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# The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries

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# THE FEDERAL SENTENCING GUIDELINES AFTER *BLAKELY* AND *BOOKER*: THE LIMITS OF CONGRESSIONAL TOLERANCE AND A GREATER ROLE FOR JURIES

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## I. INTRODUCTION

On January 12, 2005, the Supreme Court's much-anticipated opinion in *United States v. Booker* overhauled the Federal Sentencing Guidelines [hereinafter Guidelines].[1] In the first part of the opinion [hereinafter *Booker A*], the Court held that a Sixth Amendment violation occurs when a judge increases a defendant's sentence based upon factual findings made by the judge rather than a jury. The Guidelines explicitly call for such judicial fact-finding. Accordingly, even before *Booker*, many viewed the Guidelines as constitutionally vulnerable in light of the Court's landmark opinion last term in *Blakely v. Washington*, which invalidated critical provisions of a similar state sentencing scheme.[2] *Booker A* was a natural outgrowth of *Blakely*.

In the second part of the *Booker* opinion, however, [hereinafter *Booker B*], the Court saved the Guidelines by (1) severing the Sentencing Reform Act of 1984's provision mandating that judges follow the Guidelines and (2) imposing a "reasonableness review" on appeal.[3] In essence, the Court created an "advisory guidelines" system.[4] Thus, while *Booker A* focused on the importance of the jury, *Booker B* did nothing to vindicate that interest.[5] Rather, this second part of the case lauded the critical role of judicial fact-finding in the Guidelines regime. The explanation for this jarring result is that four of the five justices subscribing to *Booker B* dissented from *Booker A*, meaning that they were unconvinced that the Guidelines violate the Sixth Amendment in the first place.[6] Only Justice Ginsburg subscribed to both key parts of the Court's opinion.

Despite the welcoming response of some commentators to *Booker*, Congress is unlikely to be sanguine about its apparent return of expansive discretion of the judiciary.[7] In the increasingly contentious tug of war between Congress and the

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1. United States v. Booker, 125 S. Ct. 738 (2005). Throughout this Article, the capitalized term, "Guidelines," references the United States Sentencing Guidelines. *Booker* also resolved the companion case, *United States v. Fanfan*.

2. 124 S. Ct. 2531 (2004).

3. *Booker*, 125 S. Ct. at 756–57, 765–67.

4. The district court judge who issued the first post-*Blakely* opinion essentially took this approach. *See* United States v. Croxford, 324 F. Supp. 2d 1230 (D. Utah 2004). Sentencing commentator Stephanos Bibas also identified voluntary guidelines as a possible approach following *Blakely*. *See* Stephanos Bibas, Blakely*'s Federal Aftermath*, 16 FED. SENT. REP. 333, 335 (2004) (suggesting that the Guidelines "may still serve as voluntary, non-binding guidance").

5. *See Booker*, 125 S. Ct. at 795 (Thomas, J., dissenting in part) (noting that "[t]he majority's solution fails to tailor the remedy to the wrong").

6. Justice Stevens wrote *Booker A*, joined by Justices Scalia, Souter, Thomas, and Ginsburg. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg joined Justice Breyer, who wrote *Booker B*, to form a majority with respect to that portion of the case.

7. *Cf.* Rachel E. Barkow, *The Devil You Know: Federal Sentencing After* Blakely, 16 FED. SENT. REP. 312, 312 (2004) (noting that "the politics of federal criminal justice" is a factor that "counsel[s] against premature celebration of the end of the rigidity of the Sentencing Guidelines").

courts over judicial sentencing discretion,[8] any temporary victory that the courts claim after *Booker* is pyrrhic. The 2003 passage of Title IV of the PROTECT Act, commonly known as the Feeney Amendment,[9] clearly indicated that Congress has no patience for wide-ranging judicial discretion. Indeed, the Feeney Amendment, which represented "the most sweeping legislation since the creation of the Sentencing Guidelines," dramatically restricted downward departures from the Guidelines.[10] Congress enacted these controversial reforms to rein in judges who, in Congress's view, were granting unjustified leniency under the Guidelines regime.[11] Thus, inherent tension exists between the Feeney Amendment dictates and the *Booker B* holding: the former calls for stiffer sentences and even less discretion for judges, while the latter removes the mandatory nature of the Guidelines altogether. By rendering the Guidelines "advisory," the Court, among other things, effectively nullified that portion of the Feeney Amendment which sought to restrict judicial downward departure discretion.

While the reverberations of *Blakely*[12] muted—and *Booker* arguably mooted—the protests over the Feeney Amendment,[13] Congress's effort to further curtail sentencing discretion remains enormously relevant even in the aftermath of *Blakely* and *Booker*. Congress's deeply suspicious attitude toward sentencing judges provides a guidepost to how Congress will react to the breach in the Guidelines structure that *Booker* created, and Congress's posture does not indicate a ready acceptance of the return of sentencing discretion to the judicial branch. To the contrary, *Booker* may provide an impetus for an even more radical curtailment

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8. As two sentencing commentators have recently noted,

> politics drives sentencing today now more than ever . . . . The tension between the three coordinate branches over sentencing remains a battle still very much in progress; [the] Feeney debate [referring to last year's Feeney Amendment, which curtailed judges' capacity to depart downward from Guidelines sentences] continues to resonate in all three branches, although it has created unusual tensions between Congress and the courts.

Benson B. Weintraub & Benedict Kuehne, *The Feeney Frenzy: A Case Study in Actions and Reactions in the Politics of Sentencing*, 16 FED. SENT. REP. 114, 117 (2003); *see also* Douglas A. Berman, *Taking Stock of the Feeney Amendment's Many Facets*, 16 FED. SENT. REP. 93, 96 (2003) ("[T]he level of ill-will between the federal judiciary and Congress seems to have reached a peak as a result of the enactment of the Feeney Amendment."); *see generally* Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 776 (2002) (describing the "continuing struggle between legislatures and courts for control over criminal procedure").

9. *See infra* Part V(B).

10. Alan Vinegrad, *The New Federal Sentencing Guidelines: The Sentencing Commission's Response to the Feeney Amendment*, 16 FED. SENT. REP. 98, 98 (2003). Specifically, "Congress directed the Sentencing Commission to promulgate, within 180 days, guidelines amendments 'to ensure that the incidence of downward departures are substantially reduced.'" *Id.* (quoting Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 [hereinafter PROTECT Act], Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003)). Vinegard's article outlines the Commission's response, including its elimination of six grounds for departure. *See* Vinegrad, *supra*, at 99-100.

11. *See* Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining Under the Feeney Amendment*, 16 FED. SENT. REP. 109, 109 (2003) ("Much of the controversy regarding Title IV of the newly enacted PROTECT Act, known generally as the Feeney Amendment, has focused on the amendment's restrictions of judicial departure authority.") (citing PROTECT Act, § 401(g), 117 Stat. at 671).

12. *See* Douglas A. Berman, *Examining the* Blakely *Earthquake and Its Aftershocks*, 16 FED. SENT REP. 307, 307 (2004) (referring to *Blakely* as an "earthquake").

13. *See* Vinegrad, *supra* note 10, at 98 (noting the "barrage of judicial criticism" levied at the Feeney Amendment).

of sentencing discretion and an increase in the mandatory minimum sentences that are the bane of the academy, defense bar, and judiciary alike.[14]

Any realistic assessment of *Booker*'s longevity must acknowledge the premise that Congress is skeptical of—indeed, hostile to—the notion that judicial discretion will lead to appropriate and uniform sentences. This Article proposes revisions to the Guidelines that work within the context of the current congressional climate—as *Booker B* assuredly does not.[15]

Part II of this Article starts with a brief history of the Guidelines, promulgated as a result of the Sentencing Reform Act of 1984,[16] legislation that arose because of deep congressional frustration with the then-current discretionary sentencing scheme.[17] Part III lays the groundwork for *Blakely* and *Booker* by outlining *Blakely*'s forerunner, *Apprendi v. New Jersey*.[18] *Apprendi* itself highlighted the potential constitutional problem with judicial fact-finding that increases a defendant's sentence and *Apprendi* spawned a raft of legal scholarship. Because of the existing, exhaustive scholarly work on *Apprendi*, Part III.A treats *Apprendi* and prior case law in a relatively truncated fashion. Part III.B discusses the lower courts' interpretation of *Apprendi*, which limited its potential impact on the Guidelines. While *Apprendi* held that a jury must decide any fact (besides recidivism) that increases the maximum penalty for a crime, a number of factual findings can affect the applicable Guidelines range without impacting the maximum statutory sentence. Prior to *Blakeley*, lower federal courts consistently interpreted *Apprendi* to mean only that factual findings that moved a defendant from one *statutory* penalty level to another violated the Sixth Amendment.

Narcotics cases are illustrative. In Table 1 below, the grey-shaded area represents the statutory sentencing boundaries corresponding to the crime of distribution of five kilograms, one kilogram, and 100 grams of cocaine, respectively.[19] Those areas reflect the broad statutory sentencing range to which a defendant convicted of distributing the above amounts of cocaine is subject. For example, the possible sentences for a defendant convicted of distributing five kilograms of cocaine range from imprisonment for ten year to imprisonment for life. The minimum sentence for a defendant convicted of distributing more than

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14. *See* Gary Fields and Laurie P. Cohen, *Mandatory Sentences Loom as Issue*, WALL ST. J., Sept. 30, 2004, at A4.

15. *Cf.* United States v. Booker, 125 S. Ct. 738, 790 (2005) (Scalia, J., dissenting in part) ("The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.").

16. Sentencing Reform Act of 1984 (SRA), 18 U.S.C. §§ 3551–3586 (2000); 28 U.S.C. §§ 991–98 (2000).

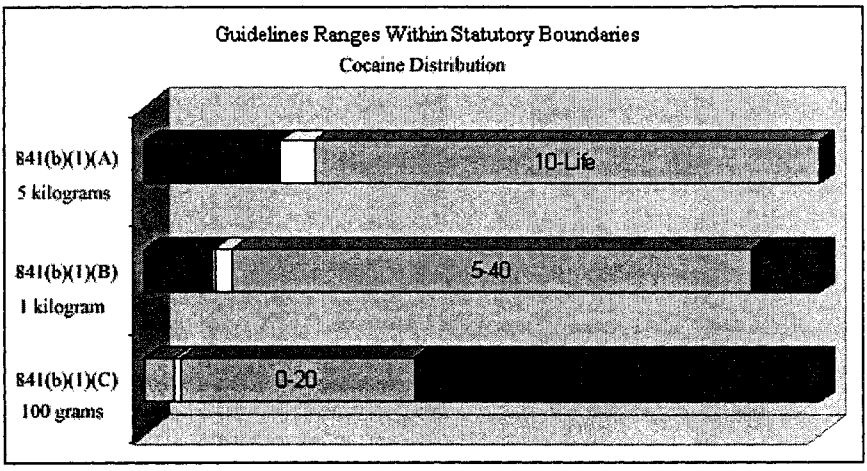
17. The Sentencing Reform Act of 1984 established the United States Sentencing Commission, which in turn promulgated the United States Sentencing Guidelines. The Guidelines took effect in 1987. For a thorough discussion of the Guidelines, see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (discussing background of the Guidelines).

18. 530 U.S. 466 (2000).

19. *See* 21 U.S.C. § 841(b)(1)(A)-(C) (2000). Subsection (b)(1)(D) provides for lower penalties, but that subsection applies only to the distribution of marijuana and other lesser drugs. The prior three subsections of § 841 are the exclusive provisions for the "hard drugs" of heroin, powder cocaine, and crack cocaine.

five kilograms of cocaine is ten years, as the black-shaded area represents.[20] In the five-kilogram example, the white zone illustrates the Guidelines' relatively narrow sentencing range, which is *within* the statutorily-permitted grey zone. Those ranges are 121-151 months, 63-78 months, and 27-33 months for distribution of five kilograms, one kilogram and 100 grams of cocaine, respectively,[21] before any additional Guidelines adjustments for conduct such as use of a firearm or additional drug quantities under the "relevant conduct" provision.[22]

Table 1




To the extent that the Guidelines provide for much narrower ranges *within* the statutory range, the lower courts found that a judge who did not engage in fact-finding that ratcheted up the maximum *statutory* sentence a defendant faced did not violate *Apprendi*. Judicial fact-finding that increased only the applicable maximum Guidelines range therefore continued after *Apprendi*.[23] Judicial fact-finding leading to higher Guidelines ranges is the practice that *Blakely* appeared to have

20. *See id.* § 841(a) (prohibiting distribution of a controlled substance); see also *id.* § 841 (b)(1)(A) (providing penalty provision for distribution).

21. *See* United States Sentencing Guidelines § 2D1.1(c)(4), (7), (11) (Nov. 2004) [hereinafter U.S.S.G.]; *see also* U.S.S.G. ch. 5, pt. A (Nov. 2004) (*see infra* note 45). The Guidelines Sentencing Table provides Guidelines ranges in months (*see* Exhibit A); the graph represents the Guidelines sentencing ranges when converted to years.

22. *See infra* Part II.B.

23. As represented in the graph, this process would involve moving a white zone within a grey zone by, for example, finding that a defendant was responsible for additional drug quantities under the "relevant conduct provision." *See infra* note 54 and accompanying text. This judicial fact-finding would have the effect of increasing a defendant's Guidelines sentencing range without going outside the limits of the statutory constraints the grey areas represent. For example, if the judge found the defendant to be responsible for drug quantities in excess of one kilogram, the defendant's "white zone" would move to the right, resulting in a higher sentence.

deconstitutionalized,[24] and which *Booker* explicitly holds is unconstitutional under a mandatory Guidelines regime. Part III.C of this Article provides an analysis of *Blakely*, which produced a bitterly divided Court.

Part IV addresses the lower courts' struggles to address the *Blakely* decision, before *Booker*, through two primary means: by setting aside the Guidelines altogether or by working within an eviscerated Guidelines system. As further illustrated in Part IV, several lower courts assumed the Guidelines are "severable," thus amenable to the excise of Guidelines provisions requiring judges to enhance sentences. Judges taking this approach attempted to comply with *Blakely* by refusing to adjust defendants' sentences upward, but by otherwise applying the current Guidelines framework. This approach undoubtedly complies with the Sixth Amendment but results in sentences radically lower than those the Guidelines currently prescribe.

By contrast, some courts found the Guidelines unseverable and applied the Guidelines as if they were wholly advisory. For example, in *United States v. Croxford*,[25] Judge Paul Cassell took an approach that resulted in a sentence very close to that which the Guidelines required. Cassell held that the Guidelines must rise or fall as a united whole, because giving defendants the benefits of downward adjustments without the burdens of sentence enhancements results in a lopsided system inconsistent with the goals of the Sentencing Reform Act. Judge Cassell treated the Guidelines as only advisory and reclaimed virtually all of the broad pre-Guidelines judicial sentencing discretion, subject only to statutory limits. The *Booker* Court ultimately adopted a similar approach, but did so by severing that provision of the Guidelines which makes the regime mandatory. Part IV.C outlines the Court's recent *Booker* decision in summary form.

In light of Congress's recent passage of the Feeney Amendment, demonstrating congressional intolerance for judicial downward departures from the Guidelines, Congress almost certainly will not abide a return to wide-ranging judicial discretion. Few judges are as deferential to the goals of uniformity underlying the Guidelines as Judge Cassell. As Justice Scalia noted in his dissent in *Booker B*, judges "certainly cannot" be "expected to adhere to the Guidelines" given their "notorious unpopularity."[26] Indeed, just two days after the Supreme Court handed down the *Booker* decision, a federal district judge in Wisconsin declined to follow the Guidelines, finding that "*Booker* is not . . . an invitation to do business as usual."[27] In a decision emphasizing the defendant's individual circumstances, the judge imposed a sentence below the Guidelines that was "sufficient, but not greater than necessary, to satisfy the purposes of sentencing."[28]

Congress will now have to confront the enervated Guidelines wrought by *Booker B*. As Justice Breyer explicitly noted: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the

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24. "Deconstitutionalized" is used here as a synonym for "rendered unconstitutional." Others have used the term to refer to something having been interpreted as no longer constitutionally required. *See* Yale Kamisar, *Foreword: From* Miranda *to §3501 to* Dickerson *to* . . . , 99 MICH. L. REV. 879, 888 (2001) (referring to the Supreme Court's efforts to dilute, or "deconstitutionalize," Miranda v. Arizona, 384 U.S. 436 (1966)).

25. 324 F. Supp. 2d 1230 (D. Utah 2004), *adhered to by* 324 F. Supp. 2d 1255 (D. Utah 2004).

26. United States v. Booker, 125 S. Ct. 738, 790–91 (2005) (Scalia, J., dissenting).

27. United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005).

28. *Id.*

Constitution, that Congress judges best for the federal system of justice."[29] Accordingly, Part V addresses the question of how to amend the Guidelines to reclaim their mandatory status while also complying with the Sixth Amendment requirements of *Blakely* and *Booker*.

Taking a chapter-by-chapter approach, I propose several significant reforms to the Guidelines, including amending the relevant conduct provision and providing for an increase in the jury's role at sentencing. These reforms would provide a starting point for resolving the constitutional infirmities of the post-*Blakely* and *Booker A* Guidelines while also avoiding the infirmities of the fix that *Booker B* provided. Finally, I propose an altered sentencing table, providing for higher maximum sentences at most levels, to counteract the unwarranted sentence-reducing effects that might otherwise result. My proposals are designed to both (1) anchor a defendant's sentence more closely to jury findings[30] and thus broadly vindicate Sixth Amendment rights that are at the heart of *Blakely* and *Booker A* and (2) continue greater uniformity in sentencing, a goal the Guidelines were designed to accomplish.

## II. A BRIEF HISTORY OF THE GUIDELINES

### *A. The Pre-Guidelines World*

In the era prior to the Sentencing Guidelines, federal district court judges enjoyed virtually unlimited discretion in sentencing defendants.[31] For example, a defendant convicted of murder in aid of racketeering could receive a sentence ranging from life imprisonment to mere probation.[32] In 1973, then-Judge Marvin E. Frankel published a compelling and highly influential sentencing study[33] describing the discretionary power of judges as "almost wholly unchecked and sweeping" and condemning that sentencing regime as "terrifying and intolerable for

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29. *Booker*, 125 S. Ct. at 768.

30. Of course, a guilty plea is the resolution of most federal criminal cases, and in such cases, my proposals would tie sentences more closely to a defendant's admissions during the plea.

31. *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long[.]"). Similarly, Stith and Cabranes point out that:

> From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum.

STITH & CABRANES, *supra* note 17, at 9 (footnote omitted).

32. *See* 18 U.S.C. § 1959 (1993) (providing for sentence of "any term of years"). Congress amended the statute in 1994 and now provides that, for murder, the sentence for a convicted defendant is "death or life imprisonment, or a fine under this title, or both . . . ." 18 U.S.C. § 1959 (2000); *cf.* Blakely v. Washington, 124 S. Ct. 2531, 2545 (2004) (O'Connor, J., dissenting) (noting that, in Washington state, "[b]efore passage of the [Reform] Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation").

33. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

a society that professes devotion to the rule of law."[34] Uncertainty and unwarranted disparities plagued the sentencing system.[35]

### *B. The Sentencing Guidelines*

In 1984, the Sentencing Reform Act put an end to unfettered discretion.[36] Sentencing reform enjoyed wide, bipartisan support. The strange alliance of Senators Kennedy,[37] Hatch, Biden, and Thurmond sponsored the bill.[38] Liberals and conservatives may have pushed for reform for different reasons: liberals feared that such discretion led to unwarranted disparities based on race or economic backgrounds; conservatives feared that unfettered discretion was a license for leniency.[39] Both groups, however, lacked faith in individual judges.[40] The Sentencing Reform Act created the United States Sentencing Commission, which was empowered to promulgate "guidelines" establishing sentencing ranges for all federal offenses.[41]

The determination of sentences under the Guidelines is by reference to a sentencing "grid," which contains an "Offense Level" along the vertical axis and a "Criminal History Category" along the horizontal axis.[42] The horizontal axis

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34. *Id.* at 5. For a thorough discussion of the background leading up to the passage of the Guidelines, and the contributions of Frankel and others, see STITH & CABRANES, *supra* note 17, at 9–37; *see also* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 300–05 (2000) (describing sentencing before the Guidelines).

35. *Cf. Blakely*, 124 S. Ct. at 2545 (O'Connor, J., dissenting) (noting that a sentence in Washington state before sentencing reform "could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant's crime or background").

36. *See Mistretta*, 488 U.S. at 396 (stating Guidelines "fetter the discretion of sentencing judges"). For thorough treatment of the legislative history of the Sentencing Reform Act, see Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

37. For a discussion focusing on Senator Kennedy's leadership role in the process, see Stith & Koh, *supra* note 36, at 230–57 (discussing additionally the role of proposals developed during a 1995 Yale sentencing seminar).

38. *See* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L. J. 1355, 1361 (1999) (reviewing STITH & CABRANES, *supra* note 17, and citing *id.* at 48).

39. "When liberals saw disparity, they pictured sentencing judges who discriminated on the basis of race, class, and gender; when conservatives saw disparity, they pictured judges who imposed overly lenient sentences." *Id.* at 1361 (citing STITH & CABRANES, *supra* note 17, at 38–39).

40. *See id.* at 1361–62 (explaining that "shared distrust of judges" was a "major influence" in sentencing reform); *see also* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT. REP. 316, 318 (2004) ("The Sentencing Reform Act was the result of overwhelming bipartisan support for ending disparities that occur at sentencing or at the parole stage."); *id.* at 328 n.62 ("Disparate sentences for similarly situated defendants were based primarily upon geography, race, gender, and judicial philosophy.").

41. *Mistretta*, 488 U.S. at 367, 369 (noting that the Sentencing Reform Act created the Commission "to devise guidelines to be used for sentencing" and to "promulgate determinative-sentence guidelines"); *see also* STITH & CABRANES, *supra* note 17, at 2 (claiming that "the most far-reaching and dramatic provision of the Sentencing Reform Act [was] the charge to the newly established Sentencing Commission to develop and implement a system of mandatory sentencing guidelines").

42. Professor Frank O. Bowman, III succinctly described the axes:

> The Criminal History Category on the horizontal axis of the Sentencing Table is a rough effort to quantify the defendant's disposition to criminality, which is reflected in the number and nature of his prior contacts with the criminal

adjusts the severity of a potential sentence based upon the defendant's past criminal record.[43] The vertical axis "reflects a base severity score for the crime committed, adjusted for those characteristics of the defendant's criminal behavior that the Sentencing Commission has deemed relevant to sentencing."[44] As one can see in the Sentencing Table at Exhibit A, the more serious the offense and the more extensive the defendant's criminal history, the longer the sentence.

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> law. The Offense Level on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. The offense level customarily has three components: (1) a "base offense level," (2) a set of "specific offense characteristics," and (3) additional adjustments under Chapter Three of the guidelines. The base offense level is a seriousness ranking based purely on the fact of conviction of a particular statutory violation. For example, all fraud convictions carry a base offense level of 6. The "specific offense characteristics" are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They "customize" the crime. For example, the Guidelines differentiate between a mail fraud in which the victim loses $1,000 and a fraud with a loss of $1,000,000. A loss of $1,000 would produce no increase in the base offense level for fraud of 6, while a loss of $1,000,000 would add eleven levels and thus increase the offense level from 6 to 17.

Bowman, *supra* note 34, at 306 (footnotes omitted).

43. *Id.*; *see also* STITH & CABRANES, *supra* note 17, at 3.

44. STITH & CABRANES, *supra* note 17, at 3; *see also* Bowman, *supra* note 34, at 306.

## EXHIBIT A
## SENTENCING TABLE[45]
## (IN MONTHS OF IMPRISONMENT)

### CRIMINAL HISTORY CATEGORY (CRIMINAL HISTORY POINTS)

| Offenses Level | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
|---|---|---|---|---|---|---|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| 18 | 27-33 | 30-37 | 43-41 | 41-51 | 51-63 | 57-71 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| 27 | 70-87 | 78-97 | 100-125 | 100-125 | 120-150 | 130-162 |
| 28 | 78-97 | 87-108 | 110-137 | 110-137 | 130-162 | 140-175 |
| 29 | 87-108 | 97-121 | 120-150 | 121-151 | 140-175 | 151-188 |
| 30 | 97-121 | 108-135 | 130-162 | 135-168 | 151-188 | 168-210 |
| 31 | 108-135 | 121-151 | 140-175 | 151-188 | 168-210 | 188-235 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-292 | 262-327 |
| 35 | 168-210 | 188-235 | 210-262 | 235-292 | 262-327 | 292-365 |
| 36 | 188-235 | 210-262 | 235-292 | 262-327 | 292-365 | 324-405 |
| 37 | 210-262 | 235-292 | 262-327 | 292-365 | 324-405 | 360-life |
| 38 | 235-292 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | Life | Life | Life | life | Life | life |

45. U.S.S.G. Ch. 5, pt. A (Nov. 2004) [hereinafter Sentencing Table].

A series of sometimes-complicated calculations under the Guidelines manual determines a defendant's particular "location" on the grid,[46] a set of instructions that Professor Stith and Judge Cabranes pejoratively compared to the Internal Revenue Code.[47] The term "Guidelines," before the radical change that *Booker B* wrought, was effectively a misnomer, because the United States Code mandated the imposition of sentences within narrowly prescribed ranges.[48] For example, absent an allowable departure, a judge confronted with a defendant who has an Offense Level of twenty-two and no Criminal History points (Criminal History Category I), would have been required to sentence the defendant to a sentence of between forty-one and fifty-one months.[49]

The sentencing statute permits departures from the Guidelines only when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."[50]

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46. *See* Bowman, *supra* note 34, at 306; *see also* STITH & CABRANES, *supra*, note 17, at 3 ("The Guidelines, through a complex set of rules requiring significant expertise to apply, instruct the sentencing judge on how to calculate each of these factors.").

47. *See* STITH & CABRANES, *supra* note 17, at 3 (noting that the Guidelines Manual consists of "more than nine hundred pages of technical regulations and amendments, weighing close to five pounds—which may be usefully compared to, for example, the Internal Revenue Code, which weighs in at just under four pounds") (footnote omitted).

Stith and Cabranes's criticism notwithstanding, a useful exercise is to envision a world of taxation without the predictability the Internal Revenue Code provides. Imagine, instead, that the law required all income earners to provide their statements of earnings and household expenses to tax judges, who were empowered to tax each earner at a rate ranging from zero to fifty percent, at the tax judge's discretion and without an explanation. A citizen paying $25,000 would be justifiably outraged to learn that his similarly-situated neighbor had only been assessed a $100 tax. This system would not be unlike sentencing before the Guidelines.

48. *See* 18 U.S.C. § 3553(b)(1) (2000) (mandating application of Guidelines sentence). Note that *Booker B* has severed this provision. Before *Booker B*, the Court and commentators recognized that "[w]hile the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive." Mistretta v. United States, 488 U.S. 361, 413 (Scalia, J., dissenting). *See also id.* at 367 (noting that the Judiciary Committee "rejected a proposal that would have made the sentencing guidelines only advisory"). "Despite the use of the term *guidelines*, the sentencing rules issued by the Sentencing Commission are binding on the federal judiciary." STITH & CABRANES, *supra* note 17, at 2.

49. *See* Sentencing Table, Exhibit A, *supra* note 45. Furthermore, as the forty-one to fifty-one month range demonstrates, the highest point of the range is no greater than twenty-five percent more than the lowest point of the range. *See Mistretta*, 488 U.S. at 368 ("The maximum of the range ordinarily may not exceed the minimum by more than the greater of 25% or six months . . . .") (citations omitted); *see also* STITH & CABRANES, *supra* note 17, at 3 (explaining that "the sentencing range in each box is small, the highest point being 25 percent more than the lowers point").

50. 18 U.S.C. § 3553(b) (2000); *see* Koon v. United States, 518 U.S. 81, 97 (1996) (addressing proper issues for departure and establishing that courts of appeals should review district courts' departures under an "abuse of discretion" standard, as Congress did not wish to give appellate courts "wide-ranging authority over district court sentencing decisions"); United States v. Headley, 923 F.2d 1079 (3d Cir. 1991). The Commission has provided that district courts are to "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes," and to consider a departure only when confronted with "an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." U.S.S.G., ch. 1, pt. A, introductory cmt. at 4(b) (Nov. 2004).

One of the more controversial features of the Guidelines is their contemplation of a version of "real offense sentencing,"[51] which requires a judge to sentence a defendant based upon the totality of the defendant's conduct, not just the offense with which the defendant is charged. The notion that a defendant's sentence is based upon his "real offense," however, begs the questions: "real" according to whom, and according to what standard? Before *Apprendi* and *Blakely*, the judge made the critical findings about what the defendant did, based on a "preponderance of the evidence" standard.[52] As Professor Mark Osler has argued, "fact-finding was historically a function of trial, and its shift to sentencing has resulted in an unsettling loss of rights."[53] This concern goes to the heart of *Blakely* as the *Booker A* majority further expressed, and yet *Booker B* contemplates that judicial fact-finding will continue apace.

At sentencing, the judge is directed to consider all of the defendant's "relevant conduct." In some instances, the judge's findings will necessarily go beyond the scope of a jury's guilty verdict or those facts which a defendant may have admitted at the plea hearing or sentencing.[54] For example, even if the evidence introduced at trial was limited to powder cocaine, at sentencing the judge may find that the defendant also distributed heroin in connection with the overall drug distribution scheme.[55] More dramatically, the Guidelines contemplate that a judge disregard a jury's acquittal of a defendant of certain conduct and determine a sentence with

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51. *See generally* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997) (describing real-offense aspects of the Guidelines); *see also* David Yellen, *Just Desserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1436–39 (1997) (criticizing real-offense sentencing).

52. *See* United States v. Watts, 519 U.S. 148 (1997).

53. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 652 (2003).

54. Section 1B1.3 of the Guidelines sets forth the "Relevant Conduct" provision, which directs the sentencing judge to consider:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense . . . .

U.S.S.G. § 1B1.3 (Nov. 2004). "The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional." United States v. Witte, 515 U.S. 389, 402 (1995) (citation omitted).

55. The *Witte* court explained:

> The relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and the recidivism statutes . . . are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized [statutory] range if it was either accompanied by or preceded by additional criminal activity.

*Id.* at 403.

consideration of the acquitted conduct.[56] *Blakely* called such practices into constitutional question.

## III. THE ROAD TO *BLAKELY*

### *A.* Apprendi *and its Forerunners*

The Court's decision four years ago in *Apprendi v. New Jersey*[57] set the stage for *Blakeley*. In *Apprendi*, which other scholars and commentators have thoroughly analyzed,[58] the Court invalidated a sentencing enhancement that was based upon a judicial finding that Apprendi committed a hate crime. The Court held that juries, rather than judges, must find any facts, other than those related to recidivism, that lead to an increase in the statutory maximum penalty for a crime.[59]

As commentator Freya Russell notes, "*Apprendi* drew on two lines of Supreme Court cases that grapple with the issues of what must be proven in order to sentence a defendant, when and by whom it must be proven, and what standard of proof should govern the proceeding."[60] The first line of cases deals with what the government must prove at trial; the second treats sentencing proceedings as requiring different constitutional protections.[61] Therefore, whereas *In re Winship*[62] established the "beyond a reasonable doubt" standard as the familiar standard of proof governing criminal trials, *McMillan v. Pennsylvania*[63] held that the lower evidentiary standard of a preponderance of the evidence can apply at sentencing

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56. *See* United States v. Watts, 519 U.S. 148 (1997); *see also* United Sates v. Pineiro, 377 F.3d 464 (5th Cir. 2004), *cert. granted, vacated and remanded*, 125 S. Ct. 1003 (2005). In *Pineiro*, the judge found that the defendant was responsible for distributing 453.6 kilograms of marijuana and more than a kilogram of cocaine, even though the jury had explicitly found that the defendant had distributed "'less than fifty kilograms' of marijuana and '50 grams or less' of cocaine." *Id.* at 466. Professor David Yellen has been particularly critical of this feature of the Guidelines:

> [I]t has been my experience that almost every lay person, regardless of political inclination, is shocked to learn that a federal judge *must* increase a sentence based on conduct for which the defendant has been acquitted. I believe the reason for this shock is the intuitive judgment that society's right to punish an individual flows directly from, and is limited by, the conduct for which that individual has been convicted. In Professor O'Sullivan's world [*see supra* note 51] (and the Sentencing Commission's), just deserts becomes a free floating rationale not anchored to the legal process of conviction.

Yellen, *supra* note 51, at 1437. *See generally* Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996) (proposing that the Sentencing Commission should change Guidelines to delete enhancements for acquitted conduct).

57. 530 U.S. 466 (2000).

58. For particularly thorough treatment of *Apprendi*, including a full discussion of the concurring and dissenting opinions, see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1115–23 (2001), and Freya Russell, Note, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing:* Apprendi v. New Jersey *and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CAL. L. REV. 1199, 1202–08 (2001).

59. *Apprendi*, 530 U.S. at 490.

60. Russell, *supra* note 58, at 1208.

61. *Id.*

62. 397 U.S. 358 (1970).

63. 477 U.S. 79 (1986).

and satisfy due process requirements.[64] In *Apprendi*, Justice Stevens noted that the *McMillan* Court "coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge."[65]

Professor Stephanos Bibas argues that, for the past thirty years, the Court "has struggled to explain which facts are elements of crimes and which are sentencing factors."[66] The Court traditionally gave legislatures broad latitude to label potential "aggravators" as either elements of crimes—which would require proof to a jury beyond a reasonable doubt—or sentencing factors, which judges could determine on a preponderance standard.[67] In *Apprendi,* however, the Court rejected the New Jersey legislature's labeling choice that made the defendant's racial animus a sentencing factor. As the majority reasoned, "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"[68] *Apprendi*, in turn, built upon the Supreme Court's decision in *Jones v. United States*,[69] in which the Court reversed a sentence that was enhanced based upon a judge's finding that the defendant caused "serious bodily injury" during the course of a carjacking.[70] As the Court said in *Apprendi*:

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64. *See* Russell, *supra* note 58, at 1208, 1210 (citing *In re* Winship, 397 U.S. 358, 364 (1970); McMillan v. Pennsylvania, 477 U.S. 79 (1986)).

65. Apprendi v. New Jersey, 530 U.S. 466, 485 (2000).

66. Bibas, *supra* note 58, at 1102. "Elements must be charged in an indictment and proved beyond a reasonable doubt to a jury. Sentencing factors, in contrast, are entrusted to the sentencing judge under a lower standard of proof." *Id.* (footnotes omitted). The distinction between the two is of fairly recent vintage. As the Court pointed out in *Apprendi*, any such distinction "was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478.

67. *McMillan*, 477 U.S. at 85 (noting that the "legislature's definition of the elements of the offense is usually dispositive"); *see also* Bibas, *supra* note 58, at 1102 (observing that "the Court has repeatedly recognized that legislatures have broad latitude to define crimes and punishments") (footnote omitted). *But see Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact . . . the core crime and the aggravating fact together constitute an aggravated crime"); *id.* at 518 (Thomas, J., concurring) (remarking that "McMillan began a revolution in the law regarding the definition of 'crime'" and that "[t]oday's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments").

68. *Id.* at 493.

69. 526 U.S. 227 (1999).

70. The *Jones* case was the subject of close analysis by both Bibas, *supra* note 58, at 1111–15, and Russell, *supra* note 58, at 1211–13. Jones was convicted of violating 18 U.S.C. § 2119 (1998), the subsections of which provided for different maximum sentences depending upon the nature of the bodily injury, if any, that the defendant inflicted. Though the indictment did not identify a subsection, and while the jury did not receive a charge on bodily injury, the judge handed down a twenty-five year sentence upon a finding that the defendant caused serious bodily injury. The Supreme Court "conceded that, at first glance, the body of § 2119 appeared to contain all the elements and the subsections appeared to be mere sentencing factors," but found that the subsections providing for enhanced sentences in the event of serious bodily injury or death "provided for much higher penalties and conditioned them on further important facts." Bibas, *supra* note 58, at 1112 (footnote omitted). The Supreme Court ultimately "reversed the defendant's sentence, holding that the statute should be read as setting out three distinct offenses . . . ." Russell, *supra* note 58, at 1212.

As Bibas and Russell further note, footnote six of the *Jones* opinion "identified the principle that became the [elements] rule: '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.'" Russell, *supra* note 58, at 1213 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)); *see also* Bibas, *supra* note 58, at 1114 ("The Court conceded that today, not every fact that affects sentencing must be found by a jury. In footnote six, however, the Court suggested the elements

> [O]ur reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.[71]

This notion, first explicitly articulated in *Jones*, has been at the heart of the Court's analysis in *Apprendi*, *Blakely*, and *Booker*.

In a dissenting opinion in *Apprendi*, Justice O'Connor forcefully criticized the majority's analysis and predicted severe consequences for determinate sentencing schemes such as the Guidelines.[72]

### *B.* Apprendi *in the Lower Courts*

In the aftermath of *Apprendi*, however, most lower federal courts adopted an interpretation that significantly limited its impact on the Guidelines before *Blakely*. By reading *Apprendi* to apply only to cases involving effects on the maximum *statutory* sentence, courts left most Guidelines calculations unaffected.

Under this interpretation of *Apprendi*, courts may think of the maximum sentencing provisions in every criminal statute as containing the "outer boundaries"

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rule . . . .") (footnote omitted).

Both Bibas and Russell contrast *Jones* to the Court's decision the prior year in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), in which the Court affirmed a sentence under a similar statutory scheme where the "aggravating factor" was the prior commission of a felony. In that case, the Court held that recidivism, "perhaps the most traditional sentencing factor," need "not be an element of the offense." Bibas, *supra* note 58, at 1108; *see also* Russell, *supra* note 58, at 1211 (noting that the *Almendarez-Torres* Court relied upon *McMillan* in finding that the "penalty clause was a sentencing factor" and further found "that it is normally Congress' role to decide which factors are elements and which are sentencing factors") (footnotes omitted).

Interestingly, Bibas points out that the line-ups of justices in the *Jones* and *Almendarez-Torres* cases were almost exactly reversed:

> *Jones* was the mirror image of *Almendarez-Torres*. Four members of the *Almendarez-Torres* majority [Kennedy, Rehnquist, O'Connor, and Breyer] repeated their arguments in dissent in *Jones*. They wanted to defer to legislatures, stressed traditional leeway for judicial fact-finding at sentencing, and forecast that the elements rule would cause grave practical problems. Conversely, the *Jones* majority copied the *Almendarez-Torres* dissent. These Justices distrusted legislatures and judges, exalted juries, relied on traditions of jury fact-finding, and adopted a strong rule of construction to avoid constitutional doubts.

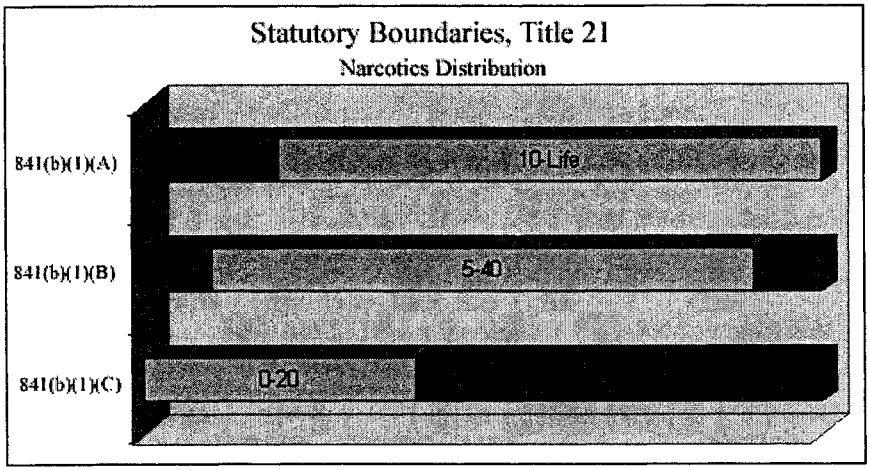
Bibas, *supra* note 58, at 1115.

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

72. *Id.* at 544 (O'Connor, J., dissenting). For a fuller discussion of the O'Connor dissent, see Bibas, *supra* note 58, at 1120–22; Russell, *supra* note 58, at 1207. Criticism of the analysis of the *Apprendi* majority is beyond the scope of this article. Others have strongly articulated the view that "*Apprendi* is wrong." *See, e.g.*, Stephanos Bibas, Apprendi *in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1, 12 (2003) ("*Apprendi*'s abstract principle undervalues the benefits of insulated, expert judicial sentencing."). Because the Court adhered to the holding of *Apprendi* in both *Blakely* and *Booker*, this Article takes *Apprendi*'s underlying rationale as a given in current jurisprudence. Notably, Chief Justice Rehnquist, who may soon retire, was an *Apprendi* dissenter, not a member of its majority.

or "hard constraints" of sentencing,[73] as Table 2 below represents.[74] The black-shaded areas represent the prohibited zones in which a court cannot sentence a defendant. For example, the prohibited zone for a defendant convicted under Subsection 841(b)(1)(C) is more than twenty years.

Table 2




Defendants did receive some benefit from *Apprendi* in that it set some outer limits on sentences,[75] but *Apprendi* did not lead to radically lower sentences. This result is attributable in part to the significant statutory maximum sentences federal criminal statutes provide. Had courts interpreted *Apprendi* more broadly to prohibit even upward adjustments to the otherwise applicable Guidelines range *within the statutory boundaries*, its effect would have been more far-reaching.

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73. Note, however, that Justice O'Connor also referred to the Guidelines as themselves imposing "hard constraints." *See* Blakely v. Washington, 124 S. Ct. 2531, 2550 (2004) (O'Connor, J., dissenting) (referring to "hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines . . . .").

74. The table reflects the penalty provisions of 21 U.S.C. § 841(b)(1)(A)–(C) (2000).

75. I should acknowledge that not all commentators would concede that *Apprendi* "benefited" defendants. Most notably, Stephanos Bibas provocatively argues that *Apprendi* does not provide the benefits to defendants that are largely assumed, because most defendants plead guilty, and, in Bibas's view, may receive less meaningful sentencing hearings in the wake of *Apprendi*. *See* Bibas, *supra* note 58, at 1152–67. In his words,

> [t]he idea that rights can hurt defendants and deprive them of hearings is counterintuitive. But the elements rule does more than confer new rights; in effect, it *mandates* that enhancements be tried at trial if at all. In doing so, it takes away the more valuable right to try enhancements at sentencing after pleading guilty.

*Id.* at 1152 (footnote omitted). In my view, the better argument is made by Professors King and Klein. *See* Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (2001). They argue that:

> By raising the burden of proof, *Apprendi* makes it much more difficult for the prosecutor to prove aggravating facts that trigger longer sentences. If the prosecutor couldn't successfully convince the defendant to admit to the aggravating fact prior to *Apprendi*, his chances of successfully convincing the defendant to admit to it after *Apprendi* are lower, not higher.

*Id.*

The prevailing view limiting *Apprendi*'s impact was not without its critics. As Professor Stephanos Bibas argued even before *Blakely*, *Apprendi* suggested that judges should not make any factual findings leading to sentencing enhancements—whether under the Guidelines or the relevant statute. In his words, "[t]here is no logical difference between enhancing maxima set by Congress and maxima set by the Sentencing Commission."[76] Applying *Apprendi* to the Guidelines, however, "could invalidate hundreds of thousands if not millions of federal and state guideline sentences. These staggering practical consequences will likely deter the Court from extending the elements rule to its logical conclusion."[77] As Douglas Berman noted in his article about *Blakely*'s aftershocks, "most observers . . . 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 guidelines sentencing outcomes *within* otherwise applicable statutory ranges. But then the big one hit."[78]

### C. Blakely v. Washington

#### 1. *The Underlying Case*

Defendant Ralph Blakely, Jr. was a paranoid schizophrenic who kidnapped his estranged wife after she filed for divorce.[79] He bound her with duct tape, threatened her with a knife, and forced her into a box in his pickup truck. Blakely ordered the couple's son, age thirteen, to follow the truck in a separate car and claimed he would harm the boy's mother if the boy did not comply. The son escaped from the situation during a stop at a gas station, but Blakely continued on with his estranged wife and went to a friend's house. The friend called the police, and Blakely was subsequently arrested.[80]

Although the State initially charged Blakely with first-degree kidnapping, Blakely pled guilty to second-degree kidnapping "involving domestic violence and use of a firearm," a Class B felony.[81] In his guilty plea, Blakely admitted nothing beyond the bare facts underlying the charged crime.[82]

Under the terms of the plea, the contemplated sentencing range was forty-nine to fifty-three months, reflecting the "standard range" for a second-degree kidnapping involving a firearm.[83] Before imposing a sentence, however, the court heard testimony from the kidnapping victim. The judge then imposed a higher sentence of ninety months after finding an "exceptional sentence" justified, because

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76. Bibas, *supra* note 58, at 1148; *see also* Russell, *supra* note 58, at 1229 (arguing that the logic of *Apprendi* means that judges should not use uncharged and unproven offenses to enhance sentences within the relevant conduct provision of the Guidelines).

77. Bibas, *supra* note 58, at 1148 (footnote omitted). Bibas also has noted that the impact of *Apprendi* was limited in the states. *See* Bibas, *supra* note 72, at 1.

78. Berman, *supra* note 12, at 308. While the Court's *Blakely* decision did appear to take *Apprendi* to its logical conclusion, a majority of the Court balked at applying the force of that logic to the Guidelines in *Booker*. By recharacterizing the Guidelines as "advisory," the Court is struggling mightily to avoid the "staggering" impact to which Professor Bibas refers.

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

80. *Id.*

81. *Id.* Blakely pled guilty pursuant to a plea agreement with the Government. *See id.*

82. *Id.* at 2535.

83. *Id.*

Blakely had acted with "'deliberate cruelty'" in committing the kidnapping offense.[84]

### 2. *Washington's Sentencing Scheme*

One provision of Washington state law provided for a maximum penalty of ten years' confinement for Class B felonies.[85] As Justice Scalia noted in his majority opinion, however, other provisions of Washington's sentencing law further constrained the sentencing range.[86] Washington's sentencing scheme thus bore strong similarities to the Guidelines in providing narrower ranges, binding on judges, within the broader statutory framework.[87]

Under Washington's law, the sentencing judge could impose a sentence higher than the standard range only upon finding "'substantial and compelling reasons justifying an exceptional sentence.'"[88] The Act listed illustrative aggravating factors, including acting with "deliberate cruelty" in cases such as Blakely's.[89] A judge who imposed such an "exceptional sentence" was required to make factual findings and legal conclusions to support the sentence imposed.[90] An aggravated sentence under this scheme was appropriate only if based upon factors independent of those "'used in computing the standard range sentence for the offense.'"[91]

### 3. *The Majority's Analysis*

In analyzing the defendant's sentence in *Blakely*, the Court strictly applied the *Apprendi v. New Jersey* rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[92] The Court found that the sentencing judge in *Blakely* violated *Apprendi* by imposing, without benefit of jury findings or the defendant's admission, a sentence that was more than three years longer than the fifty-three-month sentence prescribed as the maximum of the "standard range" (forty-nine to fifty-three months) for second-degree kidnapping with a firearm.[93] The Court found a violation of the defendant's Sixth Amendment rights despite the fact that the sentence was within the *statutory maximum* term of ten years for Class B felonies.

The State argued that Blakely's sentence was consistent with *Apprendi*, because the relevant "statutory maximum" was ten years. The Court rejected this

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84. Blakely v. Washington, 124 S. Ct. 2531, 2535 (2004) (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (2000)). The defendant objected to the increase in his contemplated sentence, and the judge then conducted a three-day hearing in which he heard from several witnesses. At the conclusion of that hearing, he issued a series of factual findings and adhered to his initial sentencing determination. *Id.* at 2535–36.

85. *Id.* at 2535 (citing WASH. REV. CODE ANN. §§ 9A.20.021(1)(b) (2000)).

86. *Id.*

87. *See supra* Part II.B.

88. *Blakely*, 124 S. Ct. at 2535 (quoting WASH. REV. CODE. ANN. § 9.94A.120(2) (2000)).

89. Blakely v. Washington, 124 S. Ct. 2531, 2535 (2004) (citing WASH. REV. CODE. ANN. § 9.94A.390(2)(h)(iii) (2000)).

90. *Id.* (citing WASH. REV. CODE ANN. § 9.94A.120(3) (2000)).

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

92. *Id.* at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

93. *Id.* at 2537.

argument. Instead, the Court said: "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[94] The plain implication is that judicial fact-finding that increases a sentence is barred, regardless of whether the increase is pursuant to statute or a narrower Guidelines-type provision. As the Court explained: "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[95] The judge exceeds his authority and violates the defendant's Sixth Amendment right to trial by jury when the judge "inflicts punishment that the jury's verdict alone does not allow . . . ."[96]

Significantly, the Court in no way suggested that the sentencing judge had done anything other than comply with the sentencing scheme that Washington state established.[97] The State's sentencing procedure itself, however, violated the Sixth Amendment.[98]

The majority asserted that the Framers included a constitutional right to trial by jury because "they were unwilling to trust government to mark out the role of the jury."[99] Once the legislature determines that certain facts require punishment, a jury must find those facts.

While conceding that indeterminate schemes also involve judicial fact-finding, the Court noted that those facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned."[100] In the majority's view, Blakely was sentenced to three years more than he should have been based on the crime to which he pled guilty, and this error amounted to a constitutional violation. As the Court stated:

> 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 'the unanimous

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

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

96. *Id.*

97. *See id.* at 2535 ("A judge may impose a sentence above the standard range if *he finds* 'substantial and compelling reasons justifying an exceptional sentence.'") (emphasis added) (citing WASH. REV. CODE ANN. § 9.94A.120(2) (2000)).

98. *Id.* at 2538.

99. *Id.* at 2540. The Court disputed the State's claim that it was, in effect, deconstitutionalizing all determinate sentencing schemes. Rather, the Court said that *Blakely* dealt with the implementation of such schemes in a manner consistent with the Sixth Amendment. *Id.*

100. *Id.* As others have noted, Justice Scalia's notion of a criminal defendant "bargaining" for a particular sentence when he commits a crime contains a certain, implicit oddity—and perhaps a legal fiction. In Scalia's view:

> In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by jury.

*Id.*

suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State.[101]

The Court, suggesting that its holding was an application rather than an expansion of *Apprendi*, stated in a footnote that "[t]he Federal Guidelines are not before us, and we express no opinion on them."[102] After *Blakely*, however, and before the Court ruled in *Booker*, a federal judge could not comply with *Apprendi* and *Blakely* by simply continuing to follow the practice of making upward adjustments under the Guidelines while staying within a broader statutory limit.[103] Because imposition of the Guidelines was mandatory (with limited provisions for departures), one could not determine the maximum authorized sentence, as defined by *Blakely*, by consulting the internally-contained statutory penalty provisions alone. Only by consulting the Guidelines themselves could one find what are, in essence, the "standard ranges" and the enhanced ranges; the latter depend upon judicial fact-finding, and therein lies the problem. This Guidelines procedure goes to the heart of *Blakely*'s concerns.

### 4. *The* Blakely *Dissents*

The *Blakely* decision generated three separate dissents. The first, Justice O'Connor's,[104] bitterly lamented that her worst fears[105] had come to pass in *Blakely*: "Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."[106]

O'Connor started her opinion by predicting that the inevitable result of the majority opinion would be a "consolidation of sentencing power" in the judicial branch, increasing judicial discretion and decreasing uniformity in sentencing.[107] She rejected the notion that the Framers would have found that either the Sixth Amendment or the Due Process Clause required such a result, and predicted that the consequences of the majority decision could prove "disastrous."[108]

Justice O'Connor then outlined the sentencing scheme that existed in Washington prior to its Sentencing Reform Act of 1981, which she noted was like the old federal system, characterized by "unguided discretion" leading to sentencing disparities, including disparities "correlated with constitutionally suspect variables such as race."[109] Before sentencing reform, a defendant's sentence could be as dependent upon a judge's idiosyncrasies as upon the background of the defendant and the particulars of his crime. Sentencing reform acted to constrain judges' discretion and, in the views of the dissenters, to serve the goals of due process and

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101. *Id.* at 2543 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *343 [350]).

102. Blakely v. Washington, 124 S. Ct. 2531, 2538 n.9 (2004).

103. *See supra* Part III.B.

104. *Blakely*, 124 S. Ct. at 2543 (O'Connor, J., dissenting). Justice Breyer joined O'Connor's dissent in its entirety, while Chief Justice Rehnquist and Justice Kennedy joined in part. Chief Justice Rehnquist and Justice Kennedy did not join Part IV-B of the O'Connor dissent, which specifically found that the majority's opinion doomed the Guidelines.

105. *Id.* at 2550. Justice O'Connor first articulated this concern in *Apprendi*. *See id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 549–59 (2000) (O'Connor, J., dissenting)).

106. *Id.*

107. *Id.* at 2543.

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

109. *Id.* at 2544 (citation omitted).

the right to a jury trial which the majority suggested Washington's new sentencing scheme undermined.

O'Connor predicted high costs for preserving determinate sentencing schemes in the wake of the majority's opinion.[110] Factors that would enhance a sentence in a system such as the Guidelines, "such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury . . . ."[111] O'Connor lamented the necessity of charging those same factors that judges historically took into account when sentencing within broad statutory ranges, "simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range."[112] She also accused the majority of "doctrinaire formalism" in rejecting Washington's scheme on Sixth Amendment grounds and expressed a preference for a "balanced case-by-case approach" to constitutional challenges to sentencing.[113] In her view, the majority's "rigid rule" would destroy the progress sentencing reform brought.[114] Finally, O'Connor accused the majority of ignoring "the havoc it is about to wreak on trial courts across the country."[115]

Justices Kennedy and Breyer filed additional dissenting opinions.[116] All of the dissents, however, fail to fully acknowledge how dramatically judicial fact-finding shapes a defendant's sentence under the current Guidelines regime, and the implications of that system on a defendant's Sixth Amendment rights.

## IV. *BLAKELY*'S IMPLICATIONS AND SEVERABILITY

### *A.* Blakely*'s Implications*

*Blakely*'s implications are radical and far-reaching.[117] Judicial factual findings that have an enormous impact on sentencing are a premise of the Guidelines

110. *Id.* at 2546.

111. *Id.* (citing *In re* Winship, 397 U.S. 358 (1970))

112. *Id.*

113. *Id.*

114. *Id.* O'Connor also took issue with the majority's claim to "the mantle of history and original intent." *Id.* at 2548. Relying on her earlier dissent in *Apprendi*, she explained that broad sentencing discretion was a concept unknown to the Framers; they never had to consider the constitutional implications of a choice between "submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offense and offenders." *Id.*

115. *Id.* at 2549. She identified a number of "unsettling" questions left open by the Court's decision: "How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether?" Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting).

116. *Id.* at 2550 and 2552. Breyer joined the Kennedy dissent and O'Connor the Breyer dissent. Justice Breyer, as a primary author of the Guidelines, is particularly committed to them. *See, e.g.*, Breyer, *supra* note 17; Brent Kendall, *Justices Likely Will Strike Sentencing Guidelines*, L.A. DAILY J., Oct. 5, 2004, at 1, 9.

117. *Cf.* Bibas, *supra* note 58, at 1123 (noting that, in *Apprendi*, "[t]he dissenters' tones of alarm do not exaggerate the stakes. The elements rule will have sweeping effects, and the suggestions in the concurrences would be more sweeping still."). In *Blakely*, the "more sweeping" suggestions of the *Apprendi* concurrences became reality.

system. The "real-offense" nature of Guidelines sentencing[118] means that the specific count of conviction often matters far less than the "real facts" the judge finds.[119] As Professor Reitz explained, "[u]nder real-offense sentencing systems, judges are given spacious authority to determine an offender's 'real' crimes."[120]

*Blakely* barred judges from making the key factual findings underlying Guidelines sentences. At first blush, this outcome has a peculiar irony, especially when one considers that judges have long lamented that the Guidelines have stripped them of judicial discretion.[121] In *Blakely*, the Court stripped judges of further authority. Where the Guidelines previously vested judges with the critical decision-making role in sentencing, the Supreme Court found that locus of authority unconstitutional and held that juries, not judges, must make the factual findings that lead to increased sentencing ranges.[122]

On the other hand, and somewhat counter-intuitively, a system that gave judges even more far-ranging authority would not run afoul of *Blakely*.[123] In the pre-Guidelines world of unlimited judicial discretion, a defendant convicted of distributing 100 grams of powder cocaine faced a sentence of anywhere from probation to twenty years' imprisonment. Anything a judge deemed relevant could form the basis for a sentence within that range. According to *Blakely*, however, limiting the judge's discretion, and basing sentencing decisions within the statutory range upon factual findings under a state guidelines scheme, ran afoul of the Sixth Amendment. If factual findings called for higher sentencing ranges, then juries had to find those facts. If, on the other hand, the judge simply used facts to decide a

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118. As Justice (then Judge) Breyer described in his seminal article, *supra* note 17, at 10, "[a] 'real offense' system . . . bases punishment on the elements of the specific circumstances of the case." For a comprehensive discussion of the real-offense nature of Guidelines sentencing and a powerful defense of same, see O'Sullivan, *supra* note 51. Notably, though disagreeing with many of her conclusions, Professor David Yellen describes O'Sullivan's "well-developed defense" as "probably the best possible case for including what I have called alleged-related offenses in the sentencing calculus." Yellen, *supra* note 51, at 1434 (footnote omitted).

119. For example, in cases involving defendants convicted of distributing between 100 grams and 1 kilogram of cocaine, punishing two defendants identically seems wrong if Defendant A distributed 1 kilogram of cocaine to minor children, and carried a firearm while doing so, whereas Defendant B distributed 100 grams of cocaine to adults, and did so unarmed. *See* O'Sullivan, *supra* note 51, at 1346 ("[I]mposing a uniform tariff on all persons who violate an undifferentiated criminal code section, although extremely costly in human and financial terms, will only in the most happenstantial way further the purposes of criminal sentencing."). The question is, however, who should decide the "real facts."

120. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993).

121. *See generally* STITH & CABRANES, *supra* note 17, at 89–90 (discussing many judges' uneasiness with regard to Guidelines sentencing).

122. Blakely v. Washington, 124 S. Ct. 2531, 2536–43 (2004); *cf.* Bibas, *supra* note 58, at 1099 (footnote omitted) ("The elements rule holds that any fact that increases a defendant's statutory maximum sentence must be an element of the offense. These facts must therefore be charged in an indictment and proved to a jury beyond a reasonable doubt.").

123. As Justice O'Connor noted in dissent,

> [F]acts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury, . . . simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

*Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (citation omitted).

defendant's sentence within a discretionary range, no Sixth Amendment problem arose.

One can think of the *Blakely* majority as allowing judges to exercise discretion, but not to decide facts that then require sentencing within a higher range. As Judge Posner explained:

> [T]he issue in *Blakely* was not sentencing discretion—it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact (and to do so under the wrong standard of proof).[124]

The pre-*Booker* Guidelines provisions that required judges to make the innumerable factual findings leading to increased sentences plainly ran afoul of *Blakely*. Struggling to work within the Guidelines framework before *Booker* decreed the Guidelines advisory, lower court decisions applying *Blakely* to the Guidelines generally fell into two broad camps: (1) those that severed *Blakely*-offending features from the Guidelines and issued sentences based upon an eviscerated Guidelines scheme[125] and (2) those that treated the Guidelines as non-severable and viewed the system, *in toto*, as unconstitutional after *Blakely*.[126] The Supreme Court ultimately granted certiorari in two cases that effectively took the former approach.

### *B.* Booker *and* Fanfan *in the Lower Courts*

On July 9, 2004, a split panel of the Seventh Circuit Court of Appeals found the sentencing judge's upward adjustments under the Guidelines unconstitutional in *United States v. Booker*.[127] The case began when Freddie J. Booker was arrested with 92.5 grams of crack cocaine in his duffel bag.[128] Booker claimed that he had not put the drugs in his duffel bag and the case went to trial.[129] A jury found him guilty of possession with intent to distribute at least fifty grams of cocaine base.[130] The crime of conviction was 21 U.S.C. § 841(b)(1)(A)(iii), which has a statutory sentencing range of ten years to life.[131]

At trial, Booker only contested whether or not he placed the drugs in his bag, and not the quantity of the drugs; therefore, the court found that the jury's guilty verdict necessarily determined Booker had possessed 92.5 grams of crack, which,

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124. United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004), *aff'd and remanded*, 125 S. Ct. 738 (2005).

125. *See, e.g.*, United States v. Shamblin, 323 F. Supp. 2d 757, 768 (S.D. W. Va. 2004) (finding a lower sentencing range "[b]ased on only those sentencing factors that [defendant] admitted during his plea).

126. *See, e.g.*, United States v. Croxford, 324 F. Supp. 2d 1230, 1242 (D. Utah 2004) (treating "the Guidelines as unconstitutional in their entity in this case and sentenc[ing defedant] between the statutory minimum and maximum"), *adhered to by* 324 F. Supp. 2d 1255, 1265 (D. Utah 2004).

127. 375 F.3d 508 (7th Cir. 2004), *aff'd and remanded*, 125 S. Ct. 738 (2005).

128. *Id.* at 509.

129. *Id.*

130. *Id.*

131. *Id.*

at sentencing, yielded a base offense level of thirty-two.[132] Under the Guidelines, that base offense level would have yielded a maximum sentence of 262 months for an individual with Booker's criminal history.[133] However, at sentencing, the judge found by a preponderance of the evidence that Booker had distributed an additional 566 grams of cocaine base, yielding an increased base offense level of thirty-six.[134] The sentencing judge also found Booker obstructed justice, further raising his offense level.[135] The resulting sentencing range was 360 months (30 years) to life; the judge sentenced Booker to 30 years in prison.[136]

Writing for the majority, Judge Posner found that a sentence reflecting such upward adjustments under the Guidelines violated *Blakely*'s dictates.[137] Posner found irrelevant the fact that the determination of the "maximum sentence" without adjustments was by reference to the overlaying Guidelines, rather than by the terms of a federal statute.[138] Like the statutory scheme at issue in *Blakely*, the Guidelines established a "standard range" for Booker's offense and provided aggravating factors that would, if a judge found them present, increase the range, as had happened in this case.[139]

Judge Posner rejected the Government's argument that the Guidelines could survive the Court's ruling in *Blakely*.[140] Although the Government argued that the Guidelines simply "regularize discretion" that judges exercise in selecting sentences within the statute-specific sentencing ranges, the court found the "vices" of the Guidelines to lie in the *requirement* that judges find facts under a preponderance of the evidence standard, which then result in a particular sentence.[141] The court found that *Blakely* gives defendants the right to demand that a jury make such findings under the "beyond a reasonable doubt" standard: "The finding of facts (other than the fact of the defendant's criminal history) bearing on the length of the sentence," such as those the sentencing judge made in *Booker*, "is just what the Supreme Court in *Blakely* has determined to be the province of the jury."[142]

Given the court's conclusion that the operation of the Guidelines in Booker's case violated the Sixth Amendment under *Blakely*, Judge Posner next considered the government's argument that this conclusion ran afoul of the Supreme Court's earlier ruling in *United States v. Edwards*.[143] In *Edwards*, decided before *Apprendi*,

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132. *Id.*

133. United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004), *aff'd and remanded*, 125 S. Ct. 738 (2005).

134. *Id.* at 509.

135. *Id.*

136. *Id.*

137. *Id.* at 515.

138. *Id.* at 510–11.

139. United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004), *aff'd and remanded*, 125 S. Ct. 738 (2005).

140. *Id.*

141. *Id.* at 511–12. The court agreed that sentencing judges retain some limited discretion to sentence outside of the Guidelines. *See id.* at 511. "But the issue in *Blakely* was not sentencing discretion—it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof." *Id.*

142. *Id.* at 512.

143. 523 U.S. 511 (1998). The *Booker* court noted, "We are mindful . . . that the lower federal courts are not to overrule a Supreme Court decision even if it seems manifestly inconsistent with a subsequent decision, unless the subsequent decision explicitly overruled the earlier one." United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004) (citation omitted), *aff'd and remanded*, 125 S. Ct. 738

the Supreme Court considered whether the Guidelines permit the sentencing judge, rather than the jury, to determine the kind and quantity of drugs involved in a drug conspiracy. In *Edwards* the Court unanimously held that the Guidelines "require the judge" to make such findings;[144] the Court construed statutory language and did not squarely address the Sixth Amendment implications of the Guidelines' requirement of judicial fact-finding.[145]

In *Booker*, the Government argued that *Edwards* upheld the Guidelines "against a Sixth Amendment challenge,"[146] meaning that the lower courts were constrained to follow *Edwards* with respect to current Sixth Amendment challenges to the Guidelines. The *Booker* majority, however, rejected the Government's interpretation of *Edwards* and found that *Edwards* did not deal directly with a Sixth Amendment challenge.[147]

The court found that *Edwards* did not apply and that Booker had a post-*Blakely* right to have a jury determine the drug quantity and the facts necessary for an obstruction of justice enhancement. The Seventh Circuit remanded the case for resentencing.[148] Because a sentence of 262 months would have been consistent with the verdict without consideration of the sentencing judge's additional findings, Judge Posner suggested sentencing Booker to that term as one option on remand.[149] If, on the other hand, the Government wanted a higher sentence, or if the lower court determined that the Guidelines were not severable, then Booker would be entitled to a sentencing hearing before a jury.[150]

In *United States v. Fanfan*,[151] the district court found unconstitutional, after *Blakely*, the application of any Guidelines sentencing enhancements based on drug quantities beyond those the jury found, or the application of any role enhancement.[152]

Although the judge stated that he would have imposed a pre-*Blakely* Guidelines sentence of between 188 and 235 months (corresponding to a level thirty-six), after *Blakely*, he found himself limited to sentencing the defendant based upon the quantity of drugs implicit in the jury's verdict, which was 500 grams of powder cocaine.[153] That quantity yielded an offense level of twenty-six and a sentencing range of sixty-three to seventy eight months: "[i]n other words, five or six years instead of 15 or 16 years."[154] Quoting *Blakely*, the court concluded that this significantly shorter sentence "would not bother the *Blakely* court."[155] Rather, the sentencing judge quoted the Supreme Court as follows:

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(2005).

144. *Edwards*, 523 U.S. at 514.

145. *Id.* at 516.

146. *Booker*, 375 F.3d at 513.

147. *Id.* at 514.

148. *Id.*

149. *Id.* at 515.

150. *Id.* at 514.

151. No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004), *vacated and remanded sub nom.* United States v. Booker, 125 S. Ct. 738 (2005).

152. *Id.* at *12.

153. *See id.* at *4–7.

154. *Id.* at *5.

155. *Id.* at *7.

> "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 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee, . . . of the State."[156]

In the case before the district court, moreover, "we're talking about much more than three years."[157] Referring to Fanfan as "the ring leader of a significant drug conspiracy,"[158] the court sentenced him to the maximum term of seventy-eight months under the range the judge found applicable after *Blakely*.[159]

### C. *The Supreme Court's* Booker *Decision*[160]

#### 1. Booker A—*Applying* Blakely *to the Guidelines*

In a relatively straightforward and predictable application of *Blakely*, the *Booker* majority held that the lower courts in both *Booker* and *Fanfan* correctly concluded that the Sixth Amendment applies to the Guidelines.[161] In the *Booker A* opinion, written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, the Court emphasized the mandatory nature of the Guidelines.[162] Under the Guidelines system, "The effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury."[163]

In rejecting the Government's argument that *Blakely* should not apply to the Guidelines, the Court found constitutionally insignificant the fact that the Sentencing Commission rather than Congress promulgated the Guidelines. In the Court's words, "[i]n order to impose the defendants' sentences under the Guidelines, the judges in these cases were required to find an additional fact, such as drug quantity, just as the judge found the additional fact of serious bodily injury to the victim in *Jones*."[164]

The Court recognized,

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156. *Id.* at *7 (quoting Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) (internal quotations omitted)).

157. *Id.*

158. United States v. Fanfan, No. 03–47, 2004 U.S. Dist. LEXIS 18593 *14 (D. Me. June 28, 2004), *vacated and remanded sub nom.* United States v. Booker, 125 S. Ct. 738 (2005).

159. *Id.* at *13–14.

160. The Supreme Court issued its decision in *Booker* after this Article's acceptance for publication and just weeks before the Article's scheduled date to go to press. The discussion of *Booker* is, therefore, necessarily brief and preliminary.

161. United States v. Booker, 125 S. Ct. 738, 745 (2005).

162. *Id.* at 750.

163. *Id.* at 751.

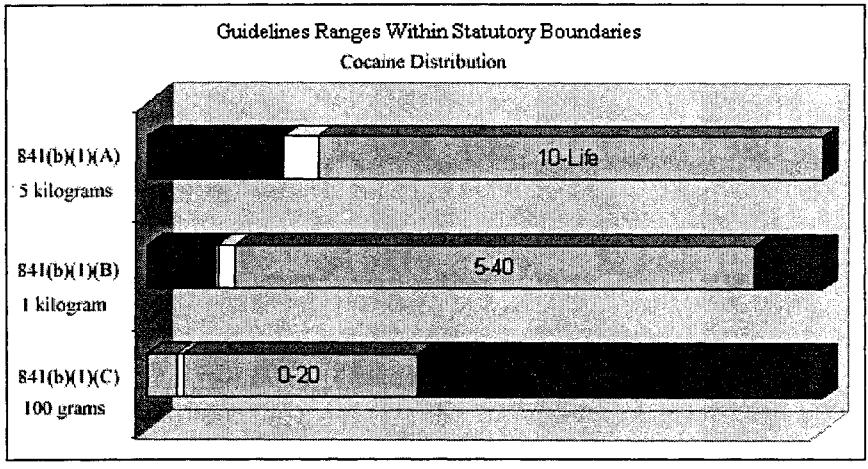
164. *Id.* at 752. For a discussion of *Jones*, see *supra* note 70 and accompanying text. In *Booker A*, the Court also rejected the Government's arguments that the doctrines of stare decisis and separation of powers compelled a holding declining to extend *Blakely* to the Guidelines. *See id.* at 753–55. Among other things, the Court, as had the court of appeals in *Booker*, rejected the Government's argument that *Edwards* compelled the Court to limit *Blakely*'s holding. *See supra* notes 143–48 and accompanying text.

> as we did in *Jones*, *Apprendi*, and *Blakely*,[165] that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right . . . that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.[166]

Accordingly, the Court reaffirmed its *Apprendi* holding that "[a]ny 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."[167]

Critical to the Court's holding in *Booker A* was the fact that the Guidelines are *mandatory*, such that they require sentencing within a relatively narrow range within the broader statutory boundaries. As Table 1, reprinted below, illustrates, the white zones represent the narrow Guidelines ranges within the broader statutory limits. Because *Blakely* interpreted "maximum sentence" to include a maximum established by a scheme analogous to the Guidelines, construing "maximum" more narrowly to include only the maximum set by the outer statutory boundaries was no longer possible after *Blakely*. Judicial fact-finding under the Guidelines has the effect of *moving* the location of the white zone within the statutory range, in essence leading to higher maximum sentences.[168]

Table 1




165. For discussion of *Apprendi* and *Blakely*, see *supra* Part III.

166. *Booker*, 125 S. Ct. at 756.

167. United States v. Booker, 125 S. Ct. 738, 756 (2005).

168. Of course, in some circumstances, judicial fact-finding under the Guidelines can lead to lower sentences, but that result would not run afoul of *Blakely*. As a practical matter, most judicial fact-finding leads to higher sentences under the Guidelines, as *Croxford*, *Booker*, and *Fanfan* illustrate. *See* United States v. Croxford, 324 F. Supp. 2d 1255 (D. Utah 2004).

However, if the white zone represented only an "advisory range," it would not include a "maximum authorized sentence." Rather, the maximum authorized sentence would be the statutory maximum, which would be life imprisonment, forty years, or twenty years, as the grey zones in Table 1, above, represent. This notion was at the heart of the Court's "solution" in *Booker B*.

*2.* Booker B—*The Fix*

The *Booker B* majority, written by Justice Breyer and joined by the three other *Booker A* dissenters plus Justice Ginsburg,[169] recast the Guidelines as "advisory" in order to avoid the Sixth Amendment problem with mandatory Guidelines that *Booker A* identified. Specifically, the Court found 18 U.S.C. § 3553(b)(1), which makes the Guidelines mandatory, "incompatible with today's constitutional holding" and severed that provision.[170] The court also struck 18 U.S.C. § 3742(e), which established a de novo standard of appellate review and was premised on the Guidelines' mandatory nature.[171] With the Guidelines now only "advisory," sentencing judges can continue to make the factual findings that lead to increased sentences—precisely because they are no longer required to do so in a way that would run afoul of *Blakely* and *Booker B*. Sentencing judges must "consult" the Guidelines but are not bound to apply them.[172]

In addressing severability, the *Booker B* majority claimed to be "answer[ing] the remedial question by looking to legislative intent."[173] According to *Booker B*, the remedy of severing the Guidelines mandatory provisions was more consistent with Congress's intent than a remedy engrafting a jury trial requirement onto the Guidelines. The *Booker B* majority concluded that Congress would have preferred to invalidate the Sentencing Reform Act rather than impose a Sixth Amendment requirement and would have preferred the majority's remedy to invalidation of the Act.[174]

Central to this conclusion was *Booker B*'s analysis that "real offense sentencing" is a cornerstone of the Guidelines and that only judges can effectively determine the "real offense."[175] Requiring jury fact-finding would "destroy the system," according to the majority, by preventing a judge from relying upon information uncovered after the trial and by tying sentences simply to charges prosecutors brought, rather than to the facts underlying those charges.[176]

Looking specifically at the underlying facts of *Booker*, Justice Breyer noted that "[a] system that would require the jury, not the judge, to make the additional '566 grams' finding is a system in which the prosecutor, not the judge, would control the sentence. That is because it is the prosecutor who would have to decide what drug amount to charge."[177]

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169. Professor Dershowitz has been harshly critical of Justice Ginsburg for "switching sides" and taking inconsistent positions with no explanation. *See* Alan Dershowitz, *Prima Donnas in Robes*, L.A. TIMES, Jan. 17, 2005, at B11.

170. *Booker*, 125 S. Ct. at 756.

171. *Id.* at 764, 765.

172. *Id.* at 767.

173. *Id.* at 757 (citation omitted).

174. *See id.*

175. This proposition is dubious at best. *See infra* Part V.C.1.

176. United States v. Booker, 125 S. Ct. 738, 760 (2005).

177. *Id.* at 763.

In addition to recasting the Guidelines as advisory, the Court in *Booker B* also excised Section 3742(e), the provision related to the standard of review of appeals.[178] With that section excised, the Court found that the Sentencing Reform Act contained an implicit standard of review for reasonableness.[179]

The *Booker B* majority acknowledged that the "reasonableness" standard might not "provide the uniformity that Congress originally sought to secure. Nor do we doubt that Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create."[180] Nonetheless, the majority found that retention of sentencing appeals "would tend to iron out sentencing differences," whereas invalidating the Sentencing Reform Act entirely would not.[181]

Dealing with the two cases before it, the Court then affirmed the court of appeals' decision in *Booker* and remanded it for resentencing, and vacated the district court's sentence in *Fanfan*, the sole premise for which was the drug quantity implicit in the jury verdict.[182] Presumably, the sentencing courts in both *Booker* and *Fanfan* can now either follow the prescribed Guidelines sentences flowing from the facts the sentencing judges find—or not.

### 3. *The* Booker *Dissents*

Justices filed dissenting opinions from both *Booker A* and *Booker B*. In his dissent from *Booker B*, Justice Stevens[183] (who authored *Booker A*) asserted that neither of the Court's majority opinions [*Booker A* nor *Booker B*] found any provision of the Sentencing Reform Act inherently unconstitutional. He described the *Booker B* majority's excision of provisions of the Act "a policy choice that Congress has considered and decisively rejected."[184]

Looking at the underlying facts of Booker's case, Stevens noted that the sentencing judge's initial sentence of 360 months would have been consistent with both the Guidelines and the Sixth Amendment if the jury, rather than the judge, had made the findings regarding the additional 566 grams of crack.[185] As Stevens reasoned:

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178. In 2003, the Feeney Amendment modified this section to provide for *de novo* review of departures in order to reduce the number of departures from the Guidelines. If Guidelines are "advisory," then the notion of a Guidelines "departure" is arguably irrelevant.

179. *Booker*, 125 S. Ct. at 766–67.

180. *Id.*

181. *Id.* at 767.

182. *See id.* at 769.

183. United States v. Booker, 125 S. Ct. 738, 771 (2005) (Stevens, J., dissenting in part). Justice Souter joined the Stevens dissent entirely, while Justice Scalia joined in part.

184. *Id.*

185. *See id.* at 772. Justice Stevens explained that four underlying factual determinations formed the basis for Booker's underlying sentence:

> (1) the jury's finding that [Booker] possessed 92.5 grams of crack (cocaine base); (2) the judge's finding that he possessed an additional 566 grams; (3) the judge's conclusion that he had obstructed justice; and (4) the judge's evaluation of his prior criminal record.

*Id.* Had the jury made the finding of 566 grams, its findings as to the total amount of crack would have authorized a sentence of between 324 and 405 months–a relatively broad range that would then have permitted the judge to consider, in picking a sentence within that range, the defendant's "obstruction of justice, his criminal history, and all other real offense and offender factors without violating the Sixth Amendment." *Id.*

> The principal basis for the Court's chosen remedy is its assumption that Congress did not contemplate that the Sixth Amendment would be violated by depriving the defendant of the right to a jury trial on a factual issue as important as whether Booker possessed the additional 566 grams of crack that exponentially increased the maximum sentence that he could receive. I am not at all sure that assumption is correct, but even if it is, it does not provide an adequate basis for volunteering a systemwide remedy that Congress has already rejected and could enact on its own if it elected to.[186]

Stevens criticized the majority for overbreadth, particularly in light of the number of cases which pleas resolve (95%) and the number of cases that do not involve sentencing enhancements.[187] Given that the Guidelines could apply in their entirety to the majority of federal cases, he found that the Guidelines are not facially invalid.[188]

Stevens emphasized that *Blakely* did not invalidate judicial fact-finding *in toto*. Judicial factfinding is invalid only when it leads to a sentence greater than the sentence that either the jury's findings or the defendant's admissions authorize. Judicial fact-finding that simply moves a defendant *within* a range remains constitutional after *Blakely*.[189]

Stevens found that "severability analysis" did not apply to this case, because no provision of the Sentencing Reform Act or Guidelines "falls outside of Congress's power."[190] While the provisions *Booker B* severed may result in a Sixth Amendment violation when combined with other provisions, they are facially valid. Justice Stevens harshly criticized the majority's severability approach:

> There is no case of which I am aware . . . in which this Court has used "severability" analysis to do what the majority does today: determine that *some* unconstitutional applications of a statute, when viewed in light of the Court's reading of "likely" legislative intent, justifies the invalidation of certain statutory sections in their entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important.[191]

Justice Stevens asserted that rather that rewriting the Sentencing Reform Act, he would allow the Government to continue its post-*Blakely* practice of proving facts required for sentencing enhancements to a jury.

Even under the severability approach, Justice Stevens found the majority's reading of legislative intent unpersuasive. His review of the Sentencing Reform Act emphasized the goal of reducing disparity, and he found unsupportable the majority's view that Congress would prefer a system that retained "real offense sentencing" by judges without mandatory Guidelines. "The notion that Congress

186. *Id.*
187. *See* United States v. Booker, 125 S. Ct. 738, 772 (2005) (Stevens, J., dissenting in part).
188. *See id.* at 774.
189. *See id.* at 775.
190. *Id.* at 777.
191. *Id.*

had any confidence that judges would reduce sentencing disparities by considering relevant conduct . . . either ignores or misreads the political environment in which the SRA passed."[192] Moreover, the Guidelines mandatory nature has always been an essential element of the system, and "Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options."[193] Stevens concluded that *Booker B*'s remedy fails to meet the goals of *Apprendi*, "frustrates Congress' principal goal in enacting the SRA, and violates the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes."[194]

In a separate dissent,[195] Justice Scalia likewise viewed *Booker B*'s remedy as "misguided," given its focus on the "manner" of achieving uniformity (judicial fact-finding) rather than the actual achievement of uniformity.[196] "The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."[197] Given the "notorious unpopularity" of the Guidelines with many judges, Justice Scalia predicted a return to the disparity characterized by pre-Guidelines sentencing.

Justice Thomas, also dissenting separately,[198] faulted the *Booker B* majority for failing to tailor its remedy to the Sixth Amendment infirmity *Booker A* identified. In his view, the proper course was to invalidate the statute as applied only insofar as necessary to cure the defect. Applying that principle to the cases at hand, Booker's initial sentence violated the Sixth Amendment, but Fanfan's did not. Section 3553(b)(1), which the majority facially invalidated, "is entirely constitutional in numerous other applications."[199] Accordingly, Thomas would have severed only the unconstitutional applications of the Guidelines scheme.[200]

In their opinion dissenting from *Booker A*, Justice Breyer, whom Chief Justice Rehnquist and Justices O'Connor and Kennedy joined, relied on their earlier dissents from *Apprendi* and *Blakely* and found that the Sixth Amendment did not forbid sentencing judges to determine the manner in which a defendant committed an offense.[201] The dissenters further found that *Blakely* and *Apprendi*, even if valid,

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192. *Id.* at 785.

193. United States v. Booker, 125 S. Ct. 738, 786 (2005) (Stevens, J., dissenting).

194. *Id.* at 789.

195. *Id.* at 789–95 (Scalia, J., dissenting in part).

196. *Id.* at 789.

197. *Id.* at 790.

198. *Id.* at 795–802 (Thomas, J., dissenting in part).

199. United States v. Booker, 125 S. Ct. 738, 797 (2005) (Thomas J., dissenting in part).

200. Unlike Justice Stevens' approach, which found that severability analysis did not apply, Justice Thomas explicitly found that severability did apply and that the presumption of severability had not been overcome. *Id.* at 801. He agreed with Stevens, however, that Breyer's approach in *Booker B* "grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional." *Id.* at 800 n.10. Specifically, he criticized Breyer for skipping the critical first step of "declar[ing] a provision or application unconstitutional, using substantive constitutional doctrine (not severability doctrine)" and only then asking whether the rest of the act can stand. *Id.*

Justices Stevens' and Thomas' approaches, while different, essentially reach the same result. An analysis of the merits of their different conclusions as to severability *qua* severability is beyond the scope of this Article.

201. *Id.* at 802 (Breyer, J., dissenting in part).

"involved sentences embodied in a statute, not in administrative rules,"[202] and thus did not apply to the Guidelines.

## V. A BETTER FIX TO THE GUIDELINES

### *A. Problems With* Booker B

While *Booker A* was a natural outgrowth of the Court's recent jurisprudence, *Booker B* produced a jarring result in attempting to salvage as many current features of the Guidelines as possible while effecting an end-run around the Sixth Amendment requirements *Booker A* recognized. At the same time, the majority severed perhaps the most essential feature of the Guidelines—the provision making them mandatory. As the dissenters noted, Congress expressly rejected the advisory system *Booker B* created. While some judges may attempt to vindicate the goals of the Guidelines in good faith,[203] other judges will disagree about how closely to follow the "advisory" Guidelines. Some judges will no doubt balk, post-*Booker*, at making the factual findings that *Booker B* insists are critical to the system. A judge may well, for example, pass "reasonableness review" on appeal by insisting, per *Booker A*, that the Government must prove any factual findings leading to a higher sentence to a jury beyond a reasonable doubt.

The *Booker B* dissenters argued persuasively that the majority's analysis was flawed. The majority elevated above all else the solitary role of the judge in finding the "real facts," and emphasized, as Justice Scalia noted, the "*manner* of achieving" uniformity rather than the actual achievement of uniformity that was Congress's overriding goal in passing the Sentencing Reform Act.[204]

The majority uncritically accepted the fairness of a system driven by judicial fact-finding, and avoided the Sixth Amendment constraints of *Booker A*, in essence, by reverting to the pre-Guidelines world of open-ended discretion.[205] Numerous problems exist with *Booker B*'s approach, which go beyond the most glaring problem of returning to the pre-Guidelines days of disparity. Among other things, advisory Guidelines will have the effect of blunting one of the most important tools in a prosecutor's arsenal: Section 5K1.1, which provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."[206] A defendant facing a high Guidelines sentence previously had a strong incentive to cooperate with authorities in order to get a prized 5K1.1 motion, allowing the judge to depart below the Guidelines.[207] However, departures may prove meaningless in an advisory system; thus,

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202. *Id.* at 806.

203. *See* United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) (applying the Guidelines post-*Booker* and urging other courts to do the same).

204. *See Booker*, 125 S. Ct. at 790 (Scalia, J., dissenting in part).

205. As Professor Douglas Berman has recently argued, a system driven by judicial fact-finding also raises due process concerns. Douglas A. Berman, *Burdens of Proof and a New Due Process of Sentencing*, Sentencing Law and Policy, *at* http://sentencing.typepad.com (Jan. 21, 2005).

206. U.S.S.G. § 5K1.1 (Nov. 2004).

207. For particularly thorough treatment of the cooperation system, see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 6–21 (2003).

defendants may have a reduced incentive to cooperate with authorities in cases where statutory mandatory minimum sentences do not apply.[208]

Another obvious problem with the *Booker B* solution is that, while narcotics defendants will continue to face statutory minimum sentences[209] that act as "hard constraints" on judges, other defendants currently do not. This disparity will lead to widely varied treatment of narcotics defendants as a group as compared to other defendants and thus exacerbate the problem that already exists with harsh mandatory minimum sentences in drug cases. In drug cases, both statutory mandatory minimum sentences and Guidelines sentences are linked to quantity, while in white collar crimes, Guidelines sentences are linked to loss amounts, but no statutory mandatory minimum sentences apply. Because many judges believe the Guidelines are too rigid, they will likely begin opting out of "advisory Guidelines" in white collar crime cases, whereas they will be unable to do so in narcotics cases to which statutory mandatory minimums apply.

Just two days after the Court handed down *Booker*, a district court judge rejected the advisory Guidelines sentence in a white collar crime case, partly because "[o]ne of the primary limitations of the guidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level."[210] The judge imposed a sentence that was less than one-third of the proposed Guidelines sentence.[211] Many more such cases will follow, with judges exercising reclaimed discretion to abandon the Guidelines.

While many compelling arguments claim the Guidelines are too rigid and draconian insofar as they link sentences to quantities in drug cases and loss amounts in white collar criminal cases, *Booker B* allows for flexibility only in the latter category. Indeed, drug cases—arguably the area in which the need for sentencing reform is greatest—are the only category that Booker B leaves largely unaltered. This observation raises fundamental fairness concerns; however, the concerns with *Booker B* are largely academic, as Congress will not for long tolerate its reinvigoration of judicial discretion in large categories of cases. As Justice Breyer noted in his *Booker B* majority opinion, "The ball now lies in Congress' court."[212]

### *B. Congressional Intolerance*

The prevailing congressional attitude toward judicial discretion in sentencing can be summed up in two words: Feeney Amendment. That 2003 legislation, which further reined in judicial sentencing discretion by limiting downward departures,[213] generated a "firestorm of protest" by the judiciary[214] and the academy.

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208. Under 18 U.S.C. § 3553(e) (2000), a judge may depart even below a statutory minimum sentence if the Government attests that a defendant has provided substantial assistance. Defendants retain the incentive to cooperate in cases where statutory mandatory minimum sentences apply, because *Booker B*'s holding regarding "advisory Guidelines" would not allow a judge to avoid an applicable mandatory minimum sentence imposed by statute without a "substantial assistance" motion.

209. Narcotics defendants typically face statutory minimum sentences of five or ten years, depending upon drug quantity. *See supra* Table 1.

210. United States v. Ranum, 353 F. Supp. 2d 984, 989 (E.D. Wis. 2005).

211. *Id.* at 985.

212. United States v. Booker, 125 S. Ct. 738, 768 (2005).

213. Alan Vinegrad, the former United States Attorney for the Eastern District of New York, described the Feeney Amendment as follows:

> In April 2003, Congress passed the most sweeping federal sentencing legislation

Many of the arguments against the Feeney Amendment are compelling, but congressional hostility toward discretionary sentencing is currently entrenched. A more viable long-term alternative to the *Booker B* fix is to use the constitutional problems *Blakely* identified as an opportunity to correct the Guidelines surgically to extract some of the fundamental problems of the system while still working within the requirement of limiting judicial discretion that Congress will surely demand.

With the Feeney Amendment, Congress sent an unequivocal message of distrust of judges with broad sentencing discretion. If even the limited downward departure power the Feeney Amendment curtailed was unacceptable, Congress will be even less likely to embrace a return to wide-ranging judicial discretion that is the inevitable consequence of *Booker B*. Instead, Congress will likely see a "fix" to the Guidelines that will comply with *Blakely* but also serve the legislative goal of keeping a tight rein on judicial discretion. *Booker B* will not provide that solution.

The *Booker B* dissenters found the Guidelines in their entirety facially valid, pointing out that prosecutors already were adapting to *Blakely* by alleging and proving to juries beyond a reasonable doubt the facts required for sentencing enhancements.[215] While the Guidelines may be susceptible to an interpretation that complies with the Sixth Amendment, such an understanding is not their most natural reading. The Guidelines contemplate that judges will find facts that lead to increased sentencing ranges, even though operation without that feature is possible. Thus, while the dissenters were absolutely right not to undertake a rewriting of the Guidelines, Congress would have needed to make changes to the Guidelines in light of *Booker A* even had the *Booker B* dissenters carried the day and left the Guidelines intact.

### *C. Proposed Changes*

The *Booker B* decision made Congressional action not just preferable, but inevitable. While a line-by-line or section-by-section menu of suggested changes to the Guidelines to conform to *Blakely* and *Booker* is beyond the scope of this Article, a logical step is to take a chapter-by-chapter approach to propose specific changes that will vindicate the Sixth Amendment but also recognize the practical and political constraints on wholesale Guidelines reform.[216]

A number of caveats accompany these proposals. One is that they are necessarily preliminary, given the freshness of the Court's *Blakely* and *Booker*

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> since the creation of the Sentencing Guidelines. This legislation, which is commonly known as the Feeney Amendment and was part of a larger enactment known as the PROTECT Act, imposed a series of sentencing "reforms" intended to make it more difficult for federal district judges to grant downward departures from the Guidelines and for such departures to be upheld on appeal.

Vinegrad, *supra* note 10, at 98. In his article, Vinegrad outlined the six separate grounds for departure the Sentencing Commission eliminated in compliance with the PROTECT Act's directives. *See id.*

214. *Id.* at 98. One of the most striking acts of protest was the resignation of the Honorable John Martin, a well-regarded district court judge in New York who had served as the United States Attorney in the Southern District of New York. *See id.*; *see also* Weintraub & Kuehne, *supra* note 8, at 115 ("The Feeney Amendment has in effect jolted the entire federal judiciary with a lightening [sic] rod to reform sentencing reform.").

215. *See Booker*, 125 S. Ct. at 771 (Stevens, J., dissenting).

216. *See* STITH & CABRANES, *supra* note 17, at xi (recognizing structural and other constraints in the context of proposing reforms to the Guidelines).

opinions. The second is that they do not attempt to address the important, overarching questions about the appropriate goals of sentencing and whether the Guidelines system best meets those goals. In other words, these proposals may not result in the best possible sentencing scheme. Rather, I make a more modest claim. I begin from the premise that the goals of the Guidelines were salutary[217] and from the related premise that the Guidelines are now too deeply entrenched in our criminal justice system to eliminated easily. However, the Guidelines do need modification. I also start from the view that the majorities in *Apprendi*, *Blakely*, and *Booker A* were correct in holding that the Sixth Amendment forbids judicial fact-finding that increases a defendant's maximum sentence.[218]

The Guidelines currently direct sentencing judges to calculate sentences by applying provisions from several different chapters of the Guidelines Manual. In summary form, judges first determine the applicable Guidelines section from chapter two, then apply the "relevant conduct" provision in chapter one to determine the "base offense level." Next, courts make specific adjustments pursuant to the chapter two provisions, and then make further adjustments according to the chapter three provisions that apply to all offenses. After determining the defendant's criminal history category from chapter four, judges then refer to the sentencing table in chapter five to determine the sentence.[219] As a preliminary step toward making mandatory Guidelines compliant with *Blakely*, I propose changes to particular provisions of chapters one, two, three and five.

### *1. Chapter One: Amending the "Relevant Conduct" Provision*

The Guidelines instruct judges first to "[d]etermine the offense guideline section . . . applicable to the offense of conviction . . . ."[220] For example, the applicable Guidelines section for a drug trafficking offense is § 2D1.1. That section alone constitutes twenty-seven pages, multiple sub-sections, and extensive commentary, and includes a drug quantity table that provides for base offense levels ranging from six to thirty-eight. These base offense levels correspond to sentencing ranges for first-time offenders, *before adjustments*, that vary from 0-6 months (Level 6) to 235-292 months (Level 38).[221] To determine the applicable guideline *range* within the section, the judge must refer to the relevant conduct provision.[222]

The relevant conduct provision, which commentators have called "the 'cornerstone' of the guideline system,"[223] is also one of the most maligned[224] and

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217. I recognize that there is substantial evidence that sentencing disparities "have continued to plague the system" even after the Guidelines. Osler, *supra* note 53, at 683. However, I believe that unwarranted disparities would become even more acute under an advisory Guidelines system.

218. I recognize compelling contrary arguments. *See supra* note 72.

219. *See* U.S.S.G. §§ 1B1.1-2 (Nov. 2004).

220. *Id.* § 1B1.2(a) (Nov. 2004); *see also* 18 U.S.C. § 3553(b)(1) (2000) (providing that the court shall impose a sentence within guideline range, except under narrow circumstances).

221. *See id.* § 2D1.1 (Nov. 2004) and Sentencing Table, Exhibit A, *supra* note 45.

222. *See id.* § 1B1.2(b) (Nov. 2004) (citing § 1B1.3 (Relevant Conduct)).

223. Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, 10 FED. SENT. REP. 16, 16 (1997) (citing William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990)).

224. *See, e.g.*, David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 403 (1993). Yellen explained:

> One of the most remarkable and controversial aspects of the Federal Sentencing

problematic. By its terms, the "relevant conduct" provision provides that the base offense level

> shall be determined on the basis of . . . .
>
> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . .
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.][225]

The wording of this provision is broad, and, under pre-*Blakely* practice, required the judge to consider not just the crimes for which the Government formally charged and convicted the defendant, but also uncharged crimes and even acquitted conduct.[226]

A scheme contemplating that judges will sentence defendants based upon facts beyond those underlying the offense of conviction goes to the heart of *Blakely*'s concern. Thus, Congress must modify the relevant conduct provision in order to return to a system of mandatory Guidelines.[227] Although perhaps facially valid as a theoretical matter,[228] one would be hard-pressed to imagine the invocation or application of this provision in a manner consistent with *Blakely* and *Booker A*. Indeed, the sentencing judge's application of this provision in *Booker*—finding that the defendant had quantities of crack over and above the quantities the jury found—was the primary reason that the court of appeals invalidated Booker's sentence after *Blakely*.

A simple amendment to the relevant conduct provision could provide for the determination of the base offense level based upon "the defendant's admissions or the jury's findings regarding all acts and omissions caused by the defendant that occurred during the commission of the offense." This amendment retains the "real offense" goal of the Guidelines in directing the judge to take into account all of the jury's factual findings in imposing a sentence.[229] For example, if the jury found that

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> Guidelines . . . is that the length of a defendant's sentence may be based, not only upon the crimes for which the defendant has been convicted, but also upon alleged crimes related to the offense of conviction, for which the defendant was not convicted.

*Id.* at 403.

225. U.S.S.G. § 1B1.3(a) (Nov. 2004).

226. David N. Yellen, *Is "Relevant Conduct" Relevant? Reconsidering the Guidelines' Approach to Real Offense Sentencing*, 44 ST. LOUIS U. L.J. 409, 410 (2000); Johnson, *supra* note 56, at 160 (noting that relevant conduct "includes a vast array of activity related to the offense of conviction and deemed pertinent to the offender's culpability").

227. *Cf.* Russell, *supra* note 58.

228. One could interpret the provision, after *Booker A*, as requiring that a jury find relevant conduct. *Cf.* United States v. Booker, 125 S. Ct. 738, 779 (2005) (Stevens, J., dissenting) ("As a textual matter, the word 'court' [in 18 U.S.C. § 3553(a)] can certainly be read to include a judge's selection of a sentence as supported by a jury verdict . . . ."). Although reading the word in that way to avoid a constitutional infirmity is possible, Congress did not have jury fact-finding in mind.

229. Of course, guilty pleas resolve the vast majority of cases. *See* Bibas, *supra* note 58, at 1100. In a plea situation, the sentencing judge would have to account for all of the facts the defendant admitted during the course of the plea or to which the defendant stipulated as part of a plea agreement.

a defendant distributed 100 grams of cocaine, and then made a further finding that the defendant also distributed one kilogram of cocaine, the amended relevant conduct provision would make plain that the judge *must* sentence based upon the total quantity of narcotics found, rather than based only upon the 100 gram quantity. The key is that the findings are the jury's[230] and that all such relevant factual findings are accounted for in sentencing.[231]

Regardless of the merits of "real-offense" sentencing,[232] where judges are the finders of "real facts," *Blakely* bars this aspect of the Guidelines. In addition, tying the relevant conduct provision to trial findings or the defendant's admissions would have the salutary effect of immediately making sentencings less cumbersome, more straightforward, and fairer to defendants for the reasons Professor David Yellen and others have long articulated.[233] As Yellen has argued, many current aspects of real-offense sentencing—with sentences radically divorced from jury findings—simply do not comport with our intuitive sense of what is right and just.[234]

Justice Breyer and others would argue, of course, that altering the "relevant conduct" provision in this way allows prosecutors to determine the sentence based upon the charge alone. As Justice Breyer said in *Booker*, in examining the facts of that case, a system that forces a jury rather than the judge to find facts about quantity, "is a system in which the prosecutor, not the judge, would control the sentence. That is because it is the prosecutor who would have to decide what drug amount to charge."[235] The notion that *Booker B* resolves this problem is misguided.

One of the most persistent defenses of the relevant conduct provision, and "real-offense" sentencing generally, is that the mechanism controls prosecutorial discretion by limiting undue prosecutorial leniency. To the extent that the purpose of the relevant conduct provision was to prevent prosecutors from making an "end run" around the intended severity of the Guidelines, the provision is toothless in the

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230. In the event of a plea, the sentencing would be based upon the defendant's admissions.

231. This proposal minimizes the problem of treating very different defendants uniformly. *See supra* note 119.

232. *See generally* O'Sullivan, *supra* note 51 (describing real-offense aspects of the Guidelines).

233. *See, e.g.*, Yellen, *supra* note 51, at 1436–38 (criticizing real-offense sentencing); Yellen, *supra* note 226, at 454–59 (criticizing mandatory related-offense sentencing); Yellen, *supra* note 226, at 409–11 (discussing the impact and power of relevant conduct principle); *cf.* Osler, *supra* note 53, at 652, 669–70.

234. *See* Yellen, *supra* note 51, at 1437:

> [I]t has been my experience that almost every lay person, regardless of political inclination, is shocked to learn that a federal judge *must* increase a sentence based on conduct for which the defendant has been acquitted. I believe the reason for this shock is the intuitive judgment that society's right to punish an individual flows directly from, and is limited by, the conduct for which that individual has been convicted. In Professor O'Sullivan's world [*see supra* note 51] (and the Sentencing Commission's), just deserts becomes a free floating rationale not anchored to the legal process of conviction.

*See also* Johnson, *supra* note 56, at 154 ("That an offender's sentence may be enhanced, sometimes dramatically, on the basis of conduct for which he was acquitted strikes many as counterintuitive and inappropriate.").

235. United States v. Booker, 125 S. Ct. 738, 763 (2005).

overall scheme of the Guidelines.[236] In reality, this provision only has teeth when prosecutors use it as a weapon.

A number of reasons explain this proposition. Prosecutors can choose to charge crimes that have statutory maximum sentences that serve to defeat the relevant conduct provision.[237] As discussed above, the maximum sentence for a defendant charged with narcotics distribution under § 841(b)(1)(C) of Title 21 can be no longer than the statutory maximum boundary of twenty years, even if the Guidelines would otherwise require a longer sentence.[238] More dramatically, a prosecutor can drop more serious charges and pursue simply a "telephone count," which provides a statutory maximum sentence of four years for using a telephone to facilitate a drug transaction.[239] In addition, prosecutors can simply opt not to pursue factual information that would cause the relevant conduct provision to increase the defendant's sentence.[240] In our adversarial system, a "real-offense" sentencing scheme works only as intended if prosecutors are motivated to oversee wide-ranging investigations into the full scale of a convicted defendant's criminal activity. Because "real-offense" sentencing depends so heavily upon prosecutors, different prosecutorial practices (which are the inevitable consequence of separate and, in large part, independent United States Attorney's offices in each federal district) can subvert the goal of reduced disparity in sentencing that was a primary motivation behind the Guidelines.

The notion that the current Guidelines achieve uniformity by getting to the "real facts" through judicial fact-finding and probation officer investigations is naive. Only in a rare case would the discovery of "real facts" without the cooperation of the prosecutor be possible; in the vast majority of cases, the uncovering or disclosure of facts occurs at the prosecutor's instigation. The real question is who should decide the "real facts." *Blakely* clearly contemplated that juries, rather than judges, should make such decisions. Regardless of who the decision-maker is, whether judge or jury, the system does not ascertain "real facts" in situations where prosecutors choose not to investigate or present all the facts.

My proposed amendment will not necessarily do a better job of forcing prosecutors to consistently develop the "real facts" than does the current system that contemplates judicial fact-finding. Rather, my position is that the fact-finder's

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236. *Cf.* Yellen, *supra* note 51, at 1438 (noting that "alleged-related offense sentencing neither ends prosecutorial leniency, nor eliminates unwarranted disparity"); *see also* Wiliam J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (noting that "criminal law and the law of sentencing define prosecutors' options, not litigation outcomes.").

237. *See* Yellen, *supra* note 51, at 1438–39 ("Prosecutors have a variety of ways to reward favored defendants. These include charging offenses with low statutory maximums . . . ."); Standen, *supra* note 8, at 789 (observing that "the plasticity of criminal statutes, particularly in a federal system lacking a coherent criminal code, invites prosecutorial manipulation of sentences by selective charging and plea decisions") (footnotes omitted).

238. *See supra* Part III.B.

239. 21 U.S.C. § 843(b), (c).

240. When I practiced in the Southern District of New York, probation officers routinely relied on prosecutors to provide the charging instruments and other materials that would form the bases for making the proposed sentencing calculations for the court to apply under the Guidelines. If a trial has occurred, that information can be quite extensive; if a guilty plea resolved the case, the information may consist of little more than the charging instrument and plea agreement.

findings are almost always necessarily limited by the prosecutor's choices.[241] Given the structure of the Department of Justice, the Guidelines simply cannot resolve problems with disparities in prosecutorial practices. However, my proposed amendment does have the salutary effect of recognizing that juries, rather than judges, should find the facts.

Furthermore, by amending rather than eliminating the relevant conduct provision, the Guidelines retain the requirement that a defendant's sentence should be based upon the totality of his actual conduct—at least insofar as the Government has proved it beyond a reasonable doubt under the ordinary rules of evidence. As Justice Scalia derisively noted, the current system allows judges to find "'real conduct'" based upon "bureaucratically prepared, hearsay-riddled presentence reports . . . ."[242]

Under my proposal, prosecutors will likely charge whatever facts they think they can prove and take their chances with a jury; at best, they will prove the entire case, and, at worst, they will likely prove some of it. Under the current Guidelines regime, prosecutors have a perverse incentive to try only narrow, readily proven facts to a jury, knowing that they will have the benefit later of proving "shakier" facts to a judge based upon a mere preponderance standard.[243]

### 2. *Chapter Two: An Increased Role for Juries and a Call for Simplification*

Transferring more factual determinations to jurors after *Blakely* and *Booker* broadly vindicates the Sixth Amendment values that were at the heart of *Blakely* and *Booker A*. Some facts are more conducive to jury fact-finding than others: those related to drug quantity, for example, seem particularly suitable to jury determination. After *Apprendi*, "drug quantity is an element of [21 U.S.C.] § 841 that must be found by a jury beyond a reasonable doubt,"[244] at least insofar as the government seeks to sentence a defendant beyond the lowest-level statutory penalty provisions in the narcotics laws.[245]

Other factual determinations under the Guidelines that are particularly amenable to jury fact-finding include the question of whether the defendant carried a firearm and questions related to monetary losses in fraud cases. While a section-by-section analysis of all of the offense conduct provisions of chapter two is beyond the scope of this Article, many of the provisions of that chapter survive *Blakely*, and

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241. *Cf.* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 218–19 (1982) (noting "invisible" sentencing discretion that various actors exercised in the criminal justice system during the pre-Guidelines regime).

242. United States v. Booker, 125 S. Ct. 738, 791 (2005) (Scalia, J., dissenting in part); *see also* Osler, *supra* note 53, at 669 (noting that a defendant's sentence can be greatly increased "based on nothing more than unsubstantial hearsay contained in the presentence report presented to the judge.").

243. *See* Osler, *supra* note 53, at 670 ("the relevant conduct provision furthers the corrosive effect of promoting fact-gathering as a function of sentencing rather than trial. As [Professor Daniel] Freed notes, the current relevant conduct rule has created strong incentives for the prosecutor to dodge trial and instead bring facts at sentencing") (citing Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1714 (1992)).

244. United States v. Moreno, 2000 U.S. Dist. LEXIS 17947, at *6 (S.D.N.Y. Dec. 11, 2000) (collecting cases).

245. *See* 21 U.S.C. § 841(b)(1)(C) (2000) (providing for maximum sentence of twenty years) and discussion *supra* Part III.

other provisions are susceptible to reformulation so that juries make the called-for factual determinations.

For example, in the aggravated assault provisions, the base offense level is fourteen, in addition to which the Guidelines contemplate a number of potential upward adjustments.[246] If the assault involved "more than minimal planning," the judge is to increase the offense by two levels;[247] if the defendant used a firearm, the judge is to add from three to five levels.[248] If the victim sustained injuries, the judge is to increase the defendant's sentence by from three to seven levels, depending upon the scope of the injuries.[249] If pecuniary gain motivated the assault, the judge adjusts upward by two levels;[250] if the defendant violated a court order, the increase is two levels.[251] If the defendant's crime of conviction was under 18 U.S.C. § 111(b) or § 115, the court is directed to add two more levels.[252] Thus, the judge can increase the base offense level by a total of eighteen levels during the adjustment stage, resulting in an offense level of thirty-two which, for a first-time offender, results in a Guidelines range of 121-151 months, versus an 18-24 month sentencing range for a base offense level of fifteen.[253]

Scrutinizing this Guidelines provision suggests ways to streamline and simplify the Guidelines with the goal of making them more "juror-friendly." Distinguishing between discharging, "otherwise us[ing]," and brandishing or threatening to use a firearm or dangerous weapon seems unnecessary. Distinguishing between firing and merely carrying a gun makes sense, but to parse further the possible ways a defendant can use weapon seems overly technical and bureaucratic, and not easily susceptible to jury determination. The provision's current division of types of injury to a victim into five discrete levels suffers from the same problem.[254]

Deciding whether an assault crime was "motivated by a payment or offer of money or other thing of value"[255] is not very different from the kind of determination jurors already have to make in cases involving murder-for-hire under the racketeering laws.[256] Determining whether the offense "involved the violation of a court protection order,"[257] however, involves questions of legal interpretation and should perhaps be stricken from the Guidelines provision rather than being turned over to a jury. Eliminating this provision would have the net effect of

246. U.S.S.G. § 2A2.2 (Nov. 2004).

247. *Id.* § 2A2.2(b)(1).

248. *Id.* § 2A2.2(b)(2).

249. *Id.* §§ 2A2.2(b)(3)(A)-(E). The cumulative effect of the weapons and injury adjustments, however, cannot exceed ten levels. *See id.*

250. *Id.* § 2A2.2(b)(4).

251. U.S.S.G. § 2A2.2(b)(5) (Nov. 2004).

252. *Id.* § 2A2.2(b)(6).

253. *See id.*

254. *See id.* §§ 2A2.2(b)(3)(A)-(E) (Nov. 2004).

255. *Id.* § 2A2.2(b)(4).

256. *See* 18 U.S.C. § 1959(a) (2000) ("Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, . . . murders . . . or threatens to commit a crime of violence against any individual . . . shall be punished . . . .").

257. U.S.S.G. § 2A2.2(b)(5) (Nov. 2004).

reducing the maximum offense level under this Guideline from thirty-two to thirty.[258]

Having jurors decide the key facts that affect the defendant's sentence vindicates a defendant's Sixth Amendment rights,[259] but not everyone would agree that this approach is advisable. As Justice (then Judge) Breyer argued in his early article about the Guidelines,

> [a] drug crime defendant . . . cannot be expected to argue at trial to the jury that, even though he never possessed any drugs, if he did so, he possessed only one hundred grams and not five hundred, as the government claimed. There must be a post-trial procedure for determining such facts.[260]

Justice Breyer expressed similar reservations in his recent *Blakely* dissent.[261] The obvious concern is that requiring a defendant to argue quantity before a jury will prejudice the defendant as his focus on the quantity undermines his claim of innocence on the underlying charge.

This concern is probably overstated. Defendants are frequently in the position of having to make arguments in the alternative at trial. For example, a defendant charged with both drug distribution and the use of a firearm in a drug trafficking offense may necessarily have to argue that he did not deal drugs, but even if he did, he did not carry a gun. The reality of drug trials is that facts about quantity and any use of weapons are often inextricably intertwined with facts about the underlying offense.[262] Details about the offense that ultimately affect the sentence are likewise relevant in many other types of criminal trials. In the above example of the Guidelines provisions related to aggravated assault, the prosecutor would almost certainly seek to introduce, at the underlying trial, evidence of any use of a weapon or injuries the victim sustained. Facts that are relevant to sentencing often are bound up in the core crime. To the extent certain cases involve particular facts that are unusually prejudicial, courts can consider appropriate stipulations,[263] or defendants can waive their right to jury determinations of such facts.[264]

To the extent pre-*Blakely* practice allowed prosecutors to opt not to present all aggravating facts to a jury, but instead to prove only the basics of the crime to a jury and then seek an enhancement later from the judge based upon the

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258. Because an effort to simplify and streamline the Guidelines will have this effect, I propose expanding the maximum possible sentence at each Guideline level to counterbalance this downward force on sentences. *See infra* Part V.C.

259. *See* Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) ("Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.") (citation omitted).

260. Breyer, *supra* note 17, at 10.

261. *See Blakely*, 124 S. Ct. at 2556–57 (Breyer, J., dissenting).

262. I can think of no instance as a federal prosecutor where I would have deferred until sentencing any presentation of evidence about drug quantities or the use of firearms in a drug trial. Such information is often part of the "narrative force" of the Government's presentation at trial. *See* Old Chief v. United States, 519 U.S. 172, 186–89 (1997) (noting that the Government generally may prove its case as it sees fit).

263. *See Old Chief*, 519 U.S. 172, 175–178 (discussing defendant's offer to stipulate to prior conviction in felony possession case).

264. *See Blakely*, 124 S. Ct. at 2541 ("Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.").

preponderance standard, this practice goes to the core of the Sixth Amendment violation *Blakely* identified. Forcing prosecutors to put more facts before juries vindicates the constitutional interests at the heart of that decision. As Professor Barry L. Johnson has powerfully argued, "Jury participation in the criminal justice system serves several important values. One such value is to ensure the 'substantive criminal law's objective of only punishing those defendants who are morally culpable in the community's eyes.'"[265]

Professor Erik Lillquist, however, recently highlighted a troubling concern with an increased role for juries in sentencing. He points out that, when juries have more options from which to choose, more juries will opt to convict, and the number of acquittals will decrease.[266] In other words, if jurors only have the option of "guilty" or "not guilty" on a simple count, they are more likely to acquit outright than if they have a menu of different conviction choices.[267] While bifurcating jury trials into guilt and penalty phases is a possible solution, most people view bifurcation as expensive and time-consuming.[268]

However, a less costly and less time-consuming alternative to bifurcation is available. To the extent that much of the sentencing evidence is, in fact, relevant at the underlying trial, jurors could receive serial verdict forms. Juries could initially decide the guilt or innocence of the defendant on the core underlying statute, and upon a finding of guilt, then make the factual determinations specific to the sentence.

Another problem with increased jury involvement at sentencing is the problem of the "ignorant decision-maker." Whereas judges under the current Guidelines fully understand the implications of their factual findings, juries would not. Traditionally, juries have been kept ignorant of the sentencing implications of their decisions.[269] At first blush, leaving more sentencing decisions to jurors might appear to exacerbate this problem.

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265. Johnson, *supra* note 56, at 183–84 (quoting Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 216 (1983)).

266. *See* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621 (2004). As Lillquist explains:

> Ironically, *Apprendi* may cause more harms to defendants than benefits. *Apprendi*, in short, should result in *more convictions*. This is because *Apprendi*, at least as it has been implemented in many courts, has the effect of increasing the number of options placed before the jury. Where once the jury had a decision between not guilty or guilty, now the jury must decide among not guilty, guilty of a lesser offense, or guilty of a greater offense.

*Id.* at 623. Of course, *Blakely* only magnifies this effect. Whereas the prevailing view post-*Apprendi* and pre-*Blakely* was that judges still made the factual determinations that increased sentences within the Guidelines—as opposed to factual determinations that increased maximum statutory sentences—after *Blakely*, juries may be called upon to make many more factual determinations, effectively expanding their menu of conviction options even further. *Cf.* Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) (noting "modest inconvenience to the State of submitting its accusation" to a jury).

267. *See* Lillquist, *supra* note 266, at 623.

268. *See Blakely*, 124 S. Ct. at 2556 (Breyer, J., dissenting); Standen, *supra* note 8, at 794.

269. *See* Bibas, *supra* note 58, at 1134 n.249 ("Juries are not told about penalties and indeed are forbidden to consider them."). I will leave for another day questions about the wisdom of keeping full information from jurors, a practice that also permeates the Federal Rules of Evidence and other aspects of criminal trials.

Upon further reflection, the problem of the ignorant decision-maker is more acute under the current Guidelines regime than under a proposed system in which jurors complete serial verdict forms. Under the current system, jurors have no way of knowing that a verdict of "guilty" may set in motion an extended sentencing hearing at which the court may, for example, make sentencing determinations based upon conduct for which the jury has acquitted the defendant.[270] By finding a defendant guilty, under the current Guidelines, jurors unwittingly trigger far longer sentences than they realize. Yet, if courts specifically *asked* jurors to make findings as to quantity, use of a firearm, and other specific characteristics of the offense, the jurors would likely contemplate that those judgments would be relevant to the ultimate sentence.[271]

### 3. *Chapter Three Role Adjustments and the Sentencing Table*

The Guidelines chapter three adjustments related to victims, role in the offense, and obstruction of justice require consideration after *Blakely* and *Booker*.[272] Some adjustments will be more readily determinable by juries than others. The source of an adjustment for obstruction of justice, for example, could come from additional jury factual findings after the decision on the underlying crime or, if that solution is not practical[273] and the Government does not wish to charge obstruction as a separate crime, a higher sentence within the Guidelines range. Determining whether a defendant had an "aggravating role" in an offense,[274] however, may not be as susceptible to jury determination.

A defendant's "role in the offense," whether mitigating or aggravating, is a classic sentencing factor. To the extent that a judge makes a mitigating role determination, the judge decreases the defendant's sentence. This practice does not run afoul of *Blakely*. However, because the current Guidelines contemplate aggravating role adjustments based upon factual determinations such as the number of people supervised, such enhancements conflict with *Blakely*, even though a decision about a defendant's role in the offense is the kind of factor a judge might traditionally have considered in pronouncing the sentence under a discretionary scheme.

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270. *See supra* note 56 and accompanying text.

271. *But see* King & Klein, *supra* note 40, at 319 ("*Blakely* does not mandate jury sentencing, only jury fact-finding for facts triggering sentences beyond those authorized by the conviction alone; the jury will still not know the punishment consequences of its findings.").

272. Some such changes suggest themselves. For example, with regard to the Guidelines section on hate crimes, which contemplates that the "finder of fact at trial" should make any findings such as racial animus "beyond a reasonable doubt," a simple modification to the subsection could eliminate that portion that also provides that the sentencing judge can make such findings after a plea (unless the defendant admits them). *See* U.S.S.G. § 3A1.1 (Nov. 2004). Such judicial findings are precisely what *Apprendi* and *Blakely* deconstitutionalized.

273. If trial perjury were the basis of the "obstruction of justice," the court could presumably ask the jury to make a factual determination on that point if it rendered a guilty verdict on the underlying crime at trial. If obstruction of justice occurred after trial but before sentencing, the Government would have the option of bringing a new charge or seeking a higher sentence within the Guidelines range. *See* United States v. Booker, 125 S. Ct. 738, 772 (2005) (Stevens, J., dissenting) ("Because the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and discretionary decisions within those ranges, they allow ample latitude for judicial factfinding that does not even arguably raise any Sixth Amendment issue.").

274. U.S.S.G. § 3B1.1 (Nov. 2004).

My proposed amendment to this section of the Guidelines is to eliminate aggravating role adjustments in favor of expanded Guidelines ranges at each level. This change would enable judges to exercise expanded discretion in assessing a defendant's role, but prevent judges from giving sentences that Congress would likely consider too lenient. Specifically, I propose that, at each level of the new Sentencing Table, the maximum sentence shall be the maximum sentence that currently corresponds to the offense level that is three levels higher ($L + 3$).[275] For example, whereas the current sentencing table provides for a range of zero to six months at offense level seven, six to twelve months at offense level ten, and twelve to eighteen months for offense level thirteen, the new ranges would provide zero to twelve months at offense level seven, six to eighteen months at offense level ten, and so on.[276]

With an expanded sentencing range available at each level, judges can take the defendant's "role in the offense" into account by sentencing organizers and leaders at the higher end of the Guidelines range. Expanded ranges will also help offset any other downward force in sentencing *Blakely* and *Booker* exerted.

Finally, I propose the simplification and regularization of the entire Sentencing Table, such that all sentences are multiples of six, corresponding to half-year increments. This change makes sentencing options more transparent. Thus, in creating my Proposed New Sentencing Table reproduced below, I first regularized all sentences so that they are easily divisible into half-year periods. In Category II, for example, the sentencing range at offense level seven of two to eight months under the *current* Sentencing Table[277] became zero to six months; the current sentencing range at offense level eight of four to ten months,[278] became six to twelve. All numbers were rounded to the nearest multiple of six. Once the table was "regularized," I made the upward adjustments at each level as described above ($L + 3$). Thus, the maximum sentence that previously corresponded to level forty-three would now correspond to level forty, the maximum sentence that previously corresponded to level forty-two would now correspond to level thirty-nine, and so on. Other than "regularizing" each number to make it divisible by six, as described above, I made no changes to the minimum sentences in the sentence ranges.

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275. *Cf.* Memorandum from Frank Bowman to the United States Sentencing Commission (June 27, 2004), *available at* 16 FED. SENT. REP. 364 (2004) (proposing what has become known as the "Bowman Fix," which would simply raise the top of each Guideline level to the statutory maximum); Mark Osler, *The* Blakely *Problem and the 3x Solution*, 16 FED. SENT. REP. 344, 344-45 (2004) (calling for ranges that would be "either 18 months or 75% of the bottom of the bottom of the range, whichever is higher"). The "Bowman Fix," while likely very appealing to a Congress most concerned about undue judicial leniency, would provide such large ranges that unwarranted disparities in sentences would inevitably recur. In addition, his system would make plea negotiations more difficult, because defendants would have no reasonable assurances about the outer bounds of their sentences. *Cf.* Jacobs, *supra* note 241, at 240 ("Determinate sentencing promises to relieve prisoners' uncertainty by providing a certain release date[.]"); Jeffrey R. Stern, Note, *Preemption Doctrine and the Failure of Textualism in* Cipollone v. Liggett Group, 80 VA. L. REV. 979, 992 (1985) ("As outcomes become more certain, litigators settle claims or otherwise avoid litigation.").

Osler's proposal is intriguing, but provides ranges that are too great at the lower levels. Starting at Level 35, $L+3$ begins to result in ranges that are even greater than those Osler proposes.

276. *See* Proposed New Sentencing Table, Exhibit B, *infra*. In the example, the given range is for a person in Criminal History Category I. *See* Sentencing Table, Exhibit A, *supra* note 45, and Proposed New Sentencing Table, Exhibit B, *infra*.

277. *See* Sentencing Table, Exhibit A, *supra* note 45.

278. *See id.*

One advantage of the Guidelines is that they are a work in progress, susceptible to modification. To the extent that judges complain that the current Guidelines give them too little discretion, but Congress distrusts judges it perceives to be lenient, this proposed change in the sentencing table allows Congress to monitor the success of expanded discretion.[279] Would judges, for example, start sentencing leaders of criminal organizations toward the top end of the new ranges? If not, then a reassessment of the Guidelines would be in order.

279. As *Booker B* made clear, "[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." United States v. Booker, 125 S. Ct. 738, 767 (2005). Indeed, the Commission just sent out a missive to all judges making clear that, post-*Booker*, its collection of statistical information is more important than ever.

# EXHIBIT B
## PROPOSED NEW SENTENCING TABLE
## (IN MONTHS OF IMPRISONMENT)

### CRIMINAL HISTORY CATEGORY (CRIMINAL HISTORY POINTS)

| Offenses Level | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
|---|---|---|---|---|---|---|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-12 | 0-12 |
| 2 | 0-6 | 0-6 | 0-6 | 0-12 | 0-12 | 0-18 |
| 3 | 0-6 | 0-6 | 0-6 | 0-12 | 0-12 | 6-18 |
| 4 | 0-6 | 0-6 | 0-12 | 0-12 | 6-18 | 6-24 |
| 5 | 0-6 | 0-12 | 0-12 | 6-18 | 12-18 | 12-24 |
| 6 | 0-12 | 0-12 | 0-12 | 6-18 | 12-24 | 12-30 |
| 7 | 0-12 | 0-12 | 6-18 | 6-24 | 12-30 | 18-30 |
| 8 | 0-12 | 6-18 | 6-18 | 12-24 | 18-30 | 18-36 |
| 9 | 6-18 | 6-18 | 6-24 | 12-30 | 18-36 | 24-36 |
| 10 | 6-18 | 6-24 | 12-24 | 18-30 | 24-36 | 24-42 |
| 11 | 6-24 | 12-24 | 12-30 | 18-36 | 24-42 | 30-48 |
| 12 | 12-24 | 12-30 | 18-30 | 24-36 | 30-48 | 30-54 |
| 13 | 12-30 | 18-30 | 18-36 | 24-42 | 30-54 | 36-60 |
| 14 | 18-30 | 18-36 | 24-40 | 30-48 | 36-60 | 36-66 |
| 15 | 18-36 | 24-40 | 24-48 | 30-54 | 36-66 | 42-72 |
| 16 | 24-40 | 24-48 | 30-54 | 36-60 | 42-72 | 48-78 |
| 17 | 24-48 | 30-54 | 30-54 | 36-66 | 48-78 | 54-90 |
| 18 | 30-54 | 30-54 | 36-60 | 42-72 | 54-90 | 60-96 |
| 19 | 30-54 | 36-60 | 36-66 | 48-78 | 60-96 | 66-108 |
| 20 | 36-60 | 36-66 | 42-72 | 54-90 | 66-108 | 72-120 |
| 21 | 36-66 | 42-72 | 48-78 | 60-96 | 72-120 | 78-126 |
| 22 | 42-72 | 48-78 | 54-90 | 66-108 | 78-126 | 84-138 |
| 23 | 48-78 | 54-90 | 60-96 | 72-120 | 84-138 | 90-150 |
| 24 | 54-90 | 60-96 | 66-108 | 78-126 | 90-150 | 102-162 |
| 25 | 60-96 | 66-108 | 72-120 | 84-138 | 102-162 | 108-174 |
| 26 | 66-108 | 72-120 | 78-138 | 90-150 | 108-174 | 120-186 |
| 27 | 72-120 | 78-138 | 90-150 | 102-162 | 120-186 | 132-210 |
| 28 | 78-138 | 90-150 | 96-168 | 108-174 | 132-210 | 138-234 |
| 29 | 90-150 | 96-168 | 108-186 | 120-186 | 138-234 | 150-264 |
| 30 | 96-168 | 108-186 | 120-210 | 138-234 | 150-264 | 168-294 |
| 31 | 108-186 | 120-210 | 138-234 | 150-264 | 168-294 | 186-330 |
| 32 | 120-210 | 138-234 | 150-264 | 168-294 | 186-330 | 210-366 |
| 33 | 138-234 | 150-264 | 168-294 | 186-330 | 210-366 | 234-406 |
| 34 | 150-264 | 168-294 | 186-330 | 210-366 | 234-406 | 264-life |
| 35 | 168-294 | 186-330 | 210-366 | 234-406 | 264-life | 294-life |
| 36 | 188-330 | 210-366 | 234-406 | 264-life | 294-life | 324-life |
| 37 | 210-366 | 234-406 | 264-life | 294-life | 324-life | 360-life |
| 38 | 234-406 | 264-life | 292-life | 324-life | 360-life | 360-life |
| 39 | 264-life | 292-life | 324-life | 360-life | 360-life | 360-life |
| 40 | 292-life | 324-life | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | Life | Life | Life | Life | Life | Life |

## V. CONCLUSION

These changes are merely a start in what will be a long and laborious process of reassessing the Guidelines after *Blakely* and *Booker*. Simplifying the Guidelines is a salutary goal in itself. To comply with the Sixth Amendment without jettisoning mandatory Guidelines requires a greater role for juries at sentencing, making Guidelines simplification not just desirable, but essential. The Guidelines are certainly imperfect, but I agree with those—including the *Blakely* dissenters who comprised the *Booker B* majority—who argue that the goals of sentencing reform were worthy ones. Unfortunately, *Booker B*'s fix eviscerates the most important feature of the Guidelines while failing to address the Sixth Amendment, due process, and fairness concerns implicit in a system that depends heavily upon judicial fact-finding based on a mere preponderance standard. The relative harshness of the current Guidelines regime is arguably more justifiable if defendants receive sentencing enhancements only on the basis of facts juries find beyond a reasonable doubt.

The Guidelines have always been a "work in progress," and *Blakely* and *Booker* present an opportunity to fix some of their most problematic features. It would be unfortunate if Congress were to respond to *Booker* by simply enacting harsh mandatory minimum sentences for most federal crimes. Salvaging the Guidelines is possible, but will have to occur in the current political climate in which Congress is manifestly mistrustful of the scope of sentencing discretion that *Booker B* contemplated. Giving more authority to jurors protects the rights of criminal defendants and avoids the problems that plagued the pre-Guidelines era. In addition, giving judges limited additional discretion to impose higher sentences within revised sentencing ranges may be one way to satisfy both Congress and judges alike.