NOTE: WHERE ARE WE GOING, WHERE DID WE COME FROM: WHY THE FEDERAL SENTENCING GUIDELINES WERE INVALIDATED AND THE CONSEQUENCES FOR STATE SENTENCING SCHEMES

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Text

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In Blakely v. WasEhington, [1] the Supreme Court held that the State of Washington's determinate sentencing scheme violated the Sixth Amendment's guarantee of a jury trial. The Court's decision in Blakely was described as an "earthquake which has shaken the foundation of structured sentencing reforms." [2] Before the 1970s, sentencing was largely unregulated, and judges possessed almost complete discretion to determine the length of a defendant's imprisonment. [3] While the Blakely Court emphasized that it was addressing only the constitutionality of Washington's sentencing scheme, [4] the Court's reasoning suggested that judges can consider only facts found by a jury to increase a defendant's sentence beyond **[*250]** the range prescribed by law. [5] Such an understanding

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[1] *542 U.S. 296 (2004)*.

[2] Douglas A. Berman, Conceptualizing Blakely, *17 Fed. Sentencing Rep. 89, 94 n.2 (2004)*. See also Senate, Judges Urge "Blakely" Redux, N.Y. L.J., July 26, 2004, at 2 (citing Justice O'Connor's comment to the Ninth Circuit's annual conference that the case resembled a category ten earthquake).

[3] Douglas A. Berman, Examining the Blakely Earthquake and its Aftershocks, *16 Fed. Sentencing Rep. 307 (2004)* [hereinafter Berman, Examining Blakely]. See also David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime and Just. 71, 73 (2001) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion.").

[4] *Blakely, 542 U.S. at 308* ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."). The Court also noted that it was not considering the Federal Guidelines in its decision, *id. at 305 n.9*, and distinguished indeterminate sentencing from determinate sentencing. *Id. at 309*.

[5] *Id. at 304* ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment,' and the judge exceeds his proper authority.") (citation omitted). See also *id. at 307 n.11* ("Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt … is unclear.").

means that the Constitution does not allow judges to make findings of fact based on a preponderance of the evidence that would increase a defendant's applicable sentencing range. [6] The consequences of this interpretation are immense. For the last twenty years, most sentencing reforms have made judges the primary fact-finders during the sentencing phase. [7]

Speculation as to the seriousness of Blakely's repercussions was soon confirmed. [8] Less than seven months after Blakely, in United States v. Booker, [9] the Supreme Court declared that mandatory adherence to the Federal Sentencing Guidelines is unconstitutional. [10] However, a plurality of the Court tried to salvage the guidelines by making them advisory. [11] The plurality also declared that the standard **[*251]** of appellate review for sentences should be one of "reasonableness." [12] This decision affords federal judges greater freedom in criminal sentencing. It also leaves them with a host of difficult new questions and pressures that will take time to resolve.

This note examines what type of sentencing scheme will survive constitutional muster after Booker and Blakely. Both cases stand for the proposition that the Sixth Amendment's guarantee of a trial by jury serves to protect citizens from both the legislature and the judiciary. In order for this right to be effective, a jury must, beyond a reasonable doubt, find all facts other than prior convictions, that can be used to increase a defendant's sentence. Therefore, it can never be reasonable for a judge to increase a sentence beyond the statutory maximum, as set by the legislature for the crime or crimes of which a defendant is found guilty by a jury of his or her peers.

Part I of this note chronicles the history of sentencing in the United States and the development of the Federal Sentencing Guidelines. Part II reviews the Supreme Court's recent jurisprudence regarding sentencing and the Sixth Amendment right to a jury trial, focusing on the historical reasons that have guided the Court in determining that any facts that increase a defendant's maximum sentence must be found by a jury beyond a reasonable doubt. Part III argues that indeterminate sentencing schemes are constitutional, and examines Kansas's sentencing scheme as a potential model for other states. Finally, Part IV contends that the reasonableness standard adopted

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[6] Berman, Examining Blakely, supra note 3.

[7] Id. See also *Blakely, 542 U.S. at 323* (O'Connor, J., dissenting) ("The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government.").

[8] Jon Wood of the Vera Institute of Justice stated:

Few decisions in recent memory have engendered as much uncertainty in the state and federal courts as Blakely v. Washington. In the weeks since the Supreme Court ruled, prosecutors, defense attorneys, and judges have been struggling with Blakely's implications for cases at every stage of litigation. Federal and state trial and appellate courts have issued sometimes contradictory decisions about the holding's reach. Congress and some state legislatures are gathering opinions and organizing their responses. And the Court has agreed to decide, when it returns for its fall term, the foundational question of whether Blakely applies to the federal sentencing guidelines. It is uncertain whether the Court will at the same time resolve other Blakely issues facing the states.

Jon Wool, Aggravated Sentencing: Blakely v. Washington Legal Considerations for State Sentencing Systems, Pol'y & Prac. Rev. (Vera Inst. of Just.), Sept. 2004, at 1, available at *http://www.vera.org/publication* pdf/250 477.pdf.

[9] *125 S. Ct. 738 (2005)*.

[10] *Id. at 769*.

[11] *Id. at 757* (A plurality of the Court chose to "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct - a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.").

[12] *Id. at 766* ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

by the Booker plurality, as it pertains to the Federal Sentencing Guidelines, is fundamentally flawed because a judge may never increase a defendant's sentence beyond the statutory maximum of the crime for which he or she is convicted of by a jury.

I. A Brief History of Sentencing and the Development of Legislative Guidelines

Article III, Section 2 of the United States Constitution declares that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." [13] Additionally, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public **[*252]** trial, by an impartial jury… ." [14] A jury trial is quite distinct from criminal sentencing. "Trials are about establishing the specific offense conduct that the state believes merits criminal punishment; sentencing is about assessing both the offense and the offender to impose a just and effective punishment." [15]

An example of a characteristic of an offender that courts assess during sentencing is a prior conviction.

To have a prior conviction is not in and of itself a "crime" and the state cannot bring an "accusation" and pursue a "criminal prosecution" based only on the fact that an offender has a criminal past. Because the fact of a prior conviction is an offender characteristic that is not generally an essential part of the "crimes" that the state seeks to punish, the jury trial right should not be constitutionally implicated even when prior conviction facts are the basis for specific punishment consequences at sentencing. [16]

Prior convictions have a long history of being considered during sentencing. However, other offender characteristics have resulted from the development of sentencing guidelines.

A. Sentencing Before the Federal Guidelines

Federal sentencing has never been thought of as a power assigned to a particular branch of government. [17] "Congress has the power to fix the sentence for a federal crime … ." [18] Congress also has the authority to determine judicial discretion in sentencing. [19] In the past, Congress has given the judiciary great discretion, virtually eliminating sentencing ranges. [20] This has led to the implementation of parole boards that allowed personnel of the executive branch to release prisoners before the end of their sentences. [21] "Under the **[*253]** indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually

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[13] U.S. Const. art. III, 2.

[14] *U.S. Const. amend. VI*.

[15] Berman, supra note 2, at 89.

[16] Id. at 90.

[17] *Mistretta v. United States, 488 U.S. 361, 364 (1989)*.

[18] U.S. Sentencing Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, G-134 (1991) (citing *Mistretta, 488 U.S. at 364* (citing *United States v. Wiltberger, 18 U.S. (5 Wheat) 76 (1820))*, available at *http://www.ussc.gov/r* congress/MANMIN.PDF [hereinafter Four Year Report].

[19] Id. (citing *Mistretta, 488 U.S. at 364* (citing *Ex parte United States, 242 U.S. 27, 52 (1916))*.

[20] *Mistretta, 488 U.S. at 364*; *United States v. Grayson, 438 U.S. 41, 45-46 (1978)*.

[21] *Mistretta, 488 U.S. at 364-65*.

determined the actual duration of imprisonment." [22] It also led to great disparity in sentencing, which Congress sought to correct through its creation of the United States Sentencing Commission. [23]

While the Federal Sentencing Guidelines are a recent development, sentencing guidelines are not new. By 1790, Congress had established mandatory penalties for capital crimes. [24] This typically meant the death penalty. [25] However, "in the late 19th Century, Congress provided that many of these offenses could alternatively be punished by life imprisonment." [26] Additionally, "throughout the 19th Century, Congress enacted provisions that required definite prison terms, typically quite short, for a variety of other crimes." [27] For instance, Congress made a fine or a short prison term mandatory for disobeying orders, [28] for commodities price fixing, [29] and for bank embezzlement. [30] "Until relatively recently, however, the enactment of mandatory minimum provisions was generally an occasional phenomenon that was not comprehensively aimed at whole classes of offenses." [31]

This changed with the passage of the Narcotic Control Act of 1956. [32] This Act "mandated minimum sentences … for most drug importation and distribution offenses." [33] These sentences were **[*254]** considerably longer than those enacted by Congress in the past. [34] Additionally, "The 1956 Act provided mandatory ranges within which the court was required to select a specific sentence." [35] These mandatory minimums "could not be suspended or reduced." [36] In addition, the Act proscribed the use of parole for offenses covered by the Act. [37]

Congress reevaluated the use of mandatory minimum sentences for drug crimes in 1970. [38] It found that "increases in sentence length "had not shown the expected overall reduction in drug law violations.'" [39] So,

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[22] *Id. at 365*.

[23] See Four Year Report, supra note 18, at ii; *Mistretta, 488 U.S. at 368-70*.

[24] Four Year Report, supra note 18, at 6 (citations omitted).

[25] Id. at 6 n.7.

[26] Id. (citing Act of Jan. 15, 1897, ch. 29, 1, ***29 Stat. 487***).

[27] Id.

Approximately a dozen provisions that date back to the 1800's remain on the books today. These provisions generally require mandatory prison terms of three months or less for an assortment of offenses ranging from refusing to testify before Congress, see *2 U.S.C. 192*, to the failure to report seaboard saloon purchases. See *19 U.S.C. 283*.

Id. at 6 n.8.

[28] Id. at 6 n.9 (citing *7 U.S.C. 13(a)*-(b), 303 (2000)).

[29] Id. (citing *12 U.S.C. 617* (2000)).

[30] Id. (citing *12 U.S.C. 630* (2000)).

[31] Id. at 6.

[32] Id. (citing *Pub. L. No. 84-728*, ***70 Stat. 567*** (1956)).

[33] Id.

[34] See id. at 6-7.

[35] Id. at 7.

[36] Id.

[37] Id. at 8.

[38] Id. at 7.

"Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 that repealed virtually all mandatory penalties for drug violations." [40] This corresponded to an attitude in the country that embraced the idea of curing or rehabilitating inmates. [41]

As a result, courts and parole and correctional authorities had virtually unfettered control over the amount of time an offender served in prison. Courts were expected to use their discretion to assess an offender's potential for rehabilitation; parole authorities were to use their discretion to evaluate the progress the offender actually made; and correctional authorities dictated the amount of sentence reduction an offender might receive due to "good" behavior while in prison. [Yet,] this approach to sentencing has become subject to gradual but increasing criticism. [42]

[*255] "Critics posited that rehabilitation was difficult to accomplish and measure and that wide-open judicial discretion and parole actually exacerbated the problems of controlling crime." [43] These critics advocated the use of a determinate sentencing scheme, "a system in which there is no discretionary releasing authority and a defendant may be released from prison only after expiration of the sentence imposed." [44] Such a system, critics argued, "would increase sentencing effectiveness by requiring sentences that [were] more certain, less disparate, and more appropriately punitive." [45]

B. The Federal Sentencing Guidelines

The shift from rehabilitation to a stricter, more uniform sentencing scheme began first at the state level and then moved to the federal level. [46] New York began the reform in 1973, and was followed by California and Massachusetts. [47] "By 1983, 49 of the 50 states had passed [mandatory minimum penalties]." [48] However, "only a few states [made] comprehensive statutory changes." [49] Federally, "Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime." [50] This continued every two years in response

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[39] Id. (quoting S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969)).

[40] Id. (citing Comprehensive Drug Abuse Prevention and Control Act of 1970, *Pub. L. No. 91-513*, *84 Stat. 1236* (1970)). "Sponsors of the legislation indicated a particular concern that mandatory minimum sentences were exacerbating the "problem of alienation of youth from the general society."' Id. (quoting *Pub. L. No. 91-513*, *84 Stat. 1236* (1970)). Other sponsors "argued that mandatory penalties hampered the "process of rehabilitation of offenders' and infringed "on the judicial function by not allowing the judge to use his discretion in individual cases."' Id. (quoting *Pub. L. No. 91-513*, *84 Stat. 1236* (1970)).

[41] Id. at 8 (citing Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, *80 J. Crim. L. & Criminology 883, 893-95 (1990)*). "For much of this century a dominant view in the field of corrections was that prisons existed primarily to "cure' and rehabilitate inmates." Id.

[42] Id.

[43] Id.

[44] Wool, supra note 8, at 13.

[45] Four Year Report, supra note 18, at 8.

[46] Id. at 8-9.

[47] Id. at 9 (citing Michael H. Tonry, U.S. Dept. of Justice, Sentencing Reform Impacts 3-4 (1987)).

[48] Id.

[49] Id.

[50] Id. See also *Pub. L. No. 98-473*, 503(a), *98 Stat. 2069* (1984) (amending *21 U.S.C. 860* (formerly 845a)) (implementing mandatory minimum sentences for drug offenses committed near schools); *Pub. L. No. 98-473*, 212(a)(2), *98 Stat. 1987* (1984) (amending *18 U.S.C. 3561(b)(1)*) (mandating prison for all serious felonies and establishing a minimum one-year term of probation for less serious felonies); *Pub. L. No. 98-473*, 1006(a), *98 Stat. 2139* (1984) (amending *18 U.S.C. 929*) (providing

to heightened public concern over crime. [51] In 1986, Congress enacted the Firearm Owners' Protection Act and the Anti-Drug Abuse Act. [52] The Act created a "five-year enhancement … for the use or carrying of a firearm … when the **[*256]** underlying offense was a drug crime." [53] In 1988, it created the Omnibus Anti-Drug Abuse Act [54] and, in 1990, it created the Omnibus Crime Bill. [55] Both pieces of legislation called for mandatory minimum sentences.

In addition to specific bills, Congress enacted the Sentencing Reform Act of 1984. [56] This Act established the United States Sentencing Commission and directed it to develop a body of laws to regulate federal sentencing. [57] "An overriding mandate to the Sentencing Commission was to determine the appropriate type(s) and the length of sentence(s) for each of the more than 2,000 federal offenses. Congress simultaneously eliminated parole so that sentences pronounced would be sentences served." [58]

The Commission's duty was to create fair and uniform sentences. Congress was appalled by the disparity in federal sentencing, [59] a disparity that was well documented. [60] For instance, in a Second Circuit study, "50 federal district court judges … were given 20 identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant." [61] The study documented extraordinary variations in sentencing. [62]

In a bank robbery case, the sanctions ranged from a sentence of 18 years imprisonment and a $ 5,000 fine to five years imprisonment and no fine. In an extortion case, the range of sentences was even more striking - one judge sentenced a defendant to 20 years **[*257]** imprisonment and a $ 65,000 fine, while another imposed a three year prison term and no fine. [63]

Such disparity was deemed intolerable by Congress, and it gave the Commission extensive authority to remedy the problem. [64]

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sentencing enhancements for possession of especially dangerous ammunition during drug and other violent crimes); *Pub. L. No. 98-473*, 1005(a), *98 Stat. 2138* (1984) (amending *18 U.S.C. 924*) (sentencing add-on or enhancements for the use of or carrying of a firearm during a violent crime).

[51] Four Year Report, supra note 18, at 9-11.

[52] Id. at 9 (citations omitted).

[53] Id. at 9-10 (citations omitted).

[54] Id. at 10 (citations omitted).

[55] Id. at 11. See also ***Pub. L. No. 101-647***, 2510(a), ***104 Stat. 4863*** (1990) (codified as amended at *18 U.S.C. 225* (2000)) (implementing a ten-year mandatory sentence for organizing, managing, or supervising a continuing financial crimes enterprise).

[56] Four Year Report, supra note 18, at 8 (citing *Pub. L. No. 98-473*, 211, *98 Stat. 1837* (1987) (codified as amended at *18 U.S.C 3551*-*3626* (2000); 28 U.S.C. 991-998 (2000))). The Act resulted from almost ten years of bipartisan efforts.

[57] Id. at 9, 15. The United States Sentencing Commission, created as an independent, permanent agency in the judicial branch, consisted of seven voting members, who were experts in the criminal justice area, and two non-voting members. Id. at 15. In order to maintain an impartial membership, the Act stipulated that three of the Commissioners had to be federal judges and no more than four Commissioners could be from the same political party. Id. Additionally, the Commissioners had to be appointed by the President and confirmed by the Senate. Id.

[58] Id. at ii.

[59] Id. at 15 (citation omitted).

[60] Id.

[61] Id.

[62] Id.

[63] Id.

The Commission was created as a bipartisan group, nominated by the President and appointed by the Senate. [65] The Commission promulgated the Federal Sentencing Guidelines, which essentially made all sentences determinate and made the Guidelines binding on the federal courts. [66] In January of 1989, John Mistretta challenged the Commission and the Guidelines as an unconstitutional delegation of legislative power. [67] The Supreme Court found that Congress had chosen a "mandatory-guideline system" rather than an advisory system, and that it had the power to delegate its authority to the Federal Sentencing Commission. [68] Therefore the Guidelines were binding on all federal courts. As a result of the Court's decision, many States enacted guidelines similar to the federal sentencing scheme. [69]

II. Constitutional Limitations on Legislative Sentencing Schemes' Procedures

While mandatory guidelines created greater uniformity in sentencing, they also increased the judge's power at the expense of the jury's role. The judge determined the upper limits of sentencing, relying on facts not necessarily raised at trial or proven beyond a **[*258]** reasonable doubt. [70] At first this encroachment upon the jury was allowed.

In McMillan v. Pennsylvania, [71] the Supreme Court found that a state statute authorizing the judge to raise a defendant's minimum sentence, based on facts found by a preponderance of the evidence, did not violate the Sixth Amendment. [72] Notably, the statute did not authorize a judge to exceed the maximum sentence allowed for the offense. [73] In Almendarez-Torres v. United States, [74] the Court found that not every fact expanding a penalty range must be stated in a felony indictment. [75] Specifically, the Court held that prior crimes may be taken into account during sentencing. [76] However, "as the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed." [77] The Court was forced to

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[64] *28 U.S.C. 995(a)(20)* (2000) (providing that the Commission has the authority to "make recommendations to Congress concerning modification or enactment of states relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy").

[65] Four Year Report, supra note 18, at 15; *Mistretta v. United States, 488 U.S. 361, 368 (1989)*.

[66] See Four Year Report, supra note 18, at 8.

[67] *Mistretta, 488 U.S. at 370*.

[68] See *id. at 367, 379, 412*.

[69] *Blakely v. Washington, 542 U.S. 296, 323 (2004)* (O'Connor, J., dissenting) (citing *Alaska Stat. 12.55.155* (2003); *Ark. Code Ann. 16-90-804* (Michie 2003); *Fla. Stat. 921.0016* (2003); *Kan. Stat. Ann. 21-4701* (2003); *Mich. Comp. Laws 769.34* (2004); *Minn. Stat. 244.10* (2002); *N.C. Gen. Stat. 15A-1340.16* (2003); Ore. Admin. R. 213-008-0001 (2003); 204 Pa. Code 303 (2004)).

[70] Berman, Examining Blakely, supra note 3.

[71] *477 U.S. 79 (1986)*.

[72] *Id. at 81, 93*.

[73] *Id. at 82*.

[74] *523 U.S. 224 (1998)*.

[75] *Id. at 228*.

[76] See *id. at 226, 243-47*.

consider how to preserve the right to a jury trial "in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime." [78]

A. Jones and Apprendi - A Jury Must Find Beyond a Reasonable Doubt All Facts That Increase a Maximum Sentence

The first blow to mandatory determinate sentencing came in Jones v. United States. [79] In Jones, the respondent was indicted for "carjacking or aiding and abetting a carjacking, in violation of 18 U.S.C. 2119." [80] The carjacking statute provided three maximum **[*259]** sentences based on the harm caused to the victim. [81] The magistrate advised the respondent that he faced a maximum sentence of fifteen years in prison for the carjacking offense; and the district court instructed the jury only on the first part of the statute, which did not require a finding of serious bodily harm or death. [82] The jury ultimately found Jones guilty on both carjacking charges. [83] However, the presentence report recommended a sentence of twenty-five years, because one of the victims had been seriously injured. [84] Jones challenged the recommendation on the grounds that the twenty-five year sentence was out of bounds; however, the district court invoked the twenty-five year sentence because the serious bodily harm allegation was proven by a preponderance of the evidence. [85] The Supreme Court found that serious bodily harm was an element of the underlying offense rather than a sentencing enhancement; the case was reversed and remanded. [86] In arriving at this conclusion, the Court first noted the seriousness of the issue because it implicated the respondent's Sixth Amendment right to a jury. [87]

After examining the history of the criminal justice system in England and in the United States, the Court concluded that the Founders understood the tensions between jury powers and judicial powers. [88]

The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal

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[77] *United States v. Booker, 125 S. Ct. 738, 751-52 (2005)* (citing *Jones v. United States, 526 U.S. 227, 230-31 (1999)* (explaining that a judge increased the maximum sentence from fifteen to twenty-five years)); *United States v. Rodriguez, 73 F.3d 161, 162-63 (7th Cir. 1996)* (Posner, C.J., dissenting from denial of rehearing en banc) (explaining that a judge increased the sentence from fifty-four months to life imprisonment); *United States v. Hammoud, 381 F.3d 316, 361-62 (4th Cir. 2004)* (en banc) (Motz, J., dissenting) (explaining that a judge increased the maximum sentence from 57 months to 155 years).

[78] *Booker, 125 S. Ct. at 752*.

[79] *526 U.S. 227 (1999)*.

[80] *Id. at 230*; *18 U.S.C. 2119* (1988).

[81] *Jones v. United States, 526 U.S. 227, 230* (quoting *18 U.S.C. 2119*).

[82] *Id. at 230-31*.

[83] *Id. at 231*.

[84] Id.

[85] Id.

[86] *Id. at 239, 252*.

[87] *Id. at 243-44* ("It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.").

[88] *Id. at 244-48*.

conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser **[*260]** included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part. [89]

While sentence enhancements did not exist at the Founders' time, they nevertheless represent an erosion of the jury's significance. [90] Although acknowledging that not every fact concerning sentencing had to be found by a jury the Court stated that the "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." [91] If the three maximums in the carjacking statute were treated as sentence enhancements, the jury's role in determining guilt would be nothing more than "low-level gatekeeping." [92]

Furthermore, the Court distinguished the facts in Jones from those in McMillan and Almendarez-Torres. [93] McMillan addressed an indeterminate sentencing scheme, where a judge could increase the minimum sentence served by a defendant, but not the maximum. [94] The Court in Almendarez-Torres, on the other hand, placed great emphasis on recidivism, which was a traditional factor used to increase an offender's sentence. [95]

With these considerations in mind, the Court ruled that the statute contained "three separate offenses … each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." [96] Foreshadowing the Court's forthcoming decision in Apprendi v. New Jersey, [97] Justices Stevens and Scalia both wrote concurring opinions. [98] Justice Stevens argued that the legislature could not constitutionally remove the jury from finding the facts that increased the penalty range. [99] He found it equally important that those facts should be found beyond a reasonable **[*261]** doubt. [100] Justice Scalia stated, "it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." [101] Because the holding in Jones dealt with the interpretation of a particular statute, much of the

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89 *Id. at 245*.

90 *Id. at 248*.

91 Id.

92 *Id. at 243-44*.

93 *Id. at 242, 248-49*.

94 *Id. at 242*.

95 *Id. at 249* ("The sentencing factor at issue here - recidivism - is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.") (quoting *Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998)*).

96 *Id. at 252*.

97 *530 U.S. 466 (2000)*.

98 *Jones, 526 U.S. at 253* (Scalia, J. concurring).

99 *Id. at 252*.

100 *Id. at 253*.

101 Id.

majority's reasoning concerning the implication of the Sixth Amendment during sentencing was dicta. [102] However, the Court's decision in Apprendi turned that dictum into a "watershed" holding. [103]

Charles Apprendi was arrested after he fired numerous shots into a neighbor's residence. [104] During questioning, he stated that he had fired the shots because the family, who had recently moved to the neighborhood, was African-American and "he [did] not want them in the neighborhood." [105] He later retracted the statement. [106] He was indicted by a New Jersey grand jury on twenty-three counts, none of which referred to New Jersey's hate crime statute nor asserted that he was motivated by racism. [107] He pleaded guilty to two counts of possession of a firearm for an unlawful purpose and one count of possession of an antipersonnel bomb. [108] The prosecutor dropped the remaining twenty counts. Possession of a firearm for an unlawful purpose was a second-degree offense and carried a penalty of five to ten years. [109] Possession of an antipersonnel bomb, a third-degree offense, carried a penalty of three to five years. [110] However, in the plea agreement, the State reserved the right to request a longer sentence because the shooting was racially motivated. [111] The plea **[*262]** agreement stipulated that Apprendi would serve the sentence on the third-degree count concurrently with the other two sentences. [112] Therefore, absent the hate crime enhancement, the maximum sentence Apprendi could receive for the shooting was ten years. [113] However, the judge found by a preponderance of the evidence that Apprendi fired the gun to intimidate the family, and, consequently, applied the hate crime enhancement, sentencing Apprendi to twelve years' imprisonment. [114] While the twelve-year sentence fell within the range allowed for all three counts, the judge imposed a sentence for an offense with a ten-year maximum. [115] Furthermore, the statute gave the judge

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[102] See *id. at 243 n.6* ("Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

[103] Berman, Examining Blakely, supra note 3, at 308.

[104] *Apprendi v. New Jersey, 530 U.S. 466, 469 (2000)*.

[105] Id. (quoting *State v. Apprendi, 731 A.2d 485, 486 (1999)*).

[106] Id.

[107] *Id. at 468-69* (noting a judge can extend a prison sentence when ""the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity"') (quoting language from New Jersey's hate crime statute, *N.J. Stat. Ann. 2C:44-3(e)* (West Supp. 1999-2000) (repealed 2001)).

[108] *Id. at 469-70* (citations omitted).

[109] *Id. at 470*.

[110] Id.

[111] Id.

[112] Id.

[113] *Id. at 474*.

[114] *Id. at 471*. The judge sentenced Apprendi to twelve years for the shooting and to shorter concurrent sentences on the remaining two counts.

[115] *Id. at 474*.

discretion to double, or even triple, the sentence for that count. [116] The Court held that such an increase was unconstitutional. [117]

The Court reasoned that as the Fourteenth Amendment requires due process of law before any deprivation of liberty and, as the Sixth Amendment guarantees a right of an accused to have a speedy and public trial by an impartial jury, a criminal defendant is indisputably entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." [118] The Court explained that a judge may constitutionally enjoy broad discretion in sentencing defendants, but that discretion is subject to the limitations prescribed by statute. [119] "Legislation ordinarily fixes the penalties for the common law offences equally with the statutory ones … . Under the common-law procedure, the court determines in each case what within the limits of the law shall be the punishment, - the question being one of discretion." [120] Apprendi's sentence unconstitutionally exceeded the limits fixed by law. [121]
[*263]

The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. [122]

In essence, Apprendi was found guilty of a crime for which he was never convicted. He did not plead to a hate crime, and in fact retracted his earlier statement indicating that the shooting was racially motivated. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."' [123]

The Court relied on the history of jury trials to reach its decision. The purpose of a jury, as recognized by the common law, is: "to guard against a spirit of oppression and tyranny on the part of rulers' and "as the great bulwark of [our] civil and political liberties."' [124] Furthermore, the Court noted that a trial by jury was understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." [125] Equally well founded is the right "to have the jury verdict based on proof beyond a reasonable doubt." [126] In

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[116] See *id. at 469*. For second degree offenses, the statute allowed for a ten-to twenty-year enhancement. Id. (citing *N.J. Stat. Ann. 2C:43-7(a)(3)* (West 1995)).

[117] See *id. at 476*.

[118] *Id. at 477* (quoting *United States v. Gaudin, 515 U.S. 506, 510 (1995)*).

[119] Id.; see *United States v. Tucker, 404 U.S. 443, 447 (1972)*.

[120] 1 Joel Prentiss Bishop J.U.D. (Berne), Bishop on Criminal Law 933-934, at 690 (John M. Zane & Carl Zollmann eds., 9th ed. 1923) (citation and internal quotations omitted).

[121] See *Apprendi, 530 U.S. at 483 n.10* ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.").

[122] *Id. at 482-83*.

[123] *Id. at 495* (citing *McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)*).

[124] *Id. at 477* (quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)).

[125] Id. (emphasis ommited) (citing 4 William Blackstone, Commentaries on the Laws of England 343 (William S. Hein & Co., Inc. 1992) (1789)).

Apprendi, the hate crime enhancement applied during sentencing as a sentencing factor. It was not submitted to a jury, nor was it proved beyond a reasonable doubt. However, this alone was not enough to make the enhancement unconstitutional. "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion - taking into consideration various factors relating **[*264]** both to offense and offender - in imposing a judgment within the range prescribed by statute." [127] The hate crime enhancement in Apprendi brought the sentence outside of the range prescribed for the crime. In doing so, it defied the traditional understanding and expectation of the purpose of a jury trial.

Justice Scalia's concurrence underscores the fact that the Court's decision in Apprendi rests on the historical underpinnings of the Sixth Amendment. "The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." [128] For Justice Scalia, there will always be disparities in sentencing, whether through a judge, a parole board, or a governor commuting a sentence. [129] However, a defendant should never receive a greater punishment than he bargained for when committing the crime; "his guilt of the crime … will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens." [130] Because this is the system envisioned by the Constitution, it is the system that must be upheld. [131]

While Apprendi was a landmark decision, it resulted in few practical consequences. Although much litigation resulted from the opinion, lower federal and state courts interpreted the decision narrowly. [132] Nor did state legislatures respond by altering existing sentencing schemes or criminal codes. [133] The one exception to this narrow reading of Apprendi was in Kansas, where its supreme court suggested that the State's sentencing guidelines might be unconstitutional; the Kansas legislature responded by reforming the State's guidelines. [134] Kansas now has a bifurcated system in which a jury finds facts that could authorize an aggravated sentence. [135]

[*265] This narrow interpretation of Apprendi was seemingly affirmed by the Supreme Court's holding in Harris v. United States. [136] The Court held that facts needed to establish minimum penalties do not require submission to a

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[126] *Id. at 478*. "Demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." Id. (quoting *In re Winship, 397 U.S. 358, 361 (1970)* (quoting Charles Tilford McCormick, McCormick on Evidence 321 (1954) (citation ommited))).

[127] *Id. at 481*.

[128] *Id. at 498* (Scalia, J., concurring).

[129] Id.

[130] Id.

[131] *Id. at 499* ("The guarantee that "in all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.").

[132] See generally Stephanos Bibas, Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors, *94 J. Crim. L. & Criminology 1 (2003)*.

[133] Berman, Examining Blakely, supra note 3, at 308.

[134] ***State v. Gould, 23 P.3d 801, 814 (Kan. 2001)***.

[135] See infra Part III.B (explaining the Kansas sentencing scheme).

[136] *536 U.S. 545 (2002)*.

jury or proof beyond a reasonable doubt. [137] Furthermore, on the same day that it decided Harris, the Court also ruled that indictments rendered defective under Apprendi should be reviewed for plain error and should not lead to automatic reversal of a conviction or a sentence. [138] The potential effect of Apprendi on legislative sentencing reform appeared to be curbed by these decisions. [139] For this reason, the Court's ruling in Blakely stunned the criminal justice system. [140]

B. Blakely - An Affirmation of Apprendi and the Beginning of the End for the Federal Guidelines

Howard Blakely kidnapped his estranged wife, "binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck." [141] He forced his thirteen-year-old son to follow him in another car by threatening to harm his mother if the son did **[*266]** not follow his instructions. [142] Blakely was arrested and charged with first-degree kidnapping. [143] However, under the plea agreement, the charge was reduced to second-degree kidnapping involving domestic violence and the use of a firearm. [144] Second-degree kidnapping was considered a class B felony [145] under Washington's criminal code, [146] and punishment for such a felony could not exceed ten years imprisonment. [147] Washington had a determinate sentencing scheme, which further limited the range of sentences that a judge could impose for a particular offense. For the offense of second-degree kidnapping with a firearm, a judge could impose a sentence from a "standard range" of forty-nine to fifty-three months. [148] The

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[137] *Id. at 565*. Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries - and without contradicting Apprendi. Id.

[138] *United States v. Cotton, 535 U.S. 625, 631 (2002)*. Interestingly, the Court decided yet another case regarding Apprendi. In *Ring v. Arizona, 536 U.S. 584 (2002)*, the Court actually expanded Apprendi, holding that facts needed to establish eligibility for the death penalty must be submitted to a jury and proven beyond a reasonable doubt. See *id. at 609*. "However, because most jurisdictions already relied on jury sentencing in capital cases, the Court's decision in Harris to limit the procedural requirements for imposition of minimum sentences was the most important and telling iteration of the apparent scope of Apprendi." Berman, Examining Blakely, supra note 3, at 308.

[139] Professor Stephanos Bibas wrote that Harris seemed to have "caged the potentially ravenous, radical Apprendi tiger that threatened to devour modern sentencing law." Stephanos Bibas, Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing, *15 Fed. Sentencing Rep. 79 (2002)*.

[140] Berman, Examining Blakely, supra note 3, at 308 ("It was thought that the Supreme Court would use Blakely to rule, as had nearly all lower courts, that Apprendi had no applicability to judicial fact-finding which simply impacted guideline sentencing outcomes within otherwise applicable statutory ranges.").

[141] *Blakely v. Washington, 542 U.S. 296, 298 (2004)*.

[142] Id.

[143] Id. (citing *Wash. Rev. Code Ann. 9A.40.020(1)* (West 2000)).

[144] *Id. at 298-99* (citing *Wash. Rev. Code Ann. 9A.40.030(1)*, *10.99.020(3)(p)*, *9.94A.125* (recodified as 9.94A.602) (West 2000)).

[145] *Wash. Rev. Code Ann. 9A.40.030(3)* (West 2000).

[146] Washington has modified its criminal code since Blakely.

[147] *Wash. Rev. Code Ann. 9A.20.021(1)(b)*.

[148] *Blakely, 542 U.S. at 299* (citing *Wash. Rev. Code Ann. 9.94A.320*, *9.94A.360*, *9.94A.310(3)(b)* (West 2000)).

sentencing scheme allowed a judge to depart from the standard range if he found "substantial and compelling reasons justifying an exceptional sentence." [149] The judge was also required to give reasons, based on facts and conclusions of law, for his departure. [150] Furthermore, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." [151]

Washington's prosecutor recommended that Blakely be sentenced within the standard range of forty-nine to fifty-three months. [152] However, the judge rejected the standard range and imposed a sentence of ninety months, [153] almost double what Blakely expected to **[*267]** receive pursuant to his plea agreement. [154] Blakely appealed the sentence, arguing that Washington's sentencing scheme deprived him of his Sixth Amendment right to have a jury determine all facts essential to his sentence beyond a reasonable doubt. [155] The Washington Appellate Court affirmed the sentence and the Washington Supreme Court denied review. [156] The United States Supreme Court granted certiorari and reversed Blakely's sentence. [157] The majority stated:

Petitioner 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." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to unanimous suffrage of twelve of his equals and neighbors … rather than a lone employee of the state. [158]

In reaching its decision, the Court reviewed its holding in Apprendi and again turned to a historical analysis of the Sixth Amendment.

According to the Blakely majority, Apprendi expressed the rule that: "Other than the fact of 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." [159] The majority in Blakely further clarified that: "In other words, the relevant

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[149] *Wash. Rev. Code Ann. 9.94A.120(2)* (current version at ***Wash. Rev. Code Ann. 9.94A.505*** (2001)) (textual quote does not appear in the current codification).

[150] Id. 9.94A.120(3) (current version 9.94A.505 (2001)) (textual quote does not appear in the current codification).

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

[152] *Blakely, 542 U.S. at 300*.

[153] Id. He did so based on testimony of Blakely's wife, and justified the increased sentence on the ground that Blakely had acted with deliberate cruelty. He [the defendant] used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order. *Id. at 301*. The judge actually found a number of aggravating factors, but, because the Court of Appeals questioned their validity, to support the departure the Supreme Court focused on the domestic violence with deliberate cruelty factor. *Id. at 300 n.4*.

[154] *Id. at 300*.

[155] *Id. at 301*.

[156] Id.

[157] *Id. at 301, 305*.

[158] *Id. at 313-14*.

[159] *Id. at 301* (quoting *Apprendi v. New Jersey, 530 U.S. 446, 490 (2000)*. The Court provided additional rationale:

"statutory maximum' is not the maximum **[*268]** sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." [160] A judge exceeds his or her authority when he or she sentences a defendant to a punishment not justified by the jury's verdict alone. [161] Blakely's sentence violated this rule because the judge considered factors not admitted by the defendant. In fact, under State v. Gore, [162] the judge in Blakely had no choice but to take into account factors not used in computing the standard range. [163] As Washington's sentencing procedure violated Blakely's Sixth Amendment right to a jury trial, his sentence was invalid. [164]

The Blakely Court expressed its commitment to Apprendi not only because of longstanding precedent, but because of "the need to give intelligible content to the right of jury trial." [165] This need is the touchstone for the Blakely majority's view of the Sixth Amendment right to a jury trial, and the key for determining whether or not a sentencing scheme is constitutional. It explains the holdings leading up to Blakely and the Court's subsequent ruling on the Federal Sentencing Guidelines in Booker. In order to predict what schemes will sustain a constitutional challenge, one must examine this need, as the Court has, in terms of its historical underpinnings.

The jury is the people's way of asserting control over the judiciary. The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." [166] The right to vote ensures that the people ultimately control the legislature. [167] The Framers intended that the people should also exercise some control over the judiciary. [168] "Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." [169] Nor does the political process serve as an adequate check of the judiciary. "The Framers' decision to entrench the jury-trial right in the **[*269]** Constitution shows that they did not trust government to make political decisions in this area." [170] Perhaps leaving sentencing in the hands of professionals would produce a fairer or more efficient system, but this is simply not what the Framers contemplated and therefore it does not respect the Sixth Amendment. [171] "There is not one shred of doubt, however, about the Framers' paradigm for

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This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," and that "an accusation which lacks any particular fact which the law makes essential to punishment is … no accusation within the requirements of the common law, and is no accusation in reason."

Id. at 301-02 (citations omitted).

160 *Id. at 303-04*.

161 *Id. at 304*.

162 *21 P.3d 362 (Wash. 2001)*.

163 *Blakely, 542 U.S. at 304*.

164 *Id. at 305*.

165 *Id. at 305*.

166 *Id. at 305-06*.

167 *Id. at 306*.

168 Id.

169 Id.

170 *Id. at 307 n.10*. "The very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out the role of the jury." *Id. at 308*.

criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." [172]

Washington's sentencing scheme undermined the Framers' purpose in guaranteeing a right to a jury trial. However, this was not because the scheme was by its nature determinate. Rather, it was how that sentencing scheme was carried out. "By reversing the judgment below, we are not, as the State would have it, "finding determinate sentencing schemes unconstitutional.' … This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." [173] In fact, Justice Scalia, writing for the majority, offered the Kansas sentencing scheme as an example of a determinate scheme that considered Apprendi's requirements. [174] The Court also distinguished indeterminate sentencing, specifically noting that the constitutionality of the Federal Guidelines was not before it. [175] Yet, despite the Court's attempts to narrowly confine its holding to a reaffirmation of Apprendi, Blakely set off a firestorm of speculation and created a great sense of unease in the criminal justice system.

C. Blakely's Repercussions

The response to Blakely was varied. Some federal courts held that the Federal Sentencing Guidelines were unconstitutional and did not apply at all. [176] Some of these have determined that they can still be **[*270]** used in an advisory capacity. [177] Many courts found that Blakely did invalidate the Guidelines but that it did not apply retroactively. [178] However, the majority of federal courts used the Guidelines to sentence, ruling that Blakely did

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[171] See *id. at 313*.

[172] Id.

[173] *Id. at 308* (citation omitted).

[174] *Id. at 309-10*.

[175] *Id. at 305 n.9, 308*.

[176] E.g., *United States v. Booker, 375 F.3d 508, 513, 515 (7th Cir. 2004)* (holding that Federal Sentencing Guidelines are unconstitutional where "they limit defendants' right to a jury" but declining to render a decision as to the severability of unconstitutional portions of the Guidelines); *United States v. Mueffelman, 327 F. Supp. 2d 79, 96 (D. Mass. 2004)*; United States v. Parson, No. 6:03-cr-204-Orl-31DAB, slip op. at 4 (M.D. Fla. July 22, 2004) (citation omitted); *United States v. Marrero, 325 F. Supp. 2d 453, 456-57 (S.D.N.Y. 2004)*; *United States v. Sisson, 326 F. Supp. 2d 203, 205 (D. Mass. 2004)*; United States v. Khoury, No. 6:04-cr-24-Orl-31DAB, slip op. at 2 & n.1 (M.D. Fla. July 21, 2004); *United States v. Einstman, 325 F. Supp. 2d 373, 375, 380 (S.D.N.Y. 2004)*; *United States v. Medas, 323 F. Supp. 2d 436, 436 (E.D.N.Y. 2004)*.

[177] See, e.g., *United States v. Mooney, 401 F.3d 940, 949 (8th Cir. 2004)*; *United States v. Hakley, 101 Fed.App'x 122, 2004 WL 1367481 (W.D. Mich. Aug. 12, 2004)*; *United States v. Mueffelman, 327 F. Supp. 2d 79, 96 (D. Mass. 2004)*; United States v. Carter, No. 04-20005, slip op. at 2 (C.D. Ill. July 23, 2004); *United States v. Marrero, 325 F. Supp. 2d 453, 457 (S.D.N.Y. 2004)*; *United States v. Sisson, 326 F. Supp. 2d 203, 205 (D. Mass. 2004)*; *United States v. King, 328 F. Supp. 2d 1276, 1285 (M.D. Fla. 2004)*; *United States v. Lockett, 325 F. Supp. 2d 673, 677 (E.D. Va. 2004)*; *United States v. Croxford, 324 F. Supp. 2d 1230, 1248 (D. Utah 2004)*.

[178] See, e.g., *Leonard v. United States, 383 F.3d 1146, 1148 (10th Cir. 2004)*; *Lilly v. United States, 342 F. Supp. 2d 532, 538-39 (W.D. Va. 2004)*; *Branch v. United States, No. 03-C-4108, 2004 WL 2033056*, slip op. at 7 (N.D. Ill. Sept. 2, 2004); *Orchard v. United States, 332 F. Supp. 2d 275, 277 (D. Me. 2004)*; *Morris v. United States, 333 F. Supp. 2d 759, 769 (C.D. Ill. 2004)*; United States v. Stapleton, No. 02-CR-572, 04-*C-1303, 2004 WL 1965710*, slip op. at 6 (N.D. Ill. Aug. 31, 2004); *United States v. Concepcion, 328 F. Supp. 2d 372, 374 (E.D.N.Y. 2004)*; *Raney v. United States, No. 03-C-2708, 2004 WL 2056222*, slip op. at 3 (N.D. Ill. Aug. 25, 2004); *United States v. Lowe, No. 04-C-50019, 2004 WL 1803354, at 3 (N.D. Ill. Aug. 5, 2004)*; United States v. Flannagan, No. 02-CR-0130-C, slip op. at 2 (W.D. Wis. July 26, 2004); Patterson v. United States, Civil No. 03-CV-74948-DT, Criminal No. 96-CR-80160-DT-01, 2004 WL 1615058, at 4 n.3 (E.D. Mich. July 2, 2004).

not apply to the Federal Guidelines. [179] The concern proved justified - just over six months later mandatory adherence to the Federal Sentencing Guidelines was deemed unconstitutional in United States v. Booker. [180]

D. Booker - The End of Mandatory Federal Guidelines

United States v. Booker consolidated two cases ruling that Blakely invalidated the mandatory application of the Federal Sentencing Guidelines. [181] In the Seventh Circuit case, respondent Booker was **[*271]** charged with possession with intent to distribute at least fifty grams of crack cocaine. A jury heard evidence that Booker had 92.5 grams of crack in his duffle bag. [182] It found him guilty of violating *21 U.S.C. 841(a)(1)*, which carries a minimum sentence of ten years and a maximum sentence of life imprisonment. [183] Based on the Federal Sentencing Guidelines, which considered Booker's past offenses, he should have received a sentence of no fewer than 210 months and no more than 262 months in prison. [184] However, the judge concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and had obstructed justice. [185] Under the Guidelines, such findings warranted a sentence between 360 months to life imprisonment. [186] The judge sentenced Booker to a thirty-year sentence - eight years and two months more than the maximum he could have received based solely on the facts found by the jury. [187]

In a separate case, respondent Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine. [188] The jury found that he had possessed 500 or more grams of cocaine. [189] Under the Federal Sentencing Guidelines, the maximum sentence allowed by the verdict was 78 months in prison. [190] The sentencing judge found by a preponderance of the evidence that Fanfan possessed 2.5 kilograms of cocaine powder and 261.6 grams of crack, and that Fanfan had been "an organizer, leader, manager, or supervisor in the criminal activity." [191] These additional findings required an enhancement of 15 to 16 years imprisonment. [192] However, the judge concluded that, under Blakely, he could sentence Fanfan based only on

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[179] See, e.g., *United States v. Fraser, 388 F.3d 371, 376-77 (1st Cir. 2004)*; *United States v. Hammoud, 381 F.3d 316, 345 (4th Cir. 2004)*, vacated, ***Hammoud v. United States, 125 S. Ct. 1051 (2005)***; *United v. Reese, 382 F.3d 1308, 1310 (11th Cir. 2004)*, vacated, ***Reese v. United States, 125 S. Ct. 1089 (2005)***; *United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004)*, vacated sub nom, ***Ferrell v. United States 125 S. Ct. 1071 (2005)***; *United States v. Koch, 383 F.3d 436, 438 (6th Cir. 2004)*, vacated, ***125 S. Ct. 1944 (2005)***; *United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004)*, vacated, ***Pineiro v. United States, 125 S. Ct. 1003 (2005)***; *United States v. Fotiades-Alexander, 331 F. Supp. 2d 350, 351 (E.D. Pa. 2004)*; *United States v. Olivera-Hernandez, 328 F. Supp. 2d 1185, 1187 (D. Utah 2004)*.

[180] *125 S. Ct. 738, 756-57 (2005)*.

[181] *Id. at 746*.

[182] Id.

[183] Id.

[184] Id.

[185] Id.

[186] Id.

[187] Id.

[188] *Id. at 747*.

[189] Id.

[190] Id.

[191] Id.

[192] Id.

facts found by the jury. [193] The Supreme Court granted certiorari in both cases to consider whether its Apprendi line of cases applied to the Federal Sentencing Guidelines. [194]

[*272] The Court found that Blakely was controlling. [195] Once again the Court examined the history of jury trials. It noted that jury fact-finding might not be the most efficient means of sentencing defendants, but that the interests of fairness and reliability were more important. The Court quoted Blackstone:

However convenient these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns. [196]

While the Sentencing Guidelines served a laudable purpose, that purpose did not justify violating the Sixth Amendment. The Court reaffirmed its holding in Apprendi - any fact, other than a prior conviction, that increases the maximum sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. [197] Therefore, the Guidelines, which required judges to increase sentences based on facts found by a preponderance of the evidence, were unconstitutional. [198]

However, Justice Ginsburg switched camps to salvage the Guidelines. A majority of the Court, consisting of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg, agreed the Guidelines could not bind judges. [199] Justice Ginsburg joined the dissenters, Chief Justice Rehnquist and Justices Breyer, O'Connor, and Kennedy, in holding that the Federal Guidelines were constitutional so long as they were advisory rather than mandatory. [200] This majority concluded that Congress would have preferred the Federal Sentencing Act to be advisory rather than to be totally invalidated. [201] The Court's decision "requires a sentencing court to consider the **[*273]** Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns." [202] However, the majority did not stop there. It further held that the standard of review that appellate courts must apply in reviewing sentences is one of reasonableness. [203]

E. Response to Booker

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193 Id.

194 Id.

195 *Id. at 749*.

196 *Id. at 756* (citation omitted) (emphasis removed).

197 Id.

198 Id.

199 Id.

200 Id.

201 *Id. at 757*.

202 Id. (citation omitted).

203 *Id. at 766*.

Booker produced a vocal and troubled response from both the legal community and the media. After its decision in Booker, the Supreme Court sent over 400 cases back to lower courts for review. [204] Judges in the Second and Ninth Circuits "asked lawyers to delay filings in hundreds of other pending sentencing reviews as they scrambled to make sense of the new system." [205] Part of the problem is the reasonableness standard of review that appellate courts must now apply in evaluating sentences. [206] As the Guidelines are no longer mandatory, appellate courts face the problem of determining whether a sentencing court reasonably adhered to them. [207] Another huge and unresolved problem is whether Booker should apply retroactively. "Everybody who is serving a federal sentence is trying to figure out whether they [sic] can get some relief under Booker," said James Wyda, the federal public defender for Maryland. "We've been bombarded with calls." [208]

Federal judges are under close watch. Congress and the Department of Justice are concerned about overly lenient judges. The House judiciary panel is already laying the groundwork for possible legislative action to restore a stricter framework for federal sentences. [209] Despite the concern, the U.S. Sentencing Commission's early data suggests that most judges are still following the **[*274]** Guidelines. [210] However, the trend is toward tougher punishments than those handed down before Booker, and critics worry that we may see the same disparities in sentencing that existed before the Guidelines. [211]

The Sentencing Commission's September 30, 2005 report shows a small spike in upward departures compared with previous years. [212] Since Booker, 61.9% of sentences have fallen within the appropriate guideline range. [213] In contrast, 69.4% of sentences fell within the guideline range in 2003. [214] Upward departures accounted for 1.4% of the sentences falling outside of the guideline range post-Booker, while upward departures accounted for only 0.8% of sentences falling outside the prescribed range in 2003. [215] The post-Booker spike is supported by data from 2000-2002, which also show fewer upward departures. [216] Of all the upward departures in 2003, only about

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[204] Gail Gibson, Judges Left in Confusion on Sentencing: High Court Ruling Could Mean Unfair, Inconsistent Punishments, Critics Warn; Courts Muddle Through Change, Balt. Sun, Feb. 13, 2005, at 1A.

[205] Id.

[206] *Booker, 125 S. Ct. at 766* ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

[207] As Justice Scalia points out in his dissent: "If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative." *Id. at 791* (Scalia, J., dissenting).

[208] Gibson, supra note 204, at 1A.

[209] Id.

[210] Id.

[211] Id.

[212] U.S. Sentencing Comm'n, Special Post-Booker Coding Project (data extraction on September 30, 2005).

[213] Id. at 11.

[214] Id.

[215] Id.

[216] Id. In 2000, 64.5% of sentences fell within the applicable guideline range, and only 0.7% constituted upward departures. Id. Similarly in 2001, 64% of sentences were within the guideline range, with only 0.6% upward departures. Id. In 2002, 65% of sentences were within the appropriate range and 0.8% were upward departures. The Commission does not have data from 2003 or 2004 available at this time.

21% relied on provisions in the Guidelines Manual. [217] The majority of the departures (approximately 79%) mentioned Booker or related factors, rather than the Federal Sentencing Guidelines. [218]

Although the data indicates a trend toward longer sentences, those calling for reform are worried about judicial leniency more than disparity. According to Daniel Collins, a former associate deputy general for the Justice Department, "federal sentencing policy is not some abstract matter … . Common sense suggests that if you lock up criminals for longer periods of time and lock up the very worst for very long periods of time, there will be less crime." [219] In contrast, both the American Bar Association and the National Association of Criminal Defense Lawyers think that reform should wait. [220] "[They] have suggested a yearlong waiting period before any legislative **[*275]** changes are considered, saying the time is needed to gather detailed statistics about federal sentences in the aftermath of Booker." [221]

Meanwhile judges, attorneys, and defendants are feeling their way through the new system. These decisions have created an enormous new workload, particularly for the nation's appellate courts. [222]

III. Some Guidance for States

Booker provided little help to States struggling to rework their sentencing schemes in conformance with Blakely. Although Booker held that the mandatory Federal Guidelines were unconstitutional because they allowed judges to increase sentences based on facts not found by a jury, the Court's solution was to make the Guidelines advisory. Booker seems to suggest that States with determinate sentencing schemes can correct their Blakely weaknesses simply by making their guidelines advisory. [223] However, this undermines the holding in Blakely that all facts necessary for a sentence must be found by a jury. The safer alternative in crafting a constitutional sentencing scheme is to look to the Blakely opinion for guidance.

Blakely explicitly states that indeterminate sentencing schemes do not violate a defendant's Sixth Amendment right to a jury trial. [224] While the Sixth Amendment preserves jury power, it does not limit judicial discretion. [225] An indeterminate sentencing scheme affords a judge discretion to distribute a punishment, within a legislatively set range, for the crime of which a defendant is convicted by the jury. It honors the findings of the jury. This differs from the determinate sentencing scheme employed by Washington in Blakely, which essentially allowed a judge to sentence a defendant to a punishment outside the range prescribed by the State's guidelines. As a consequence of a determinate sentencing scheme, a judge did not have to abide by the findings of a jury.

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A. States Affected by Blakely

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[217] Id.

[218] Id.

[219] Gibson, supra note 204 at 1A.

[220] Id.

[221] Id.

[222] Id.

[223] See Resources on Sentencing Law Assembled by Professor Douglas A. Berman: Blakely in the States, http://moritzlaw.osu.edu/faculty/berman/states/general.html (Mar. 22, 2005) [hereinafter Resources on Sentencing Law]. Professor Berman provides an excellent discussion of the dilemma states face. Some states are "Blakely-izing" their schemes, by requiring jury fact-finding of aggravating factors; other states are "Booker-izing" or adopting advisory guideline schemes. Id.

[224] *Blakely v. Washington, 542 U.S. 296, 309 (2004)*.

[225] Id.

The State of Washington, pre-Blakely, employed presumptive or determinate sentencing guidelines. This meant that Washington's Guidelines required "a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence." [226] Kansas, Minnesota, [227] North Carolina, Oregon, and Tennessee use such guidelines. Aside from Kansas, which is explained in Part III.B, these states all share the same problem: their sentencing schemes "only authorize[] a sentence to the presumptive maximum sentence or within the presumptive range. An enhanced sentence requires a finding of facts by the judge - the very thing the Supreme Court ruled violates the Sixth Amendment right to trial by jury." [228]

However, each of these states has or is examining its scheme and enacting legislation in conformance with Blakely. North Carolina's governor has signed a bill that would have a jury consider aggravating factors, including prior convictions, during its deliberation as to the defendant's guilt or innocence. [229] Consequently, a defendant may request a bifurcated trial. [230] Furthermore, North Carolina's Supreme Court applied Blakely to the State's Guidelines and held that Blakely error is structural and judges should not apply a harmless error standard of review to "speculate" on issues never brought before a jury. [231] Oregon has also enacted a bill that calls for a second jury proceeding when the prosecutor seeks enhancements to the defendant's sentence. [232] In contrast to Kansas, Oregon, and North **[*277]** Carolina, Tennessee has followed the Booker approach and has enacted legislation making its Guidelines advisory.

Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio do not formally employ guidelines. [233] Nevertheless, they do use determinate or presumptive sentences, rather than guidelines, and judges must provide justification when they wish to deviate from the prescribed sentencing ranges. [234] "Statutes set a single presumptive sentence or range of sentences for each offense within the statutory range. The judge must impose the presumptive sentence or one within the presumptive range and may impose a higher term only after finding aggravating factors." [235] While these states do not have a multiple-range sentencing guideline system, their schemes are structured very much like guidelines. [236] The problem with presumptive or determinate sentences, much like presumptive or determinate guidelines, is that a jury verdict or guilty plea only authorizes a sentence within a certain range. [237] If a judge enhances the sentence based on his or her own fact-finding, then

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[226] Jon Wool & Don Stemen, Aggravated Sentencing: Blakely v. Washington - Practical Implications for State Sentencing Systems, Pol'y & Prac. Rev. 1, 2 (Aug. 2004), available at http://www.vera.org/publication pdf/242 456.pdf [hereinafter Aggravated Sentencing].

[227] Minnesota Sentencing Commission reviewed its guidelines in light of Blakely and identified specific sentencing provisions that require modification and made a report to the Governor. Minn. Sentencing Guidelines Comm'n, The Impact of Blakely v. Washington on Sentencing in Minnesota: Long Term Recommendations 3 (2004), reprinted in 17 Fed. Sent. Rep. 75, available at http://www.msgc.state.mn.us/Data%20Reports/blakely longterm.pdf. H.F. 0001, 2005 Leg., 84th Sess. 14 (Minn. 2005) (5th Engrossment, May 23, 2005), available at http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H0001.5&session=ls84.

[228] Aggravated Sentencing, supra note 226, at 4.

[229] N.C. Gen. Stat. 15A-1340.16 (2003) (implementing an act to amend state law regarding the determination of aggravating factors in a criminal case to conform with the United States Supreme Court decision in Blakely v. Washington).

[230] Id.

[231] State v. Allen, 615 S.E.2d 256, 269-72 (N.C. 2005).

[232] S.B. 528-A, 73rd Leg., Reg. Sess. (Or. 2005).

[233] Aggravated Sentencing, supra note 226, at 2.

[234] Id.

[235] Id.

[236] Id.

the sentence violates the Sixth Amendment under Blakely. [238] Alaska and Indiana have enacted legislation to conform their sentencing schemes to Blakely. [239] The highest courts of Arizona, [240] California, Colorado, New Jersey, and Ohio have all considered the issue, as has New Mexico's Sentencing Commission.

The District of Columbia, Louisiana, Missouri, and Wisconsin provide guidelines that judges are encouraged to consider. [241] Judges do not have to provide reasons for departing from the Guidelines, and the effective maximum sentence is the statutory maximum. [242] Thus, the maximum sentence will always be the one authorized by **[*278]** the jury and, therefore, will not violate the Sixth Amendment. These states basically have indeterminate sentencing schemes.

Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia require judges to apply the Guidelines, but they then permit judges to upwardly depart from the prescribed range so long as they justify their reasons for doing so. [243] Whether this "voluntary" scheme is constitutional is open to debate. On the one hand, these six states technically will allow upward departures based on facts not found by the jury, which is clearly unconstitutional after Blakely. On the other hand, this system is much like the one implemented by the Booker majority. Most likely, it will depend on each state's statutes regarding criminal punishments. As long as judges do not exceed the maximum sentence as set by statute for the crime of which the defendant is convicted, the sentence will respect the Sixth Amendment's guarantee. Of these states, only Arkansas's and Maryland's legislatures have considered the issue, and they both appear to adopt a Blakely approach. Arkansas actually rejected a bill that would have made the use of sentencing guidelines voluntary, because it found that such a system would violate Blakely's holding that all facts that increase a sentence must be found by a jury. [244] Maryland has proposed a bill that would change the sentencing factors a court considers when applying an enhanced penalty. [245] This way the jury would have to find a defendant guilty of the aggravating factors in order for the defendant to receive an enhanced sentence. In contrast, Delaware's Supreme Court held that "Blakely does not impact Delaware's sentencing scheme because the SENTAC Guidelines are voluntary and non-binding." [246]

Michigan and Pennsylvania use indeterminate sentencing schemes with presumptive or determinate guidelines. [247] While indeterminate sentencing is constitutional under Blakely, these states may be in trouble because of their determinate guidelines. Judges set both the minimum sentence and the maximum sentence. The maximum sentence may be as long as the statutory maximum, which **[*279]** determines a defendant's mandatory release

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[237] Id. at 5.

[238] Id.

[239] S.B. 56, 24th Leg., 1st Sess. (Alaska 2005); ***Ind. Code 35-38-1-7.1*** (2005).

[240] ***State v. Brown, 99 P.3d 15, 16 (Ariz. 2004)*** (holding that a defendant cannot be "sentenced to a term greater than the presumptive sentence solely on the basis of facts found by the trial judge upon a showing of "reasonable evidence"').

[241] Aggravated Sentencing, supra note 226, at 5 ("Judges are encouraged to consider guidelines ranges in determining appropriate sentences, but no additional fact-finding is required of a judge to impose a sentence outside the range and up to the statutory maximum.").

[242] Id.

[243] Id.

[244] Legislative Briefs, Ark. News Bureau, Jan. 26, 2005, available at http://www.arkansasnews.com/archive/2005/01/26/News/316026.html.

[245] H.B. 822, 2006 Gen. Assem., Reg. Sess. (Md. 2006).

[246] Benge v. State, No. 137, 2004 WL 2743431 (Del. 2004). SENTAC is an acronym for Delaware's Sentencing Accountability Commission.

[247] Aggravated Sentencing, supra note 226, at 6.

date. [248] The minimum term determines the period the defendant must serve in prison. [249] A judge may sentence a defendant to a minimum term above the Guidelines range only after finding and justifying aggravating factors on the record. [250] This type of sentencing scheme does not seem to violate Blakely. [251] A defendant will never receive more than the statutory maximum, and the Court has held that a jury does not need to find facts that authorize an enhanced minimum sentence. [252] However, one may argue that these schemes are really no different from Washington's, in that the sentence the defendant actually serves, the minimum sentence, would be increased based on judicial fact-finding.

B. Kansas's Sentencing Scheme Protects the Sixth Amendment

The Blakely opinion offers Kansas as an example of a state with a sentencing scheme that preserves a defendant's Sixth Amendment right to a jury trial. [253] Kansas changed its Guidelines to correct for "Apprendi infirmities." [254] Prior to 2001, Kansas had a determinate sentencing scheme similar to the Washington scheme struck down in Blakely. [255] A sentencing judge was required to use a grid to determine a defendant's sentence. The grid took into account offender and offense characteristics. [256] The Kansas Guidelines permitted the sentencing judge to increase the length of a sentence up to a maximum of twice the highest sentence in the applicable grid box if he found one or more aggravating factors. [257] The statute did not mention a standard of proof, but the Kansas Supreme Court **[*280]** suggested that the facts "established for use in sentencing require less evidentiary weight than facts asserted for conviction." [258]

However, following the Supreme Court's decision in Apprendi, the Kansas Supreme Court held that Kansas's determinate sentencing scheme was unconstitutional. In State v. Gould, [259] the defendant was convicted of three counts of child abuse. [260] Each count fell within a thirty-one to thirty-four month sentence on the Kansas sentencing grid. [261] The State moved for an upward departure, and the sentencing court found three statutory aggravating factors. [262] Consequently, the defendant was sentenced to a sixty-eight month prison term for each of

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[248] Id.

[249] Id.

[250] Id.

[251] Michigan's Supreme Court certainly thinks so, as it held that the State's indeterminate sentencing scheme does not violate the *Sixth Amendment in Michigan v. Claypool, 684 N.W.2d 278 (Mich. 2004)*.

[252] *Harris v. United States, 536 U.S. 545, 567 (2002)*.

[253] *Blakely v. Washington, 542 U.S. 296, 309-10 (2004)*.

[254] Id.

[255] Sentencing Guidelines Act, ch. 239, 1, 1992 Kan. Sess. Laws 394 (1993) (codified as amended at *Kan. Stat. Ann. 21-4701* to -28 (1995)). See also *State v. Richardson, 901 P.2d 1, 4 (Kan. Ct. App. 1995)* (indicating that the Kansas Legislature relied on Washington, Oregon, and Minnesota guidelines in formulating its own system).

[256] See, e.g., *Kan. Stat. Ann. 21-3427* (1995).

[257] *Kan. Stat. Ann. 21-4716* (1995).

[258] ***State v. Spain, 953 P.2d 1004, 1009 (Kan. 1998)*** (quoting *Farris v. McKune, 911 P.2d 177, 192 (Kan. 1996)*).

[259] ***23 P.3d 801 (Kan. 2001)***.

[260] ***Id. at 804***.

[261] *Kan. Stat. Ann. 21-4704* (1995).

the first two counts. [263] This was twice the maximum sentence specified by the appropriate grid box. On appeal, the State argued that while the sentence exceeded the maximum sentence allowed by the Guidelines, it fell within the statutory maximum. [264] The Kansas Supreme Court, however, followed the United States Supreme Court's "reasoning that "the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict."' [265] The sixty-eight month prison sentence was a greater punishment than that authorized by the jury's verdict, and thus it was "unconstitutional on its face." [266]

Acting quickly, Kansas's legislature designed a bifurcated trial system to consider aggravating sentencing factors, thus preserving a defendant's Sixth Amendment right to a jury trial. The new statute provides that "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt." [267] The prosecutor must file a motion if he or she wishes to seek an upward departure. [268] A trial court then has two options under Kansas's new sentencing scheme. It can allow a jury to make findings on alleged **[*281]** aggravating factors during its deliberations on the guilt or innocence of a defendant, or it can order a separate procedure to consider the upward departure. [269] A defendant may waive this procedure, subject to the consent of all the parties and the trial court. [270] If a jury cannot reach a unanimous verdict regarding the existence of an aggravating factor, the trial court cannot impose an upward departure for that factor. [271] While a sentencing court can impose an upward departure if a jury unanimously finds an aggravating factor, it does not have to do so. [272] The sentencing court retains a good deal of discretion. [273] The sentencing statute does not prevent a sentencing court from considering evidence on mitigating circumstances and granting a downward departure.

Nor has this sentencing scheme proved unwieldy for Kansas's courts. Since 2001, very few bifurcated trials have actually taken place. "In most counties, there have been none at all; statewide, there may have been less than a half dozen. When these proceedings do occur, attorneys and judges estimated that they only added one to three hours to the jury trial." [274] Furthermore, over the last few years Kansas's courts have resolved a number of issues. Besides allowing for downward departures and judicial discretion to disregard a jury finding of an aggravating factor,

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[262] ***Gould, 23 P.3d at 806***.

[263] Id.

[264] ***Id. at 814***.

[265] ***Id. at 813*** (quoting *Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)*).

[266] ***Id. at 814***.

[267] *Kan. Stat. Ann. 21-4716(b)* (2002).

[268] *Kan. Stat. Ann. 21-4718(b)(1)* (2002).

[269] *Kan. Stat. Ann. 21-4718(b)(2)*, (3) (2002).

[270] *Kan. Stat. Ann. 21-4718(b)(4)*, *22-3403* (2002).

[271] Randall L. Hodgkinson, A Blakely Primer: The Kansas Sentencing Guidelines, Champion Mag., Aug. 2004, at 20, available at *http://www.nacdl.org/public.nsf/championarticles/a0408p20?opendocument*.

[272] *Kan. Stat. Ann. 21-4718(b)(7)* (2002).

[273] *State v. Kessler, 73 P.3d 761, 772 (Kan. 2003)* (holding that although the jury found aggravating factors, an upward departure from the sentencing guidelines would not be imposed by the Kansas Supreme Court).

[274] Resources on Sentencing Law, supra note 223.

the Kansas Supreme Court has considered non-prison sanctions. [275] Further, the Kansas Supreme Court has held that using consecutive sentences, rather than concurrent sentences, is discretionary and does not implicate Apprendi. [276] Thus, Kansas provides an excellent working model for states seeking to conform their sentencing guidelines to Blakely.

[*282]

IV. The Problem of Advisory Guidelines and Booker's Reasonableness Standard

While Booker seemingly reaffirmed the Supreme Court's holding in Apprendi, its ultimate holding undermines the power of its decision in Blakely. The Booker Court reiterated the language it used in Apprendi - that the statutory maximum warranted by the facts found by a jury or admitted by a defendant is the maximum sentence a judge may impose on an offender. [277] Based on this holding, the Booker Court invalidated the Federal Sentencing Guidelines. Yet, the Booker majority sustained the Federal Guidelines in an advisory capacity. [278]

Congress created the Federal Sentencing Guidelines as a mandatory framework. However, the majority in Booker decided to sever the mandatory language from the sentencing statute. [279] As Justice Stevens pointed out in his dissent, the Court decided Congress's intent based on nothing evidenced by either the Federal Sentencing Reform Act or the Federal Guidelines. "The Court's decision to [sever the mandatory language] represents a policy choice that Congress has considered and decisively rejected. While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf." [280] Stevens's dissent advocated keeping the Guidelines as they were, subject only to a jury fact-finding requirement. [281] The majority rejected this approach because it believed it would "destroy the system." [282]

[*283] However, even though the Guidelines are no longer mandatory, any upward departure authorized by them based on judicial fact-finding rather than the jury's verdict remains unconstitutional. The reason the Guidelines were found to violate the Sixth Amendment had little to do with the mandatory language and much to do with the fact that they required upward departures that were not based on facts either found by a jury beyond a reasonable doubt or

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[275] ***State v. Carr, 53 P.3d 843, 850 (Kan. 2002)*** (holding that the imposition of a prison sentence rather than probation does not implicate Apprendi).

[276] *State v. Bramlett, 41 P.3d 796, 797 (Kan. 2002)*.

[277] *Blakely v. Washington, 542 U.S. 296, 303-04 (2004)*; *United States v. Booker, 125 S. Ct. 738, 749 (2005)*.

[278] *Booker, 125 S. Ct. at 756-57*.

To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

Id. at 760.

[279] *Id. at 764*.

[280] *Id. at 771* (Stevens, J., dissenting).

[281] *Id. at 779*. "In reality, given that the Government and judges have been apprised of the requirements of the Sixth Amendment, the number of unconstitutional applications would have been even smaller had we allowed them the opportunity to comply with our constitutional holding." *Id. at 774*.

[282] *Id. at 760*.

admitted by a defendant. Under the majority's holding in Booker, the same potential problems exist. A judge may follow the now-advisory Guideline's recommendations and upwardly depart from the sentencing range. If that judge goes above the statutory maximum for the offense, he or she necessarily violates the Sixth Amendment right to a jury trial under Blakely because the judge is doing so based on his or her own findings, and not those of a jury.

Booker confuses the purpose of the Sixth Amendment jury trial requirement. While the Court's emphasis on the Sixth Amendment suggests that upward departures from the statutory maximum are unconstitutional, the majority's holding in Booker allows for another alternative. By making the Guidelines advisory in nature, the majority may be giving judges unfettered discretion and removing the Sixth Amendment from the equation. As the Guidelines are not mandatory and the majority declined to require jury fact-finding, judges may be able to find all facts relevant to sentencing by a preponderance of the evidence. Furthermore, Booker obviously presents an easier, more attractive solution to states than does Blakely. As discussed in Part III.A, many states are taking a Booker approach to their sentencing schemes. However, in light of the reasoning behind Blakely and Booker and the recent changes on the Supreme Court, this is not a wise course. [283]

Another difficulty with the Booker decision is the standard of appellate review that the Court sets forth. The Court proposed that lower courts use a "reasonableness standard." [284] It arrived at this decision based on the text of the pre-2003 Guidelines, which directed courts to review sentences outside the Guideline range "with a view **[*284]** toward determining whether [the departure was] unreasonable." [285] The majority believes that this standard will work in practice. [286] Perhaps this is why the Court gives very little guidance as to what makes a sentence unreasonable. [287] Compounding this problem is the fact that appellate courts typically review sentences for legal error. [288]

Thus far, most of the circuits are reviewing for plain error. The First, [289] Fifth, [290] Eleventh, [291] and D.C. [292] Circuits are applying a plain error standard requiring defendants to make a specific showing of prejudice from the application of mandatory guidelines. The Second [293] and Seventh [294] Circuits require the sentencing judge to determine if the defendant was prejudiced by advisory guidelines so as to satisfy the third step of plain error review, whenever the impact of the guidelines is unclear. Finally, the Sixth Circuit has adopted a general presumption that a

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[283] With Chief Justice Rehnquist and Justice O'Connor replaced on the Court, the balance may very well shift in favor of Justice Scalia's approach.

[284] *Id. at 766*.

[285] *Id. at 765*.

[286] See *id. at 766* (""Reasonableness' standards are not foreign to sentencing law.").

[287] Id. Instead the majority seems to put a great deal of the burden on the Sentencing Commission. "The Sentencing Commission will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." Id.

[288] *Id. at 791* (Scalia J., dissenting).

[289] *United States v. Antonakopoulos, 399 F.3d 68, 75, 77 (1st Cir. 2005)*.

[290] *United States v. Mares, 402 F.3d 511, 520-21 (5th Cir. 2005)*.

[291] *United States v. Shelton, 400 F.3d 1325, 1328, 1331 (11th Cir. 2005)*.

[292] *United States v. Smith, 401 F.3d 497, 499 (D.C. Cir. 2005)*.

[293] *United States v. Williams, 399 F.3d 450, 459-60 (2d Cir. 2005)*.

[294] *United States v. Paladino, 401 F.3d 471, 483-84 (7th Cir. 2005)*.

defendant was prejudiced by being sentenced under the advisory guidelines. [295] The Third, [296] Fourth, [297] **[*285]** and Ninth Circuits [298] also seem to be taking this approach. The Eighth Circuit is the only circuit so far to have reversed a sentence post-Booker on the grounds that it was unreasonable. [299] The reasonableness of a sentence remains an amorphous concept that results in the affirmation of almost all sentences.

The federal and state appellate courts may soon receive some guidance. The Supreme Court has granted certiorari in Washington v. Recuenco [300] to consider whether Blakely error can be harmless. The Court will consider two cases, Neder v. United States, [301] which applied a harmless error analysis, and Sullivan v. Louisiana, [302] which

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[295] See *United States v. McCraven, 401 F.3d 693, 700 (6th Cir. 2005)*.

[296] *United States v. Benjamin, 125 Fed. App'x 438, 439, 442-43 (3d Cir. 2005)*.

[297] *United States v. Hughes, 396 F.3d 374 (4th Cir. 2005)*.

Booker wrought a major change in how federal sentencing is to be conducted. As the law now stands, sentencing courts are no longer bound by the ranges prescribed by the guidelines. As long as a sentence falls within the statutorily prescribed range, the sentence is now reviewable only for reasonableness. Under the record before us, to leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy "the fairness, integrity or public reputation of judicial proceedings." We therefore exercise our discretion to correct this plain error.

Id. at 380-81 (citation omitted).

In determining whether the exercise of our discretion is warranted, it is not enough for us to say that the sentence imposed by the district court is reasonable irrespective of the error. The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. Indeed, the determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it.

Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable. We simply do not know how the district court would have sentenced Hughes had it been operating under the regime established by Booker.

Id. at 381 n.8.

[298] *United States v. Ameline, 400 F.3d 646 (9th Cir. 2005)*.

Our original opinion was consistent with Booker's holding that the Sixth Amendment as construed in Blakely applies to the Sentencing Guidelines. It was at odds, however, with the Court's severability remedy that eliminated the mandatory nature of the Sentencing Guidelines. Applying Booker to the present case, we conclude that (1) the Court's holding in Booker applies to all criminal cases pending on direct appeal at the time it was rendered; (2) because Ameline did not raise a Sixth Amendment argument at the time of sentencing we review for plain error; (3) Ameline's sentence violated the Sixth Amendment and constituted plain error; and (4) the error seriously affected the fairness of Ameline's proceedings. Accordingly, we vacate Ameline's sentence and remand for resentencing.

Id. at 649-50.

[299] *United States v. Rogers, 400 F.3d 640, 641-42 (8th Cir. 2005)* (holding that downward departure from a guideline range of 51-63 months to 5 years probation was unreasonable).

[300] ***126 S. Ct. 478 (2005)***.

applied a structural error analysis. This, too, will have serious consequences under Booker, as most federal courts are applying a plain error standard of review to sentences. Justice counting suggests that the Court may hold that Blakely error is structural. Two of the five majority Justices in Neder will not be part of the Court's decision **[*286]** in Recuenco. Moreover, the reasoning in Justice Scalia's dissent in Neder now seems to have gained majority support in Apprendi, Blakely, and Booker.

[The Court] acknowledges that the right to trial by jury was denied in the present case, since one of the elements was not - despite the defendant's protestation - submitted to be passed upon by the jury. But even so, the Court lets the defendant's sentence stand, because we judges can tell that he is unquestionably guilty.

… The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, the Constitution does not trust judges to make determinations of criminal guilt. Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution… . The Court's decision today is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury). [303]

While Justice Scalia wrote for the dissent in Neder, this exact reasoning led to the Court's decision in Blakely and the invalidation of mandatory Federal Sentencing Guidelines in Booker. How can a Blakely error be harmless if it violates a constitutional right? The answer is that it cannot.

Conclusion

The Sixth Amendment serves to protect defendants against both the legislature and the judiciary. Apprendi and its progeny seek to preserve the right to a jury trial from erosion by judicial fact-finding and sentencing enhancements. While the Sixth Amendment demands jury fact-finding, how this will actually affect legislative sentencing remains to be seen. In the meantime, Booker reveals more questions than it answers. Advisory guidelines give judges more discretion, and the Court's "reasonableness standard" has little bite to it. **[*287]** However, the one thing that the Court was clear on is that the Sixth Amendment requires that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." [304] According to this rule, even if the advisory Guidelines suggest an upward departure, such a departure would violate the Sixth Amendment unless based on facts found by the jury beyond a reasonable doubt or admitted by the defendant. Therefore, the advisory Federal Guidelines do little more than keep a framework in place while federal and state legislatures rework their sentencing schemes. [305]

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[301] *527 U.S. 1 (1999)*.

[302] *508 U.S. 275 (1993)*.

[303] *Neder, 527 U.S. at 31-32* (Scalia, J., dissenting).

[304] *United States v. Booker, 125 S. Ct. 738, 756 (2005)*.

[305] *Id. at 768* ("Ours, of course is not the last word: The ball now lies in Congress's court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.").

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