court explained, “the Commission . . . is an independent agency in every relevant sense. In contrast to a court’s exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines . . . .” Id. at 393-94.

48. Id. at 374. Indeed, the Court also observed that “[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.” Id. at 379.

49. See United States v. Lara, 905 F.2d 599, 609 (2d Cir. 1990) (“Many judges are unhappy with the Guidelines . . . . However, until Congress changes the law, which is its province, we must proceed within the reasonable parameters of the statute and the Guidelines.”); United States v. Aguilar-Pena, 887 F.2d 347, 353 (1st Cir. 1989) (“Judicial dissatisfaction alone, no matter how steeped in real-world wisdom, cannot be enough to trigger departures, lest the entire system crumble.”); see also Marcia Chambers, Prosecutors Take Charge of Sentences, NAT’L L.J., Nov. 26, 1990, at 13 (reporting that U.S. District Court Judge J. Lawrence Irving resigned over unhappiness with sentencing guidelines).

50. During the author’s tenure on the Commission from 1994-98, for example, commissioners met with the Criminal Law Committee of the Judicial Conference twice annually. On several occasions, members of the Criminal Law Committee testified at Sentencing Commission hearings concerning proposed guideline amendments. See Judicial Advisory Group Assists in Guideline Simplification Effort, GUIDE LINES, Aug. 1996, at 3 (describing the formation of the Judicial Advisory Group, composed of one judge from each of the twelve circuits, to assist the Commission).


52. Id. at 99-100.
upon finding that the district court abused its discretion. This more flexible standard of review shielded more departure decisions from reversal and restored an element of judicial discretion to the sentencing process.

Taken together, these developments prompted federal judges to view the guidelines more favorably. For example, a 1996 survey of federal judges found that, on average, respondents felt that guideline sentences were about "just right." This trend has continued. In 2003, another survey reported that seventy-seven percent of federal judges believed that guideline sentences more often than not "provide[d] punishment levels that reflect[ed] the seriousness of the offense" and sixty-two percent responded that the guidelines more often than not provided "just punishment." Additionally, seventy-two percent of the respondents reported that more often than not "guideline sentences avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Thus, although the survey also reported that trial

53. Id.
57. Id. at B-6; see also id. at B-11 (reporting that sixty-two percent of judges gave the guidelines average to excellent scores in evaluating their "achievements in furthering the general purposes of punishment").
58. Id. at B-4.
judges would still prefer more discretion,\textsuperscript{59} as a group, they reported relatively high satisfaction with the guideline system.

Given these favorable responses, why did so many district courts so quickly conclude that \textit{Blakely} rendered the guidelines unconstitutional? Most of these cases focused on the broad language employed in \textit{Blakely}\textsuperscript{60} without fully examining critical features that set apart the federal guidelines from Washington’s determinate sentencing statutes. These decisions, however, may also reflect an almost institutional response to another major development in federal sentencing law: congressional enactment of the “Feeney Amendment” to the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today ("PROTECT") Act.\textsuperscript{61}

In February 2003, the Senate unanimously passed the PROTECT Act.\textsuperscript{62} Principally concerned with preventing kidnappings and establishing a nationwide notification system (the “Amber Alert”), this measure generated no controversy. In March 2003, however, Congressman Thomas Feeney proposed an amendment to “address[] long-standing and increasing problems of downward departures from the Federal sentencing guidelines.”\textsuperscript{63} Feeney’s proposal called for restricting downward departures in all cases to criteria that had been “affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements.”\textsuperscript{64} The House of Representatives approved the Feeney Amendment 357–58 “without hearings or meaningful debate.”\textsuperscript{65}

Passage of the Feeney Amendment, however, provoked widespread criticism from the federal bench, defense attorneys, and various public interest groups.\textsuperscript{66} This outcry prompted Congress to

\textsuperscript{59} See id. at B-5 (Responses to Question 9).
\textsuperscript{60} See supra notes 7 and 8.
\textsuperscript{62} 149 CONG. REC. S2587 (daily ed. Sept. 24, 2003).
\textsuperscript{64} Id. at H2420.
\textsuperscript{66} See, e.g., Mark Hamblett, Federal Judges Attack Sentencing Restrictions: Judicial Conference Calls for Repeal of Feeney Amendment, 230 N.Y. L.J. Sept. 24, 2003. at 1 ("The
reconsider the Act's terms. Thus, when the PROTECT Act went to conference to reconcile differences between the House and Senate versions, conferees reached a compromise that limited the most restrictive features of the Feeney Amendment to specified measures to protect children from crime. Nevertheless, judges resented the Amendment's remaining restrictions, which required district courts to justify their departure decisions with a statement of reasons, provided broader appellate oversight of downward departures, limited composition of the Sentencing Commission to no more than three judges, directed the Commission to enact new guidelines to "ensure that the incidence of downward departures are [sic]


68. "The court ... shall state ... the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment ..." 18 U.S.C. § 3553(c)(2); see also United States v. Jones, 332 F.3d 1294, 1300 (10th Cir. 2003).

69. "With respect to determinations under subsection (3)(A) or (8)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts." 18 U.S.C.A. § 3742(e) (2003); see also United States v. Thurston, 358 F.3d 51, 70 (1st Cir. 2004) ("After the PROTECT Act, the statute requires de novo review not merely of the ultimate decision to depart, but also of the district court's application of the guidelines to the facts." § 3742(c). If this court agrees that the decision to depart was justified under the guidelines, however, the extent of the departure granted by the district court is reviewed deferentially, just as it was prior to the PROTECT Act.

70. The PROTECT Act changed the wording of 28 U.S.C. § 991(a) from "At least three" of the members shall be federal judges to "Not more than three" of the members shall be federal judges. PROTECT Act § 401(n)(1), discussed in United States v. Schnepner, 302 F. Supp. 2d 1170, 1183 (D. Haw. 2004). Therefore, the law no longer guarantees the federal judiciary representation on the Commission.

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substantially reduced,”71 and required the Attorney General to report to Congress whenever a sentencing judge departs downward.72 Notwithstanding the scaled-back version of the Feeney Amendment that became law, federal judges understandably viewed it as a frontal assault on the limited sentencing discretion they retained under the federal sentencing guidelines.73 Some opponents characterized the reporting requirement as akin to a judicial “black list,”74 which led at least one court to reject it “as an unwarranted interference with judicial independence and a clear violation of the separation of powers set forth in the United States Constitution.”75 Viewed in this light, Blakey offered federal courts a means to reassert control over sentencing decisions.76 The Blakey decision admittedly contains broad language that seems to invite such rulings.

71. Schmepper, 302 F. Supp. 2d at 1181 (citing PROTECT Act § 401(m)(2)(A)–(B)).
72. This provision of the PROTECT Act never went into effect because a provision of the law allowed the Attorney General to avoid reporting to Congress, as required by § 401(f)(2), if the office of the Attorney General submitted a report to Congress detailing the “policies and procedures that the Department of Justice has adopted subsequent to the enactment of” the Feeney Amendment within ninety days of the PROTECT Act becoming law. PROTECT Act §§ 401(f)(1), 401(f)(3), discussed in Schmepper, 302 F. Supp. 2d at 1182. The Attorney General submitted this report to the relevant committees of Congress on July 28, 2003. Id.
75. United States v. Mendoza, No. 03-CR-730-ALL, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004). In reaching this conclusion, the district court characterized the legal provision in question as a “power grab by one branch of government.” Id. at *7.
76. This view, however, certainly does not explain all decisions striking down the guidelines. For example, Judge Paul Cassell stated: “The court takes no joy in finding serious constitutional defects in the federal guidelines system. To the contrary, the court believes that the federal sentencing guidelines have insured that federal sentences achieve the purposes of just punishment and deterring future crimes.” United States v. Croxford, 324 F. Supp. 2d 1230, 1253 (D. Utah 2004).
Ultimately, however, the legal basis underlying Blakely does not provide grounds for invalidating the federal sentencing guidelines.

B. The Basis for Blakely

Blakely concerned a defendant who pled guilty to second-degree kidnapping, a class B felony for which state law provided a maximum penalty of ten years.\(^77\) Another statute, the Washington Sentencing Reform Act, provided a “standard range” of forty-nine to fifty-three months for class B felonies committed with a firearm (as Blakely had done).\(^78\) This statute authorized the sentencing judge to depart upward from the penalty range only if the court found “substantial and compelling reasons justifying an exceptional sentence.”\(^79\) Pursuant to this provision and a finding of “deliberate cruelty,” the judge imposed a sentence of ninety months.\(^80\)

Based on its earlier ruling in Apprendi v. New Jersey,\(^81\) the United States Supreme Court held that the judicial process that produced Blakely’s sentence violated his Sixth Amendment right to a jury determination of guilt beyond a reasonable doubt because the judge, rather than the jury, determined that Blakely committed the crime with “deliberate cruelty.”\(^82\) Prior to Apprendi, the Supreme Court traditionally distinguished between statutory elements and mere sentencing enhancements and applied Sixth Amendment protections only to elements.\(^83\) Although the Court had previously suggested that due process may require protections “to some degree, to determinations that [go] not to a defendant’s guilt or innocence,

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\(^78\) Id.

\(^79\) Id. at 2535 (citing WASH. REV. CODE ANN. § 9.94A.120(3) (2000)).

\(^80\) Id. at 2536.

\(^81\) 530 U.S. 466 (2000).

\(^82\) Blakely, 124 S. Ct. at 2538.

\(^83\) For example, as Judge Gerard Lynch has noted:

The conventional wisdom before Apprendi, drawn in part from the Supreme Court’s decision in McMillan v. Pennsylvania and in part from the law of discretionary sentencing that predated the sentencing reforms of the 1980’s held that the elements of the charged offense needed to be proved to the jury beyond a reasonable doubt, but that factors that bore only on the sentence to be imposed for the offense, within the limits of the discretion conferred to the courts, needed only to be proved to the satisfaction of the sentencing judge.

but simply to the length of his sentence," 84 Apprendi for the first time explicitly extended Sixth Amendment protections to at least some sentencing fact-finding. The Apprendi Court viewed sentencing enhancements that increased the defendant’s penalty beyond the authorized statutory maximum sentence as “the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” 85 Accordingly, Apprendi held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 86

This holding was neither novel nor surprising, as no sentence may exceed the statutory maximum. Blakely, however, subsequently transformed the meaning of the term “statutory maximum.” Responding to Washington State’s argument that the trial court had sentenced petitioner to a term that fell short of the ten-year statutory maximum, the majority stated that “the ‘statutory’ maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 87 Accordingly, Justice Scalia explained that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” 88 As the jury’s verdict alone did not authorize punishment beyond the statutory sentencing range for second degree kidnapping, Blakely’s penalty violated the Constitution. 89

In reaching this decision, the Blakely Court acknowledged that it had previously sustained an indeterminate sentencing scheme in which the judge, relying upon extra-record facts and exercising unlimited discretion, imposed sentence within the maximum

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84. Apprendi, 530 U.S. at 484 (citing Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).
85. Id. at 494 n.19.
86. Id. at 490.
87. Blakely, 124 S. Ct. at 2537.
88. Id. Justice Scalia explained: “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.” Id. (citation omitted) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).
89. Id. at 2538 (“[I]t remains the case that the jury’s verdict alone does not authorize the sentence.”).
established by statute. Such indeterminate sentencing systems inevitably entail implicit judicial fact-finding (e.g., so the court can determine its discretionary sentence). However, Justice Scalia’s majority opinion found indeterminate sentencing systems distinguishable because their fact-findings “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.” Thus, although indeterminate sentencing schemes expose defendants to far greater risks stemming from the broad exercise of judicial discretion, the absence of a formal fact-finding procedure apparently insulates discretionary sentencing systems from Sixth Amendment scrutiny.

Although the Blakely Court noted that “[t]he Federal Guidelines are not before us, and we express no opinion on them,” the Court’s opinion contains language potentially problematic to both the guidelines and the constitutionality of the SRA. In addition to its apparent rejection of judicial fact-finding that exposes a defendant to an increased sentence, the Court’s opinion questioned the fairness of the federal system

in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

In response, the dissent argued that due process protects adequately against excessive enhancements when “the ‘tail’ of the sentencing fact might ‘wa[g] the dog of the substantive offense.’"
The Court, however, rejected this proposal as too indefinite to provide meaningful protection.95

Not surprisingly, the dissenting opinions warned that Blakely would render the federal sentencing guidelines unconstitutional.96 Within days of the decision, their concerns proved justified as a series of district courts declared the federal guidelines unconstitutional insofar as they required judges to make postconviction factual determinations that increase sentences.97 Judge Paul Cassell's decision in United States v. Croxford is perhaps best representative of these rulings.98

Croxford pled guilty to one count of child exploitation in violation of 18 U.S.C. § 2251(a). Based on a number of factors, the probation officer recommended various enhancements above the base offense level. After considering the reasoning underlying Blakely as set forth above, Judge Cassell concluded:

A sentence may not be enhanced when doing so requires the judge to make factual findings which go beyond the defendant's plea or the verdict of the jury. Given this rule, there is no way this court can sentence Croxford under the federal sentencing guidelines without violating his right to trial by jury as guaranteed by the Sixth Amendment.99

In reaching this conclusion, Judge Cassell also relied, in part, on the dissenting opinions in Blakely to reject the proposition that the federal sentencing guidelines are structurally or otherwise distinguishable from Washington's unconstitutional statutory sentencing scheme.100

95. Id. at 2539–40. But see infra notes 174–84 and accompanying text (criticizing the Court's failure to consider a proportionality-based due process analysis).

96. Indeed, Justice O'Connor warned that "[i]f the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would." Id. at 2550 (O'Connor, J., dissenting); see also id. at 2560–62 (Breyer, J., dissenting).


98. 324 F. Supp. 2d at 1238–42.

99. Id. at 1238–39.

100. Id. at 1239.
The Blakely majority's broad language, together with the dissenting opinions' warning of the guidelines' imminent demise, led numerous other district judges to adopt the Crossford analysis. At best, however, these decisions were premature. The Blakely Court declined to address the constitutionality of the federal guidelines. Moreover, before the Blakely decision, every circuit had ruled that Apprendi did not render the federal guidelines unconstitutional.


102. Blakely, 124 S. Ct. at 2538 n.9.

103. See United States v. Goodline, 326 F.3d 26, 34 (1st Cir. 2003) ("The guideline calculations are not restricted by Apprendi's rule . . . ."); United States v. Luciano, 311 F.3d 146, 153 (2d Cir. 2002) ("We have repeatedly held that Guidelines ranges are not statutory maximums for the purpose of Apprendi analysis."); United States v. DeSumma, 272 F.3d 176, 181 (3d Cir. 2001) ("This Court has . . . concluded . . . that when the actual sentence imposed [under the Guidelines] does not exceed the statutory maximum, Apprendi is not implicated."); United States v. Kinter, 235 F.3d 192, 200 (4th Cir. 2000) ("We conclude, however, that the Sentencing Guidelines pass muster under the Apprendi Court's conception of due process . . ."); United States v. Randle, 304 F.3d 373, 378 (5th Cir. 2002) (concluding that a sentence based on facts admitted at trial supported an upward adjustment under the guidelines that did not exceed the statutory maximum); United States v. Helton, 349 F.3d 295, 299 (6th Cir. 2003) ("Once the jury has determined guilt, the district court may sentence the defendant to the statutory minimum, the statutory maximum, or anything in between, based on its (proper) application of the Guidelines and based on its (permissible) preponderance-of-the-evidence findings under the Guidelines." (relying upon Harris v. United States, 556 U.S. 545 (2000))); United States v. Johnson, 335 F.3d 589, 591 (7th Cir. 2003) (per curiam) (concluding that Apprendi did not apply because the defendant's sentence, decided under the guidelines, was "less than the statutory maximum prescribed by the statute of conviction."); United States v. Pugno, 316 F.3d 789, 791 (8th Cir. 2003) ("The rule of Apprendi only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict." (internal quotation marks and alteration in original omitted) (quoting United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000))); United States v. Toliver, 351 F.3d 423, 438 (9th Cir. 2003) (concluding that a district judge does not violate Apprendi when he does not exceed the statutory maximum); United States v. Mendez-Zamora, 296 F.3d 1013, 1020 (10th Cir. 2002) ("Apprendi [, however,] does not apply to sentencing factors that increase a defendant's guideline range but do not increase the [sentence beyond the] statutory maximum." (internal quotations marks omitted) (alterations in original) (quoting United States v. Sullivan, 255 F.3d 1256, 1265 (10th Cir. 2001))); United States v. Sanchez, 269 F.3d 1250, 1288 (11th Cir. 2001) ("Apprendi has no application to, or effect on, either mandatory minimum sentences or Sentencing Guidelines calculations, when in either case the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty."); United States v. Fields, 251 F.3d 1041, 1043 (D.C. Cir. 2001) ("Apprendi does not apply to sentencing findings that . . .")

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These decisions remain in effect until either the Supreme Court or individual circuit courts, sitting *en banc*, overrule them. Rather than await proper development of the issues at the appellate level, however, district courts often reached out to decide the guidelines’ constitutionality—occasionally without the benefit of briefing from the parties.

To the degree that district courts relied on the *Blakely* dissents to declare the guidelines unconstitutional, their analysis is misdirected: “dissenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra’s gloom more than of her accuracy.” Indeed, *Blakely*’s dissenting opinions may have overlooked that the Supreme Court has previously expressed approval of judicial fact-finding—under a preponderance of the evidence standard—for sentencing enhancements under the Dangerous Special Offender law. Ultimately, a series of other

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Supreme Court decisions sustaining the federal sentencing guidelines provides a more reliable guide to their constitutionality.

III. THE CONSTITUTIONAL CONTEXT: THE SUPREME COURT AND FEDERAL SENTENCING GUIDELINES

Courts rejecting the guidelines have largely ignored other Supreme Court precedent, failed to fully consider important differences between the federal sentencing guidelines and the state sentencing statutes that Blakely found objectionable, and taken an unduly expansive interpretation of Blakely. For example, the Crawford court declined to impose an obstruction of justice enhancement upon the defendant, noting that the majority in Blakely apparently found that precise enhancement objectionable. 108 Whatever the differences between the Blakely majority and dissents on this point, however, the Supreme Court did not overrule its unanimous decision in United States v. Dunnigan, 109 which

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those facts must be proved beyond a reasonable doubt. The Courts of Appeals have uniformly rejected due process challenges to the preponderance standard under the federal “dangerous special offender” statute, 18 U.S.C. § 3575, which provides for an enhanced sentence if the court concludes that the defendant is both “dangerous” and a “special offender.”

477 U.S. 79, 92 (1986) (emphasis added) (citation omitted) (citing United States v. Davis, 710 F.2d 104, 106 (3d Cir. 1983) (collecting cases)).

Although the Blakely Court limited McMillan to statutes that increase mandatory minimums, 124 S. Ct. at 2538, the now-repealed dangerous special offender law increased the statutory maximum and did not involve mandatory minimums. 18 U.S.C. § 3575 (repealed 1984). Indeed, subject to a constraint against “disproportionate” penalties, the law authorized judges to enhance sentences as much as twenty-five years beyond the statutory maximum. 84 Stat. 948, 949 (codified at 18 U.S.C. § 3557(b)) (repealed 1984) (emphasis added). The Judicial Conference of the United States endorsed this legislation. See H.R. Rep. No. 91-1549 reprinted in 1970 U.S.C.C.A.N. 4007, 4051. To enhance a sentence, the dangerous special offender law required the trial judge to make certain factual findings comparable to those required under the federal sentencing guidelines. For example, the law required finding that the defendant committed a designated felony as part of a pattern of conduct . . . which constituted a substantial source of his income, and in which he manifested special skill or expertise; or . . . [was] a conspiracy with three or more other persons to engage in a pattern of [criminal] conduct . . . and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy.


instructed sentencing judges to decide the facts pertinent to the obstruction of justice guideline enhancement.\textsuperscript{110}

\textit{A. District Courts Have Ignored Controlling Supreme Court Precedent}

For the most part, district courts invalidating the guidelines have failed to address the substantial body of Supreme Court precedent sustaining the constitutionality of the federal guidelines since their inception.\textsuperscript{111} Starting with \textit{Mistretta v. United States} in 1989, the Supreme Court upheld the guidelines' constitutionality in the face of a broad challenge on separation of powers grounds.\textsuperscript{112} Although \textit{Mistretta} did not involve a Sixth Amendment challenge to the guidelines, the Court's opinion carefully reviewed the origin and operation of the newly established guideline system, which, by its nature, required judicial fact-finding.\textsuperscript{113}

Further, on two occasions the Supreme Court has broadly endorsed the guidelines' relevant conduct rules, which potentially enhance sentences based on conduct beyond the actual count of conviction.\textsuperscript{114} These rules implement the Commission's "modified real offense" sentencing system, which increases penalties based on certain real offense conduct underlying the offense of conviction.\textsuperscript{115}

\begin{footnotes}
\item[110] Id. at 95 ("[I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish . . . obstruction of justice . . . .").
\item[112] 488 U.S. at 412.
\item[113] Id. at 378-79 (noting that the Commission has relied on "the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly to exercise judgment in establishing the sentencing guidelines (internal quotation marks omitted) (quoting Yakus v. United States, 321 U.S. 414, 425 (1944))).
\item[114] U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003).
The relevant conduct rules, however, are constrained by the authorized statutory maximum set by Congress for the offense,\textsuperscript{116} the elements of which are always found by the jury in its verdict. Thus, in \textit{Witte v. United States}, the Supreme Court used the statute, rather than the guidelines, to identify the maximum penalty range for the offense.\textsuperscript{117} \textit{Witte} involved a claim that the Double Jeopardy Clause precluded prosecuting a defendant for conduct (trafficking 1091 kilograms of cocaine) that had been the subject of a prior conviction’s relevant conduct enhancement.\textsuperscript{118} In rejecting this argument, the Court observed that the relevant conduct rules produced an increased guideline range that “still falls within the scope of the legislatively authorized penalty (5 to 40 years).”\textsuperscript{119}

The \textit{Witte} Court also noted that “[t]he relevant conduct provisions of the Sentencing Guidelines ... are sentencing enhancement[s] ... evincing the judgment that a particular offense should receive a more serious sentence \textit{within the authorized range} if it was either accompanied by or preceded by additional criminal activity.”\textsuperscript{120} Put simply, the enhancement applies because the “offense was carried out in a manner that warrants increased punishment.”\textsuperscript{121} Accordingly, the Court held that “where \textit{the legislature} has authorized ... a particular punishment range for a given crime, the resulting sentence \textit{within that range} constitutes

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\textit{Cornerstone of the Federal Sentencing Guidelines}, 41 S.C. L. Rev. 495, 497–99 (1990); O’ Sullivan, \textit{supra}, at 1349, 1352–61. Under this system, the offender is held accountable—and incurs an increased sentence—for designated harms that occurred either in connection with the offense of conviction or, in some instances, “that were part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a) (2003). Under no circumstances, however, may the sentence exceed the statutory maximum set by Congress when it defined the offense. U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(1) (2003). See \textit{infra} note 156 and accompanying text. Of course, the elements of the offense are always decided by the jury.
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punishment only for the offense of conviction for purposes of the double jeopardy inquiry."\textsuperscript{122}

In \textit{United States v. Watts}, the Court even endorsed a guideline sentencing enhancement for relevant \textit{acquitted} conduct.\textsuperscript{123} After the jury convicted defendant on drug charges and acquitted him on a firearms count, the trial judge "found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense."\textsuperscript{124} On appeal, the Supreme Court did not even permit briefing or full argument, and its per curiam opinion characterized as "novel"\textsuperscript{125} the view that a sentencing judge may not consider conduct encompassed by the jury's acquittal. The Court observed that "longstanding" statutory and common law doctrine authorized a sentencing judge to consider a wide variety of information about the defendant,\textsuperscript{126} which "traditionally and constitutionally"\textsuperscript{127} may include acquitted conduct.\textsuperscript{128} The \textit{Watts} Court concluded:

For these reasons, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence and we have held that application of the preponderance standard at sentencing generally satisfies due process.\textsuperscript{129}

Adding his support for a procedure that necessarily involves judicial fact-finding, Justice Scalia concurred separately in \textit{Watts} to

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\textsuperscript{122} Id. at 403–04 (emphasis added).
\textsuperscript{123} 519 U.S. 148, 157 (1997).
\textsuperscript{124} Id. at 150; see also \textit{id}. at 170–71 (Kennedy, J., dissenting) (electing to dissent because the Court had not allowed full briefing or consideration on the oral argument calendar).
\textsuperscript{125} Id. at 154.
\textsuperscript{126} Id. at 151.
\textsuperscript{127} Id. at 152 (citing Nichols v. United States, 511 U.S. 738, 747 (1994)).
\textsuperscript{128} Id. (citing United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982)).
\textsuperscript{129} Id. at 156 (emphasis added) (citations omitted) (quoting Dowling v. United States, 493 U.S. 342, 349 (1990); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2003)) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986), aff'd, 477 U.S. 797 (1986); Nichols, 511 U.S. at 747–48). The Court "acknowledge[d] a divergence of opinion" concerning "whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," but did not consider the situation before it to "present such exceptional circumstances." \textit{Watts}, 519 U.S. at 156–57; see also \textit{McMillan}, 477 U.S. at 92 n.8 (1986) ("[S]entencing courts have always operated without constitutionally imposed burdens of proof . . . .").
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emphasize his view that the Sentencing Commission could not reverse the Court's decision "by mandating disregard of the information we today hold it proper to consider." Thus, both Witt and Watts contemplated judges routinely conducting postconviction fact-finding in determining whether to apply sentencing enhancements within statutory limits set by Congress for the offense, the elements of which are always submitted to the jury for a determination of guilt consistent with all constitutional rights.

Witt and Watts do not stand alone. On other occasions, the Supreme Court has reiterated its "traditional understanding of the sentencing process [as one] which we have often recognized as less exacting than the process of establishing guilt." Thus, a series of Supreme Court decisions principally warns against sentences that exceed statutory limits— guideline increases within such limits have never warranted constitutional attention.

For example, in Edwards v. United States, defendants challenged the trial judge's authority to determine the type and quantity of drugs underlying a jury's general guilty verdict. On appeal, the defense argued that, given the general verdict, the sentencing judge "must assume that the conspiracy involved only cocaine, which... the Sentencing Guidelines treat more leniently than crack." Among other points, defendants' briefs argued that holding them accountable for crack cocaine would violate their Sixth Amendment right to a jury determination.

130. Witt, 519 U.S. at 158. Justice Scalia explained that the Sentencing Reform Act requires the Guidelines to be "consistent with all pertinent provisions of title 18, United States Code." [28 U.S.C. § 994(b)(1).] In turn, 18 U.S.C. § 3661 provides that "[a]ny limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Id. (emphasis added) (second alteration in original).

131. Nichols, 511 U.S. at 747.

132. 523 U.S. 511, 513 (1998). The jury instructions at issue allowed the jury to convict on finding a conspiracy to distribute either cocaine or crack, but the judge imposed sentence as if both drugs were involved. The defendants challenged the sentence because the jury could have intended to find only cocaine. Id.

133. Id.

In rejecting this argument, the Court apparently endorsed both the guidelines’ relevant conduct rules and the sentencing judge’s authority to decide the facts pertinent to punishment within the maximum statutory range. The Court in *Edwards* observed, “[o]f course, petitioners’ statutory and constitutional claims 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.” Significantly, the *Appendix* Court later quoted this language in noting that “[t]he Guidelines are . . . not before the Court. We therefore express no view on the subject beyond what this Court has already held.” Thus, *Appendix* seemed to indicate the Court’s view that *Edwards* had addressed the Sixth Amendment guidelines issue.

Subsequently, *Harris v. United States* sustained a trial judge’s postconviction authority to find facts triggering application of a statutory mandatory minimum sentence. The Court reasoned that, in contrast to penalties that raise statutory maximums, “judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury trial, and ‘reasonable doubt’ components of the Fifth and Sixth Amendments.” At the very least, this post-*Appendix* language suggests that the application of *Blakely* to the federal sentencing

135. *See* *Edwards*, 523 U.S. at 614 (“[R]elevant conduct” . . . includes both conduct that constitutes the ‘offense of conviction,’ and conduct that is ‘part of the same course of conduct or common scheme or plan as the offense of conviction.’) (internal quotation marks and citations omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1-2) (1998)).

136. *Id.* at 515.

137. *Appendix v. New Jersey*, 530 U.S. 466, 497 n.21 (2000) (emphasis added) (citing *Edwards*, 523 U.S. at 515); *see also United States v. Emmenegger*, No. 04 CR. 834 (GEL), 2004 U.S. Dist. LEXIS 15142, at *35–36 (S.D.N.Y. Aug. 4, 2004) (“[A]lthough the Court has never addressed, with specific reference to the Guidelines, the precise jury trial right implicated by *Blakely* and *Appendix*, it has, without a murmur of constitutional qualm, previously affirmed sentences that would appear to present the very concerns that some now argue invalidate the Guidelines.”).


139. The Court stated: “[A mandatory minimum] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding . . . .” *Id.* at 559 (emphasis added) (internal quotation marks omitted) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 87–88 (1986)). Of course, sentencing guidelines place similar limits on the sentencing court’s discretion.

140. *Id.* at 558 (emphasis added).
guidelines is hardly a foregone conclusion—especially since Harris also observed: "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution."  

B. The Differences Between the Washington and the Federal Sentencing Guidelines

The above decisions demonstrate that the Supreme Court has always permitted judicial fact-finding for sentencing offenders within the statutory maximum. The decisions also show that, rather than look to the jury’s verdict in each particular case, the Court has routinely used the term “statutory maximum” with reference to the heaviest potential legislative sanction. To the degree that Blakely suggests otherwise, it is an aberration that can be best reconciled by recognizing important differences between the Washington statutes and federal sentencing guidelines.

1. An overarching federal system

Unlike Washington’s sentencing scheme, which created “dueling” statutory maximum penalties, the federal sentencing

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141. Id. (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 248 (1999)). The Court further emphasized that the statute at issue “simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor.” Id. at 559 (emphasis added) (omission in original) (internal quotation marks omitted) (quoting McMillan, 477 U.S. at 89–90).

142. Thus, prior to Blakely, every circuit court ruled that Apprendi did not render the federal sentencing guidelines unconstitutional because the guidelines operated within the statutory maximum. See supra note 103.

143. For example, the Harris Court observed:

Since sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the “heaviest punishment” they face if convicted. Judges, in turn, have always considered uncharged “aggravating circumstances” that, while increasing the defendant’s punishment, have not “swell[ed] the penalty above what the law has provided for the acts charged.”

Harris, 536 U.S. at 562 (alteration in original) (citations omitted) (quoting 1 Bishop, supra note 88, § 81, at 54); see also United States v. Corton, 535 U.S. 625, 632 (2002) (setting aside a post-conviction judicial determination and noting that “the indictment’s failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents’ enhanced sentences erroneous under the reasoning of Apprendi and Jones”).

144. See United States v. Gonzales Magana, No. 98-10487, 2004 U.S. App. LEXIS 15759, at *3 (9th Cir. July 29, 2004); United States v. Ameline, 376 F.3d 967, 975 (9th Cir.
guidelines operate as judicial rules within an overarching statutory structure of substantive criminal law. In contrast to Washington criminal law (e.g., kidnapping), the federal sentencing guidelines do not establish degrees of culpability that trigger corresponding increases in any statutory maximum. Indeed, the federal sentencing guidelines are non-substantive in that they neither define criminality nor "bind or regulate the primary conduct of the public." Under traditional Supreme Court analysis, this omission means the guidelines do not constitute elements of criminality. Moreover the Supreme Court has previously stated that the guidelines do not "vest in the Judicial Branch [through the Commission] the legislative responsibility for establishing minimum and maximum penalties for every crime." In cases of conflict between the federal guidelines and the substantive criminal law, statutory text trumps the guidelines. Thus, the Supreme Court has observed that, rather than create new statutory ranges, the guidelines "do no more than fetter the discretion of sentencing judges to do what they have done


145. Mistretta v. United States, 488 U.S. 366, 391 (1989) ("[G]uidelines ... are court rules ... for carrying into execution judgments that the Judiciary has the power to pronounce."); see also Stinson v. United States, 508 U.S. 36, 45 (1993) ("[T]he guidelines are the equivalent of legislative rules adopted by federal agencies.").

146. Mistretta, 488 U.S. at 396; see United States v. Kliner, 235 F.3d 192, 201 (4th Cir. 2000) ("The Sentencing Guidelines do not create crimes. They merely guide the discretion of district courts in determining sentences within a legislatively-determined range, and this discretion has been entrusted to the federal courts ".from the beginning of the Republic."); (alteration in original) (quoting Apprendi v. New Jersey, 530 U.S. 466, 480 n.9 (2000) (internal quotation marks omitted) (quoting KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998))).

147. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (noting parenthetically that the "definition of a criminal offense [is] entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute" (quoting Staples v. United States, 511 U.S. 600, 604 (1994) (internal quotation marks omitted) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))) Almendarez-Torres v. United States also rejected the proposition "that the Constitution requires that most, if not all, sentencing factors be treated as elements. But Patterm suggests the exact opposite, namely, that the Constitution requires scarcely any sentencing factors to be treated in that way." Id. at 241.

148. Mistretta, 488 U.S. at 396 (emphasis added).

for generations—impose sentences within the broad limits established by Congress.\footnote{150}

2. Base offense levels, not standard sentencing ranges

Further, in contrast to Washington’s statutes, the federal guidelines do not establish a “standard sentencing range” for each crime.\footnote{151} While each crime carries a corresponding base offense level that contains its own sentencing range, that base offense level is only a starting point and is subject to adjustment for aggravating or mitigating specific offense characteristics.\footnote{152} Because the guidelines contemplate building upon this base offense level to reflect the true nature and impact of the offender’s criminal conduct,\footnote{153} there is no legal or logical basis for treating the base offense level as the statutory maximum.

For example, the guidelines set the base offense level for a first-time fraud conviction at seven, with a corresponding range of zero to six months imprisonment.\footnote{154} Given this penalty structure, Judge Gerard Lynch has observed:

Within the context of the Guidelines, however, it makes little sense to say that Congress intended the “statutory maximum” sentence

\footnote{150} Mistretta, 488 U.S. at 396.

\footnote{151} In fact, Congress intended that there be “numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and office circumstances. There would be expected to be, for example, several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances.” S. REP. NO. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3551. Therefore, Congress directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving similarly situated defendants, rather than for sentencing ranges for each particular crime. See 28 U.S.C. § 994(b)(1) (2000); U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2003); 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 526.1 (Crim. 3d 2004).

\footnote{152} U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2003); United States v. Finch, 282 F.3d 364, 367 (6th Cir. 2002) ("[T]he base offense level is the starting point in the sentencing computation.").

\footnote{153} See supra notes 22–24 and accompanying text; cf. United States v. Koch, No. 02-6278, U.S. App. 2004 WL 1899930, at *6 (6th Cir. Aug. 26, 2004) ("[T]he Guidelines do not supply a clear ‘standard sentencing range’ for each defendant and indeed represent a form of indeterminate-determinate sentencing because even after application of the hundreds of pages of the Guidelines Manual, to say nothing of relevant case law, to each individual defendant’s sentence, judges still may increase (or decrease) sentences based on factors not addressed in the Guidelines.").

for the crime of wire fraud to be six months rather than the twenty years to which Congress, subsequent to the adoption of the Sentencing Reform Act [...], increased the actual statutory maximum sentence for that crime. 155

This is especially true in light of the guidelines' "modified real offense" approach to sentencing, which—subject to the statutory maximum—increases penalties based on the defendant's relevant conduct to the crime of conviction. 156 Thus, contrary to Justice Scalia's argument in Blakely, there is no "right" to be sentenced at the guidelines' base offense level. 157

3. An individualized, rather than presumptive, approach

The guidelines' individualized approach to sentencing also sets it apart from the Washington sentencing system, which provided a generic sentencing range based primarily on the elements of the offense of conviction. For example, as Judge Gerard Lynch astutely explains:

Unlike most state penal codes, which frequently divide crimes into narrow degrees and standard categories often patterned on the highly rationalistic Model Penal Code, federal criminal statutes typically cover a vast range of behavior in undifferentiated, very general formulations. The wire fraud statute is a classic example of such a statute, which quite literally covers a multitude of sins of quite different kinds and degrees. Unlike many state guideline systems, the federal Guidelines do not set a "standard sentencing range" for the crime of wire fraud, or for most other crimes of conviction. Rather, the Guidelines provide a methodology for assessing the seriousness of different instances of crime, quite

[1] It seems evident in this day and age of Enron and Sarbanes-Oxley that Congress would never have countenanced a Guidelines system in which all first-time offenders ... were limited to a sentence of 0-6 months—the base offense for all fraud convictions—without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not "relevant") statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention ....
United States v. Einisman, 325 F. Supp. 2d 373, 380 (S.D.N.Y. 2004) (finding the guidelines unconstitutional but declining to hold them severable).
156. See infra notes 114–16 and accompanying text.
157. See infra note 91 and accompanying text.
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separate from the elements of any particular statutory crime. Where it may make sense to think of the 49–53 month “standard sentencing range” as the operative ordinary maximum punishment for kidnapping in the second degree in Washington, the federal Guidelines defy any effort to identify a “standard sentencing range” (or a “statutory maximum” other than the one literally provided by 18 U.S.C. § 1343) for wire fraud. The system simply does not work that way. 158

In Blakely, the sentencing judge departed upward from this range based upon finding an aggravating factor that distinguished second-degree from first-degree kidnapping. 159 Consequently, although Blakely pleaded guilty to second degree kidnapping, the trial court sentenced him almost as severely as if he had been convicted of first degree kidnapping. 160 This is also comparable to the circumstances in Apprendi, in which the defendant pleaded guilty to a firearms violation carrying a maximum penalty of ten years imprisonment but was sentenced pursuant to an aggravated hate crime statute with a twenty-year maximum term. 161 The federal sentencing guidelines do not permit this result, as the crime of conviction always sets the maximum sentence. 162 This explains why, before Blakely, every circuit ruled that Apprendi did not render the federal sentencing guidelines unconstitutional. 163

Nor, as Justice Scalia’s majority opinion stated in Blakely, do the federal guidelines create a regime

in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation

159. 124 S. Ct. at 2539.
160. The judge in Blakely’s case imposed a sentence of ninety months, only eight months short of a sentence for first-degree kidnapping. See id. at 2535.
161. See 530 U.S. at 468–69; see also United States v. Pinedo, 377 F.3d 464, 473 n.7 (5th Cir. 2004) (noting parenthetically that in Apprendi “the effect of the hate-crime enhancement was to ‘turn a second-degree offense into a first-degree offense’” (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000))).
163. See supra note 103.
officer who the judge thinks more likely got it right than got it wrong. 164

To the degree that this practice ever occurred, it originated from federal statutes rather than the federal guidelines, which merely implemented them. 165 More importantly, the Blakely majority’s preceding reference to the federal sentencing practice is mistaken. Since the Court’s decision in Apprendi, federal courts have required prosecutors to allege and prove facts (such as drug type and quantity) that expose a defendant to higher statutory maximums. 166 The federal sentencing guidelines, which operate within these statutory maximums, therefore are irrelevant to the Blakely Court’s concern. 167

Thus, neither prior Supreme Court jurisprudence nor the concerns that gave rise to Blakely support the proposition that the Sixth Amendment requires a jury finding whenever a specific offense characteristic adjusts the guidelines’ offense level to produce an increased sentencing range within the statutory maximum.

C. Extending Blakely Would Run Counter to History and Common Sense

Extending Blakely to require jury verdicts for guideline enhancements within statutory maximums also runs counter to history and common sense. Historically, eighteenth century juries had little or no occasion to consider sentencing factors because criminal violations carried fixed penalties based upon the severity (or degree) of the statutory offense. 168 When nineteenth-century

164. Blakely, 124 S. Ct. at 2542 (citation omitted); see also supra note 93.
165. United States v. Luna-Montoya, 80 Fed. Appx. 334 (5th Cir. 2003) (reversing an enhancement under the guidelines from 21–27 months to 70–87 months incarceration).
166. See, e.g., United States v. Nance, 236 F.3d 820, 824 (7th Cir. 2000) (collecting cases).
167. Moreover, to the degree that the guidelines specific offense characteristics might produce dramatic sentence increases, courts routinely inform defendants of this possibility at the change of plea colloquy. See FEDERAL JUDICIAL CENTER, BENCHMARK FOR U.S. DISTRICT COURT JUDGES 71–73 (4th ed. 2000).
168. See ALAN DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 83 (1976) ("punishments were legislatively prescribed with some precision"); Ilene Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990) ("Each crime had a defined punishment; the period of incarceration was generally prescribed with specificity by the legislature."). Indeed, Virginia "was the first state to
legislatures adopted indeterminate sentencing schemes, judges operated with vast discretion to impose any sentence within the maximum penalty set by law.\textsuperscript{169} Further, if judges chose to conduct a sentencing hearing, they could consider factors outside the realm of evidentiary rules and without burden of proof constraints.\textsuperscript{170} Indeed, the sentencing court did not have to issue formal findings of fact or otherwise explain its sentencing decision.\textsuperscript{171}

Of course, unfettered discretion produced widespread disparities, which, in turn, prompted Congress to enact the SRA.\textsuperscript{172} Requiring jury verdicts to justify each sentencing enhancement would further reduce judicial discretion under the federal guidelines. Consider an offender, utterly without remorse, who states his intent to remain in contact with gang members and to “have nothing to do with the laws of society.” Suppose further that the probation office delivers a devastating victim impact statement to the judge. The district court might properly consider such circumstances sufficiently egregious to warrant an upward departure from the applicable guideline range,

formally adopt jury sentencing for all criminal offenses,” and this did not occur until 1796. Jenia Ioncheva, 
\textit{Jury Sentencing at Democratic Practice}, 89 VA. L. REV. 311, 317 (2003). Although some scholars take a different view of colonial sentencing statutes, they agree that the jury did not play a significant role in sentencing determinations. Professors King and Klein have observed:

\begin{quote}
As an initial matter, it is doubtful that the setting of penalties was ever as firmly a part of the jury’s function in the United States as it was in England. Compared to juries on the other side of the Atlantic, Americans… at the time of the adoption of the Bill of Rights played a minor role in sentencing. Instead, many—or perhaps most—sentences were set by judges, at their discretion, within broad statutory ranges.
\end{quote}


\textsuperscript{169} Senators’ \textit{Amicus Brief}, supra note 17, at 4.

During the 19th century and most of the 20th century, federal sentencing was generally conducted pursuant to an intermediate system. For most offenses, Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense, but judges were free to impose a sentence anywhere within that statutory range based on the consideration of virtually any information that a court deemed relevant . . . .

\textit{Id.}.

\textsuperscript{170} See \textit{id.} at 4–6; see also, e.g., Mistretta v. United States, 488 U.S. 361, 363 (1989).

\textsuperscript{171} Mistretta, 488 U.S. at 363.

\textsuperscript{172} See S. REP. NO. 98-223, supra note 17 and accompanying text.
and should retain authority to impose punishment accordingly.\textsuperscript{173} Decisions of this kind are usually not suitable for jury determinations; this information is rarely available prior to conviction, and in any event, jurors lack the judge’s experience in evaluating how this offender’s uniquely negative qualities compare with other more ordinary or conciliatory violators.\textsuperscript{174}

Of course, the practical need to allow judges authority to increase penalties (within the statutory maximum) is not without limits. And contrary to Justice Scalia’s opinion in \textit{Blakely},\textsuperscript{175} judges are well equipped to prevent the guidelines from becoming “a tail which wags the dog of the substantive offense.”\textsuperscript{176} Justice Scalia considered the dissent’s canine reference too vague for meaningful due process analysis.\textsuperscript{177} But this metaphor, which the Supreme Court has previously employed,\textsuperscript{178} simply expresses the principle that due process does not permit sentencing factors to produce penalties grossly disproportionate to the crime of conviction. Justice Scalia’s majority opinion seems to demand a definitive rule where a less

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173. See \textsc{U.S. Sentencing Guidelines Manual} § 5K2.0–2.9 (2003) (listing appropriate grounds for upward departures); \textit{see also} United States v. Simmons, 368 F.3d 1335, 1340 (11th Cir. 2004) (“While the Guidelines address several of the most common characteristics of offenses and defendants, there is an almost endless variety of other circumstances or considerations that might warrant upward departures.” (citing and quoting parenthetically \textsc{U.S. Sentencing Guidelines Manual} ch. 1, pt. A(4)(b) (2001) (“[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.”))).

Courts use their discretion in imposing upward departures where appropriate. \textit{See, e.g.}, United States v. Courtney, 362 F.3d 497, 503–04 (8th Cir. 2004) (infliction of extreme psychological harm to the defendant’s victim, as shown in victim-impact statements (citing \textsc{U.S. Sentencing Guidelines Manual} § 2N1.1, cmt.1)); United States v. Melgar-Galvez, 161 F.3d 1122, 1124 (7th Cir. 1998) (“[T]he defendant has continually demonstrated a propensity to violate the laws of this country [and] reveals a clear and uncompromising recidivist type of criminal nature which we agree certainly should be subject to upward departure.”); United States v. Domico, 99 F.3d 1431, 1439 (7th Cir. 1996) (involvement with organized crime); United States v. Akinsdele, 84 F.3d 948, 952–53 (7th Cir. 1996) (degree of victim harm); United States v. Lara–Banda, 972 F.2d 958, 960 (8th Cir. 1992) (defendant was unrepentant, incorrigible, and posed a risk to the community).

174. \textit{Cf.} Koon v. United States, 518 U.S. 81, 98 (1996) (noting that the district court is “informed by its vantage point and day-to-day experience in criminal sentencing” and has “an institutional advantage . . . in making these sorts of determinations”).

175. 124 S. Ct. at 2542 n.13.


177. \textit{Blakely}, 124 S. Ct. at 2542 n.13.

178. \textit{See, e.g.}, Watts, 519 U.S. at 156–57 n.2 (citations omitted); \textsc{McMillan}, 477 U.S. at 88; \textsc{Almendarez-Torres v. United States}, 523 U.S. 224, 243–44 (1998).
\end{flushright}
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exacting standard should suffice. Judges routinely apply standards, rather than rules, in resolving constitutional questions. In particular, American courts have applied the proportionality principle to a wide range of situations, including Eighth Amendment claims of cruel and unusual punishment, excessive fines, and the propriety

179. For example, in a First Amendment context, "the Court's movement away from large categories towards adjudication based on individual cases may be characterized as a move from 'rules' to 'standards.'" G. Robert Blakely & Brian J. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 BYU L. REV. 829, 920 n.281. That standards are less definite than rules does not render standards meaningless. Blakely and Murray note Justice Holmes's observation: "The law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism." Id. at 1121 (internal quotation marks omitted) (quoting OLIVER WENDELL HOLMES, NATURAL LAW, IN COLLECTED LEGAL PAPERS 31, 32 (1920). In the context of criminal procedure, the Supreme Court has similarly preferred standards over absolute rules. See, e.g., Illinois v. Gates, 462 U.S. 213, 230-31 (1982) (rejecting a rigid test for probable cause determinations in favor of a totality-of-the-circumstances standard); Manson v. Brathwaite, 432 U.S. 98, 112-13 (1977) ("The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." (rejecting a per se exclusion of improper eyewitness identifications and adopting a totality-of-the-circumstances approach)). Although in Miranda v. Arizona, 384 U.S. 1 (1966), the Court initially opted for a per se prophylactic rule in the context of custodial interrogations, "neither the Supreme Court nor the lower courts have generally taken a rigid approach in the application of Miranda." WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 340 (4th ed. 2004).

of punitive damages in civil cases. 182 Several decisions have already applied this metaphor to guidelines cases, 183 and a more definitive standard would likely develop as federal common law continues to address this issue. 184 For example, notwithstanding the difficulty inherent in resolving claims of disproportionality, the Supreme Court has developed criteria to assist in this analysis for Eighth Amendment claims. 185

Reliance on due process protections is especially attractive relative to the evidentiary issues and sentencing options likely to emerge if the Supreme Court rules that Blakely renders the federal guidelines unconstitutional. From an evidentiary standpoint, applying Blakely to the federal guidelines would dramatically change charging practices and proof at trial, as the guidelines’ specific offense characteristics would be transformed into statutory elements that prosecutors must plead and prove. In addition to increasing the risk of retroactive application (thereby provoking an unprecedented

183. See United States v. Rebman, 321 F.3d 540, 545 (6th Cir. 2003) (declining to impose sentence “for a homicide under the guise of a guilty plea to the distribution of a very small quantity of drugs”); United States v. Kikumura, 918 F.2d 1084, 1100–01 (3rd Cir. 1990); United States v. Martinez, 234 F. Supp. 80, 88, 90–91 (D. Mass. 2002). Further, other courts have applied a proportionality analysis in requiring clear and convincing evidence when sentencing factors produce dramatically higher penalties. See United States v. Lynch, 367 F.3d 1148, 1162 (9th Cir. 2004); Kikumura, 918 F.2d at 1102; see also supra note 115.
184. As Judge Lynch has observed in a comparable context:

While some judges might find drawing the line . . . uncomfortably subjective, most of those who have sat on the Supreme Court throughout its history would find such an exercise the essence of the judicial role, much like distinguishing between reasonable and unreasonable searches, cruel and not-so-cruel punishments, speedy and unduly delayed trials, or reasonable and unreasonable time, place, and manner restrictions on freedom of speech, among many other examples. Such line-drawing, even if at the borders it must inevitably draw on the individual judgment of appointed judges, is infinitely preferable to applying formulaic rules in defiance of common sense or practical effect.

volume of filings for post-conviction relief), this will inevitably create new problems at trial. For example, if the Supreme Court, in

186. Justice O'Connor's dissenting opinion in Blakely noted that even if Ring v. Arizona, 536 U.S. 584, 608 (2002) (holding that Apprendi requires that aggravating factors necessary for the imposition of the death penalty be found by a jury, rather than a judge), "does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since Apprendi was decided in 2000 arguably remain open to collateral attack." Blakely, 124 S. Ct. at 2549 (O'Connor, J., dissenting). Justice O'Connor based her observation on the Supreme Court's decision in Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004), which declined to give Apprendi and Ring retroactive effect. Blakely, 124 S. Ct. at 2549 (O'Connor, J., dissenting). She noted that habeas petitioners could argue that, given Apprendi, the Blakely decision might be characterized as a "new rule" and would, therefore, apply retroactively at least to the date of the Apprendi decision. Id.; see also Morris v. United States, No. 04-3096, 2004 WL 1944014, at *11–12 (C.D. Ill. Sept. 1, 2004) (holding that Blakely announced a new rule but that Schriro precludes applying Blakely retroactively beyond Apprendi). In fact, a decision invalidating the federal sentencing guidelines (as applied) could have a far greater retroactive application than Justice O'Connor may have realized.

In Schriro, Justice Scalia explained that "[n]ew substantive rules generally apply retroactively... Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal" or faces a punishment that "the law cannot impose upon him."" 124 S. Ct. at 2522–23 (second emphasis added) (quoting Bousley v. United States, 523 U.S. 614, 620 (1998) (quoting Davis v. United States, 417 U.S. 333, 346 (1974))). "New rules of procedure, on the other hand, generally do not apply retroactively." Id. at 2523. Justice Scalia further observed: "A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes." Id. at 2524. Thus, for example, when the Supreme Court issued McNally v. United States, 483 U.S. 350, 358 (1987), which modified the definition of mail fraud to exclude certain political corruption cases, the decision applied retroactively to sentences imposed for mail fraud before McNally was decided (even to cases on collateral review). See United States v. Mitchell, 867 F.2d 1232, 1238 (9th Cir. 1989) ("We agree... that McNally is fully retroactive..." (citing United States v. Shelton, 848 F.2d 1485, 1488–90 (10th Cir. 1988) (en banc); Ingham v. Enzer, 841 F.2d 450, 453–54 (2d Cir. 1988))).

Apprendi treated certain sentencing factors as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. Although the Schriro Court concluded that Ring and Apprendi announced only new procedural rules and, thus, did not have retroactive effect to cases no longer on direct review, Schriro was only a 5–4 decision. 124 S. Ct. at 2522–23, 2526. Moreover, Blakely's impact on the federal sentencing guidelines may be substantive rather than procedural, thereby triggering broader retroactive effect. Specifically, if the Supreme Court's analysis in its pending cases suggests that the federal sentencing guidelines are the functional equivalent of statutory elements, its decision would effectively redefine the crime of conviction. Justice Scalia's burglary example in Blakely illustrates this point, as it recognizes burglary committed with a gun (i.e., in effect, aggravated burglary, for which the statutory sentence would be forty years) as distinct from burglary committed without a gun (for which the maximum possible sentence would be ten years). Blakely, 124 S. Ct. at 2540. Despite any legislative labels designating gun possession during the burglary as a sentencing element, the Blakely majority would conclude that gun possession is the functional equivalent of a substantive element that must be found by a jury. Id.
effect, finds that the federal criminal code also includes the guidelines' specific offense characteristics that potentially increase a defendant's sentence within the statutory maximum, jury instructions incorporating both federal substantive law and the guidelines' provisions will become numbingly complex.\^{187}

Questions of evidentiary prejudice will also arise in almost every case. For example, subject to narrow exceptions, the Federal Rules of Evidence do not permit prosecutors to admit evidence of a defendant's prior misconduct.\^{188} However, if a prosecutor is required to allege relevant misconduct factors in an indictment, he is entitled to prove them irrespective of their potentially prejudicial effect on the defendant.\^{189} Of course, the judge may bifurcate the trial, thereby deferring relevant conduct and other specific offense characteristics to the sentencing stage of the proceedings. But problems of this kind would mean that countless cases would require bifurcation.\^{190} The Supreme Court surely does not want bifurcated criminal trials to become the norm in federal court.\^{191}

\textit{If Blakely is construed as redefining the statutory elements of the crime of conviction to include sentencing factors—"the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," Apprendi, 530 U.S. at 494 n.19—then defendants whose sentences were enhanced under guideline factors could make a colorable argument that what the sentencing guidelines had designated as aggravating factors subject to judicial fact-finding should be considered elements, or the functional equivalent of elements, of the substantive offense for which they were convicted and thus, that Blakely announced a new substantive rule under Scherr v. Scherr, 124 S. Ct. at 2524. As such, Blakely could have broad retroactive application. Id. at 2522–23.}

\^{187} See supra note 158.


\^{189} For example, in RICO cases, prosecutors are required to prove the pattern and enterprise elements. Because the indictment must include these allegations, prosecutors are naturally given leeway to prove them. Such proof, which is very damaging to the defense, is ordinarily deemed too prejudicial to admit in non-RICO cases. Goldsmith, supra note 188, at 286 n.27.

\^{190} See U.S. Sentencing Comm'n, Use of Guidelines and Specific Offense Characteristics: FY 2002 (compiling data on the application of specific offence characteristics to a substantial number of sentences); see also, e.g., Jeffrey Standen, The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey, 87 IOWA L. REV. 775, 783, 793–94 (2002) (discussing whether relevant conduct could be considered an element of the crime under Apprendi and concluding that if it is, courts could expect to see motions for bifurcation for those sentences based, even in part, on relevant conduct). If Professor Standen's conclusions about bifurcation were right for Apprendi, they are even more correct under Blakely.

\^{191} On the contrary, the Court has shown considerable concern for preserving the efficiency of the trial process. Cf. United States v. Bailey, 444 U.S. 394, 416–17 (1980)
Of course, these problems could be avoided if Congress simply reverts to the purely discretionary, indeterminate sentencing system that preceded the guidelines for more than two hundred years. But this almost certainly will not occur, given the many well-documented problems associated with that approach. Instead, political pressure to ensure higher penalties will likely produce a more severe, determinate sentencing system. Ironically, the Blakely decision readily permits that result.

IV. LIFE WITHOUT THE FEDERAL SENTENCING GUIDELINES: THE SUPREME COURT’S GUIDE TO HIGHER SENTENCES

Blakely ostensibly vindicates the Sixth Amendment right to a jury trial and proof of guilt beyond a reasonable doubt. However, the

(continuing with text)

192. See supra notes 14-16 and accompanying text. It bears repeating that such systems require no specific fact-finding.

193. See supra notes 14-17 and accompanying text. Indeed, there is little evidence that federal judges themselves want to reinstate the pre-guidelines system. See, e.g., United States v. Emsmeier, No. 04 Cr. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *25 (S.D.N.Y. Aug. 4, 2004) ("After nearly two decades of Guideline sentencing...it is doubtful that any federal court would be comfortable wielding such extraordinary discretion.").

194. As an example of such pressure, James K. Vine, United States Attorney for the Middle District of Tennessee, wrote an opinion piece in a local newspaper arguing that tough mandatory minimum sentencing laws are responsible for "a 30-year low" in crime rates and encouraging resistance to calls to repeal mandatory minimums. James K. Vine, Nashville Eye: Current Sentencing Policy Prospets Safety of Americans, TENNESSEAN, Aug. 3, 2004, at 9A. The Tennessee later reported that despite Vine's claims that the opinion piece was developed primarily in his office, "Sandy Mattice, the U.S. attorney for Tennessee's Eastern District, submitted an Aug. 11 article to The Chattanooga Times-Free Press that was nearly identical to Vine's TENNESSEAN offering. Another article published in a Guam newspaper by a federal prosecutor there also featured many of the same passages, phrasing and transitions." Bob Johnston, Opinion Piece Comes from Local Office, Attorney Concedes, TENNESSEAN, Aug. 21, 2004. An article in The Knoxville News-Sentinel suggests that having local United States Attorneys submit editorials defending mandatory minimums was part of a Justice Department "counteroffensive" aimed at responding to the American Bar Association's recent call to repeal mandatory minimum sentencing. Jamie Satterfield, DOJ Responds to Minimum Sentence Dissenters, KNOXVILLE NEWS-SENTINEL, Aug. 18, 2004, at B1. Satterfield quotes Mattice as admitting that the article "was based on a 'model' piece drafted 'by committee' within the Justice Department." Id. In any event, it is clear that the Department of Justice is willing to encourage continued support for mandatory minimums. See also Orrin 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, 192-98 (1993) (discussing the history of mandatory minimum sentencing and some alternatives to mandatory minimums).
Court’s analysis leaves ample room for a more draconian sentencing system with fewer constitutional protections. Two features of Blakely create this potential. First, the majority opinion confirmed prior case law establishing that the Court’s Sixth Amendment analysis does not apply to sentencing factors that trigger mandatory minimum penalties.\textsuperscript{195} Second, Blakely’s rationale does not apply to factors that mitigate, rather than aggravate, punishment.

\textit{A. Mandatory Minimums}

Prior to Blakely, the Supreme Court issued two decisions sustaining the judge’s authority to make factual findings attendant to mandatory minimum sentences. In McMillan \textit{v. Pennsylvania},\textsuperscript{196} the Court sustained a state statute that provided a “mandatory minimum sentence of five years’ imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person ‘visibly possessed a firearm during the commission of the offense.’”\textsuperscript{197} The Court reasoned that due process does not require a jury finding of guilt beyond a reasonable doubt because the Pennsylvania legislature treated visible possession as a sentencing enhancement rather than an element of the offense of conviction.\textsuperscript{198} McMillan stated that “[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime . . . without suggesting that those facts must be proved beyond a reasonable doubt.”\textsuperscript{199} Justice Rehnquist’s majority opinion stated that the Pennsylvania mandatory minimum “operates solely to limit the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.”\textsuperscript{200} The Court also stated that petitioners’ claim “would have at least

\textsuperscript{195} Blakely, 124 S. Ct. at 2540.
\textsuperscript{196} 477 U.S. 79 (1986).
\textsuperscript{197} Id. at 81; see also King & Klein, \textit{Essential Elements}, supra note 168, at 1506.
\textsuperscript{198} Id. at 85-86.
\textsuperscript{199} Id. at 92 (citation omitted). McMillan stated that “petitioners do not and could not claim that a sentencing court may never rely on a particular fact . . . without finding that fact by ‘clear and convincing evidence.’” Id. at 91; see also supra note 106 and accompanying text (noting unanimous circuit approval of dangerous special offender enhancements under a preponderance of the evidence standard pursuant to judicial fact-finding).
\textsuperscript{200} Id. at 88.
more superficial appeal if a finding of visible possession exposed them to greater or additional punishment." 201

In Harris v. United States, 202 the Supreme Court subsequently rebuffed a claim that Apprendi had implicitly overruled McMillan: 203

[T]he [McMillan] Court noted that the . . . [mandatory minimum] statute "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor."

That reasoning still controls. If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become [elements] merely because legislatures require the judge to impose a minimum sentence when those facts are found . . . . 204

In Blakely, the Court applied this line of analysis to distinguish mandatory minimum statutes from the Washington law found unconstitutional. 205 Blakely thereby confirms that mandatory minimum statutes operate outside the protection of the Sixth Amendment jury trial and burden of proof requirements. Not surprisingly, Congress has already heard one proposal premised on this rationale. 206

B. Potential Congressional Responses

Even if Congress chooses not to enact widespread mandatory minimums, Blakely's analysis creates ample opportunity for increasing sentences. For example, as Blakely apparently applies only to factors that potentially increase sentences, 207 mitigating factors fall outside

201. Id. (emphasis added).
203. Id. at 556–57 ("McMillan and Apprendi are consistent . . . .").
204. Id. at 559–60 (citations omitted).
205. Blakely, 124 S. Ct. at 2538.
207. See supra notes 77–86 and accompanying text; see also Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring) ("[A] 'crime' includes every fact that is by law
its scope. This is consistent with the Supreme Court’s traditional treatment of mitigating factors.\footnote{208}

With this in mind, Congress could stiffen penalties by (1) increasing the base offense level for a targeted crime; (2) converting its specific offense characteristics into mitigating factors; and (3) imposing on the defense the burden of proving these mitigating factors.\footnote{209} For example, in \textit{Patterson v. New York}, the Supreme Court upheld a New York statute that defined second-degree murder as an intentional killing and placed upon the defendant the burden of proving an affirmative defense (“extreme emotional disturbance”) to reduce the crime to manslaughter.\footnote{210} The Court reasoned that due process only requires the State to prove each element of a crime beyond a reasonable doubt; consequently “if the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty.”\footnote{211}

\footnote{208. See \textit{Apprendi}}, 530 U.S. at 491 n.16 (“\textit{[T]he Court has often recognized . . . [the distinction] between facts in aggravation of punishment and facts in mitigation.”) (citations omitted).

\footnote{209. The \textit{Apprendi} majority reasoned that political pressures would deter such legislative measures. \textit{Id.} On the contrary, political pressure is usually exerted to increase penalties. See, e.g., \textit{Nora V. Demleitner, Symposium: Legal Issues and Sociological Consequences of the Federal Sentencing Guidelines: First Principles, First Principles: The Sentencing Commission’s Obligation to Reject False Images of Criminal Offenders}}, 87 \textit{IOWA L. REV.} 563 (2002) (discussing political pressures on state sentencing commissions to increase penalties for sexual offenders). Moreover, the proposal in the text is less severe than the alternative of new mandatory minimums.

\footnote{210. 432 U.S. 197, 206–07 (1977).}

\footnote{211. \textit{Id.} at 209. The Court also quoted extensively Chief Judge Breitler’s concurring opinion from the New York State Court of Appeals:

\begin{quote}

Nevertheless, although one should guard against such abuses, it may be misguided, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. In the absence of affirmative defenses the impulse to legislate, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of the prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove . . . the distinction between the

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Under this reasoning, for example, Congress could reconfigure the fraud guideline as follows: (1) increase the base offense level from seven to thirty-seven, which would set the penalty at the twenty-year statutory maximum; (2) designate the absence of current specific offense characteristics as mitigating factors warranting a reduction corresponding with the weight historically assigned to each such factor; and (3) place the burden of proving mitigation on the defendant.

Of course, the Patterson court acknowledged constitutional limits on the government's authority to reallocate burdens of proof "by labeling as affirmative defenses at least some elements of the crimes now defined in . . . statutes." However, this constraint would not apply to the guidelines' mitigating adjustments and specific offense characteristics, which are not statutory elements. Rather than defining any crimes, mitigating adjustments and specific offense characteristics merely assign specified weights to certain factors that reduce punishment due to the way in which the crime occurred.

In sum, the appropriate use of affirmative defenses enlarge the ameliorative aspects of a statutory scheme for the punishment of crime rather than the other way around -- a shift from primitive mechanical classifications based on the bare antisocial act and its consequences rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct.

Id. at 211–12 n.13 (emphasis added) (internal quotation marks omitted) (quoting People v. Patterson, 347 N.E.2d 898, 909–10 (N.Y. 1976)). Viewed in this light, the federal sentencing guidelines serve an ameliorative function akin to affirmative defenses. Relative to mandatory minimums, for example, this is especially true.

212. For example, starting with an offense level of thirty-seven, the guidelines could authorize the following reductions for mitigating factors: if the offense involved fewer than ten victims, decrease by two levels, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2); if the offense did not involve "theft from the person of another," decrease two levels, id. § 2B1.1(b)(3); if the offense did not involve a misrepresentation that the offender "was acting on behalf of a charitable organization," decrease by two levels, id. § 2B1.1(b)(7)); if the defendant did not "relocate[] or participate[] in relocating a fraudulent scheme to another jurisdiction to evade law enforcement," decrease by two levels, id. § 2B1.1(b)(8)); if the offense did not involve "production or trafficking of any unauthorized . . . device," decrease by two levels, id. § 1B.1.1(b)(9)); if the loss was less than $5,000, decrease by twenty levels, id. § 2B1.1(b)(1)). This calculation would produce a thirty-level reduction to a base offense level of seven and a corresponding sentencing range of zero to six months.


214. See U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b) (2003) (reduction for incomplete attempt); id. § 3B1.2 (downward adjustment for "mitigating role"). Amendment 2 of the 2003–04 Amendment Cycle modifies § 2G2.2(b)(1) of the guidelines such that a
The foregoing examples demonstrate that applying Blakely to the federal guidelines will probably not produce an era of enlightened sentencing reform. Thus, whatever their flaws, the federal sentencing guidelines are preferable to their most likely alternatives. Indeed, at least one federal judge has wisely concluded that Churchill’s adage about democracy also applies to the federal guideline system: “It is the worst possible way to sentence a defendant, except for all the others.” With this in mind, the Supreme Court should not apply unprecedented constitutional analysis to invalidate them.

V. CONCLUSION

As a former commissioner, I acknowledge that the federal sentencing guidelines are imperfect. But they also have their virtues, and, in any event, their flaws do not render them unconstitutional. The guidelines have reduced unwarranted sentencing disparity. They provide a measure of predictability in sentencing, ensuring an open process in which offenders can know the basis for their sentence and have the right to appeal erroneous applications. Relative to mandatory minimums, the guidelines also permit judges to retain at least some sentencing discretion, including the ability to depart in exceptional circumstances.


Of course, these virtues do not necessarily ensure the guidelines' constitutionality, and I recognize that the defense bar seeks to invalidate them. Indeed, Justice Scalia's majority opinion in *Blakely* emphasized this point. 219 *Blakely*, however, renders the federal guidelines unconstitutional only if the Supreme Court is willing to disregard more than two decades of its own jurisprudence as well as critical features that distinguish these guidelines from the statutes in both *Blakely* and *Apprendi*. To guideline opponents who choose to ignore these distinctions in the hope of promoting sentencing reform, I respectfully suggest that "when the gods wish to punish us, they answer our prayers." 220

219. 124 S. Ct. at 2542 (referencing the position of *amicus* brief of the National Association of Criminal Defense Lawyers).

220. OSCAR WILDE, AN IDEAL HUSBAND, act 2 (1895), *reprinted in Plays, Prose Writing and Poems* 329, 361 (Anthony Fothergill cd., Everyman 1996) (Sir Robert Chiltern speaking to Lord Goring). Wilde also wrote: "In this world there are only two tragedies. One is not getting what one wants, and the other is getting it. The last is much the worst...." OSCAR WILDE, LADY WINDERMERE'S FAN, act 3, sc. 3 (1892), *reprinted in Plays, Prose Writing and Poems* 167, 210 (Anthony Fothergill cd., Everyman 1996) (Dunby speaking to Lord Darlington); cf. Bowman, *supra* note 31, at 732 (warning critics to "be careful what you wish for because you might get it").