

Pre-Sentencing Guidelines

Before there were sentencing guideline systems, judges were free to sentence criminals to prison for as long as the statutory maximum, or to no time at all, and anywhere in between. Additionally, judges had no oversight to ensure fairness as a “sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”⁵ This “indeterminate sentencing” system was widely denounced in the late 1970’s and early 1980’s for allowing wide disparities in sentences of offenders with similar criminal histories and similar crimes.⁶ The disparities in sentence length and severity were not new in the late 1970’s. In fact, in 1939 the American Bar Association issued a report stating, “The sentencing records of many judges, as well as the judges’ own statements concerning their sentencing practices, shows the presence of arbitrary variance and numerous highly subjective factors and personal biases in the imposing of sentence.”⁷

Writing the Federal Sentencing Guidelines

The Comprehensive Crime Control Act of 1984⁸ ended of total judicial discretion in the form of indeterminate sentencing but increased prosecutorial discretion in determinate sentencing through charge selection, plea bargaining, “fact bargaining,” and the use of substantial assistance downward departure motions. The act created the United States Sentencing Commission (USSC), and charged the Commission with writing sentencing guidelines for federal criminals effective November 1, 1987. The purposes of the commission were two-fold: “honesty in sentencing” and reducing the “unjustifiably wide” sentencing disparity.⁹

According to Stephen Breyer,^{*} “By ‘honesty,’ Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four.”¹⁰ Parole was simultaneously abolished in the federal system; in 1987, a sentence of twelve years meant twelve years served.[†]

To fulfill the second objective—reducing sentencing disparities when measured by sex, race, and geography—the Sentencing Commission created a grid “that determines sentencing in light of characteristics of the offense and characteristics of the offender.”¹¹ Each “box” in the grid gives a sentencing range deemed appropriate for the severity of the offense and the defendant’s criminal history. Judges were required to sentence within this range, only departing because of enumerated mitigating or aggravating circumstances, subject to appellate review.¹²

The Sentencing Guidelines were not perfect, nor could they have been expected to be. There were at least four large compromises made when the Guideline Manual was first written. Those were: “competing rationales behind a ‘real offense’ sentencing system and a ‘charge offense’ system,”¹³ “the level of detail appropriate within the system,”¹⁴ “a ‘just desserts’ system or a ‘deterrence’ system,”¹⁵ and the role of the plea bargain in sentencing.¹⁶

^{*} Justice Breyer, then a US court of Appeals judge, served as a commissioner on the United States Sentencing Commission from 1985-1989, and was instrumental in writing the original Federal Sentencing Guidelines and accompanying statement of policy and guidance.

[†] Prisoners can be granted 54 days of “good time” per year if they cause no problems. So, if a prisoner is sentenced to twelve years, he may actually get out 548 days early, but this is still fundamentally different from the previous practice of a defendant’s sentence being reduced by years by the Parole Commission.

A “real offense” sentencing system is one that “bases punishment on the elements of the specific circumstances of the case.”¹⁷ In other words, it is a system that allows a judge to use discretion in sentencing defendants based on the aspects of the given offense. The judge usually makes these sentencing decisions “without a jury and without the use of such rules of evidence as the [prohibition against] hearsay or best evidence rules, or the requirement of proof of facts beyond a reasonable doubt.”¹⁸

A “charge offense” sentencing system, in contrast, is one that “tie[s] punishments directly to the offense for which the defendant was convicted.”¹⁹ This system tends to be less sensitive to the different ways and circumstances under which crimes are committed.*

The level of detail in the sentencing system was also a major point of compromise because the more detailed a system is, that is, the more it can “treat different cases differently, the less manageable the sentencing system becomes.”²⁰ To make the system workable, the Sentencing Commission had to limit the number of offense categories, or types of crimes, in the Guideline Manual. It could not possibly provide for each offender’s unique criminal circumstances.

The Commission also had to decide whether to punish according to a “just desserts” system, or one that puts more emphasis on deterrence. “The ‘just desserts’ approach would require that the Commission list criminal behaviors in rank order of severity and then apply similarly ranked punishments accordingly.”²¹ A system that emphasizes deterrence would punish criminal conduct that may not be very severe with harsh penalties, based on the theory that a potential criminal, faced with the possibility of a long prison sentence, would abstain from the criminal conduct. Because of a lack of consensus between the commissioners on what crimes were most “severe” and because of a lack of empirical data on deterrence, the Commission “decided to base the Guidelines primarily upon typical, or average, actual past practice.”²²

The vast majority of federal prosecutions end in plea agreements.† Breyer asserts the “Commission’s data reveals that a defendant who pleads guilty will typically receive a sentence reduced by thirty to forty percent.”²³ This makes sense, as an “acceptance of responsibility” allows the criminal justice process to move forward faster, and it shows the defendant is willing to bear the consequences of his actions. However, because the Guideline Manual has an explicit reduction in sentence for “accepting responsibility,”²⁴ “is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.”²⁵

Blakely involved consideration of all of the above compromises. In fact, debate over the compromises never went away for the fifteen years the Federal Guidelines were safe, settled law.‡ The case law that led up to *Blakely* involved debates over these four compromises. Not only that, but prosecutors used each of the compromises to their

* Some of these circumstances could be: whether the defendant did or did not use a gun in commission of the crime, whether or not money was taken, how much money was taken, whether someone was injured, how badly the person may have been injured, etc.

† In fiscal year 2002, 97.1% of federal criminal prosecutions ended in a guilty plea. This figure is not abnormal. (U.S. SENTENCING COMMISSION: 2002 Sourcebook of Federal Sentencing Statistics).

‡ *Minstretta v. United States*, 488 U.S. 361 (1989) (holding that the Sentencing Guidelines are constitutional because Congress neither delegated excessive legislative power to the Commission, nor violated the separation-of-powers principle).

advantage, proving that the inevitable discretion in the judicial system is like water, putting pressure on it will not reduce its quantity, it will just force it to another area.

Case Law Leading up to *Blakely*

Before discussing *Blakely* and its possible ramifications, it is necessary to understand the case law that led up to it. This case law reflects the compromises consciously made when writing the Sentencing Guidelines, and concerns sentencing, judicial discretion, burdens of proof, and what an “element” of a crime is.

***In re Winship*²⁶ (1970)**

Although *Winship* is a case from 1970,^{*} it sets a precedent that comes full circle in *Blakely*. Justice Brennan wrote the majority opinion in *Winship*, joined by five other members of the Court. Justice Brennan begins his opinion by discussing the standard of “proof beyond a reasonable doubt,” and, at the end of the first section of the opinion states boldly, “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”²⁷

Stephanos Bibas[†] notes “[t]he Court said nothing, however, about how to determine what is a ‘fact necessary to constitute the crime charged.’”²⁸ This important omission would open the door for future claims that “sentencing factors,” which could be defined as the details that make a crime unique, should be considered “elements” of the crime—necessary facts for a jury to find beyond a reasonable doubt.

***Mullaney et al. v. Wilbur*²⁹ (1975)**

The Court revisited the “burden of proof” question in *Mullaney*. This case involved a Maine murder statute that presumed “malice aforethought.”³⁰ “Defendants bore the burden of disproving malice aforethought by showing, by a preponderance of the evidence that they had killed in the heat of passion.”³¹ The Court held unanimously, in an opinion written by Justice Powell, that “malice aforethought” was an “element”³² of the offense, and thus must be proven beyond a reasonable doubt according to the *Winship* precedent.³³

Also, the Court stated that the *Winship* rule should not be “limited to those facts that constitute a crime as defined by state law,”³⁴ as state legislatures could then evade *Winship* by redefining elements of the offense as sentencing factors. Bibas notes that “[r]ead literally, this language could have made states bear the burden of proving all facts that affect culpability.”³⁵ Two years later, however, the Court would rule on a case that “retreated from *Mullaney*’s broad language.”³⁶

^{*} *Winship* was a case involving a juvenile, and the constitutional question was “whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law.” (In re *Winship*, 397 U.S. 358, 365 (1970)). Besides answering this question in the affirmative, *Winship* also, for the first time, clearly stated the constitutional principal we are concerned with: every fact constituting a crime must be proved beyond a reasonable doubt.

[†] Prof. Bibas has written extensively on “elements” jurisprudence, sentencing, and plea bargaining.

Patterson v. New York³⁷ (1977)

Patterson strayed from the *Winship* and *Mullaney* trend of placing the burden of proving all facts beyond a reasonable doubt on the prosecutor. A New York murder statute was in question because it seemed to violate the *Mullaney* precedent, as it required the defendant to raise an affirmative defense of “extreme emotional disturbance”³⁸ in order to reduce murder to manslaughter. This New York law stated that “the defendant had the burden of proving his affirmative defense by a preponderance of the evidence.”³⁹

Justice White wrote for the Court, in a 5-3 decision, that in *Patterson* “[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt.”⁴⁰ *Patterson* fundamentally differed from *Mullaney* because “[n]o further facts are either presumed or inferred in order to constitute the crime.”⁴¹ In *Mullaney*, malice aforethought was presumed; in *Patterson*, nothing was presumed.*

Bibas points out that “*Patterson* read *Mullaney* as narrowly as possible. The *Mullaney* law, *Patterson* stressed, had treated malice aforethought as an element and then presumed that same element... While *Patterson* stressed deference to legislative definitions of elements, it and *Mullaney* both dealt with affirmative defenses to guilt.”⁴²

McMillan et al. v. Pennsylvania⁴³ (1986)

McMillan involved a mandatory five year sentence for “anyone convicted of certain enumerated felonies...if the sentencing judge finds, by a preponderance of the evidence, that the person ‘visibly possessed a firearm’ during the commission of the offense.”⁴⁴ *McMillan* was the first case to apply the *Mullaney* question of “elements” to sentencing. Also, as the first case in which more than one of the *Blakely* Justices was on the Court, the *Blakely* camps begin to be set up.[†] Justice Rehnquist[‡] wrote the Majority Opinion, stating that:

“the Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, § 9712(b), but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt.”⁴⁵

Justice Rehnquist’s opinion, therefore, found its precedent in *Patterson*, not in *Mullaney*, and upheld the sentence enhancement.

The Supreme Court’s position after *Winship*, *Mullaney*, *Patterson*, and *McMillan* was that a state legislature could specifically label certain parts of a crime (e.g. conduct, state of mind, circumstances and criminal history) as “elements” of the crime, and others as “sentencing factors.” All of the “elements” of a crime had to be proven by a jury

* Another precedent discussed in *Patterson* is *Leland v. Oregon* (343 U.S. 790 (1952)) which held that a state can place the burden of proving insanity on the defendant. The Court in *Patterson* believed “extreme emotional disturbance” akin to insanity: “The Chief Justice and Mr. Justice Rehnquist, concurring, expressed their understanding that the *Mullaney* decision did not call into question the ruling in *Leland v. Oregon*, with respect to the proof of insanity.” (*Patterson v. New York*, 432 U.S. 197, 205 (1977) (citations omitted)).

[†] Justice Rehnquist wrote the Majority opinion in *McMillan*, which Justice O’Connor joined, while Justice Stevens filed a dissent.

[‡] Rehnquist was still an associate justice during *McMillan*. He was elevated to Chief Justice three months later.

beyond a reasonable doubt; all of the “sentencing factors” could be found by a judge using a preponderance of the evidence standard during sentencing. This rule would seem easy to follow; however there was still considerable doubt whether there was a substantive difference between “elements” and “sentencing factors” or if that distinction was just a legislative labeling decision.

***Almendarez-Torres v. United States*⁴⁶ (1998)**

Almendarez-Torres was decided by the same nine Justices who deliberated upon *Blakely*. Justice Breyer wrote the opinion of the Court, and was joined by Chief Justice Rehnquist, and Justices O’Connor, Kennedy, and Thomas. Justice Scalia wrote a dissent joined by Justices Stevens, Souter and Ginsburg.

Almendarez-Torres revisited the *McMillan* question of a sentence enhancement. The statute in question enhanced the maximum penalty for an “alien” who was once deported from the United States and then re-enters the US from 2 years to 20 years if the initial “deportation was subsequent to a conviction for commission of an aggravated felony.”⁴⁷ Justice Breyer wrote, “[w]e conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist.”⁴⁸ In doing so, Justice Breyer utilized the narrow reading of *Mullaney* that *Patterson* employed, and the precedent of *McMillan* allowing the legislature to separate “elements” from “sentencing factors.” Bibas states that in this case “the Court held that not every fact that increases a statutory maximum need be an element.”⁴⁹ This holding was directly contradicted by the later *Blakely* decision.

Justice Scalia’s dissent in *Almendarez-Torres* points to the coming battle over “elements” jurisprudence. He contends that recidivism, if used to enhance the statutory maximum sentence, must be charged in the indictment and proven to a jury beyond reasonable doubt.^{*50}

***Jones v. United States*⁵¹ (1999)**

After *Almendarez-Torres*, the line between elements of a crime and sentencing factors seemed to be settled.[†] A year later, however, Justice Thomas switched sides when deciding *Jones*. A federal car-jacking statute⁵² listed the many elements of the crime, and then three subsections detailed the sentencing factors. One of the subsections raised the maximum sentence from fifteen to twenty-five years if “serious bodily injury results” from the car-jacking.⁵³ The opinion of the Court, written by Justice Souter for the other three *Almendarez-Torres* dissenters and Justice Thomas, determined that the statute

* As Bibas summarizes, “In short, the majority and dissent stood diametrically opposed. The majority stressed deference to legislatures, the traditional treatment of recidivism at sentencing, and the need to avoid jury prejudice. In contrast the dissent distrusted legislatures and judges, exalted juries, read tradition differently, and construed the statute narrowly to avoid strong constitutional doubts.” (Stephanos Bibas, Article: *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1110).

† A few months after *Almendarez-Torres*, the Court decided *Monge v. California* (524 U.S. 721 (1998)) which again raised a question of whether a judge could enhance a sentence based on recidivism. The Court ruled that a judge could, but the dissent, led by Justice Scalia, claimed that the prior conviction must be an element of the crime currently before the court, and must be charged in an indictment and proven beyond a reasonable doubt. He used the Sixth Amendment’s trial by jury right to back up his claim, and worried over a day when legislators would give judges the ability to turn misdemeanors into felonies by heaping possible enhancements into statutes.

defined three separate crimes, each to be proven beyond a reasonable doubt by a jury, instead of one crime with three subsections of sentencing factors.⁵⁴

Confusingly, the Court held that “[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury,”⁵⁵ but in a footnote stated, “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.”(Italics added)⁵⁶

Justice Kennedy, writing for the dissenters, warned that “the Court’s constitutional doubt holding makes it difficult to predict the full consequences of today’s holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States.”⁵⁷

***Apprendi v. New Jersey*⁵⁸ (2000)**

In the landmark case of *Apprendi*, the Court formally adopted the “elements” rule, quoting directly from the confusing footnote in *Jones*.⁵⁹ Justice Stevens wrote for the Majority, joined by the same Justices as in *Jones*. The opinion dwelled on the historical role of jury and judge in trials, asserting that the jury was fact-finder and the judge simply imposed the appropriate sentence.⁶⁰ The Majority also rejected the labeling of “elements” and “sentencing factors” as a legislative decision, in effect overturning part of *McMillan*

Justice O’Connor, in dissent, echoes Justice Kennedy’s fears in *Jones*, “The principle thus would apply not only to schemes like New Jersey’s...but also to all determinate-sentencing schemes in which the length of a defendant’s sentence within the statutory range turns on specific factual determinations.”⁶¹

Justice Breyer, also in dissent, brings up the awkward position many defendants would find themselves in at trial, “having to deny he committed the crime yet offer proof about how he committed it, *e.g.*, ‘I did not sell drugs, but I sold no more than 500 grams.’”⁶² If all facts were charged in the indictment and submitted to a jury to find beyond a reasonable doubt, including sentencing facts, then the defendant would have to contest all of them at trial.

***Blakely v. Washington* (2004)**

Blakely applied the reasoning of *Apprendi* to Washington State’s sentencing scheme, and found the entire scheme unconstitutional. It stated, “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*,”⁶³ thereby redefining “statutory maximum.” (Italics in original) Justice Scalia wrote the Majority opinion, and the sides were the same as in *Jones* and *Apprendi*.

From a policy-making standpoint, *Blakely* and the “elements” rule leaves American law in an uncomfortable position. Twenty years of sentencing reform in the form of determinate sentencing, sentencing guidelines, and sentencing commissions is in jeopardy. While the Court has not yet ruled the Federal Sentencing Guidelines unconstitutional, they are structurally similar to Washington State’s.⁶⁴

Majority Opinion and the “Elements” Rule

The Majority opinion in *Blakeley* based its decision on two things, its commitment to the “elements” rule adopted in *Apprendi* and the right to a jury trial. The Majority claimed the evidence in *Jones* and *Apprendi* used to adopt the “elements” rule shows long standing precedent.⁶⁵ Yet in *Jones*, the Majority admitted that the Framers’ conception of the Sixth Amendment is difficult to ascertain because “the scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the Framing.”⁶⁶ The Majority in *Jones* also conceded that the “fact that we point to no statutes of the earlier time exemplifying the distinction between elements and facts that elevate sentencing ranges is unsurprising, given the breadth of judicial discretion over fines and corporal punishment in less important, misdemeanor, cases.”⁶⁷ Again, in *Apprendi*, Justice Stevens noted, “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ 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.”⁶⁸

Because of these admissions by the Majority in these cases, there is no validity to an original intent argument, as this debate was not yet conceived,^{*} and because judges, in fact, used discretion when sentencing offenders in “less important” misdemeanor cases. There was, however, precedent ignored by the Majority, namely the narrow reading of *Mullaney* used in *Patterson*, *McMillan*, which allowed legislatures to decide the difference between “elements” and “sentencing factors,” and *Almendarez-Torres*, which clearly rejected the “elements” rule.⁶⁹

The Majority’s other rationale in *Blakely* is the right to a jury trial.⁷⁰ The Majority wrote, “the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.”⁷¹ The argument was made that a “judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control the Framers intended.”⁷² In an attempt to support this claim in light of the history of indeterminate sentencing, which gave judges enormous discretion in sentencing, Justice Scalia wrote, “[Indeterminate sentencing] increases judicial discretion, to be sure, but not at the expense of the jury’s traditional function of finding the facts essential to lawful imposition of the penalty.”⁷³ It is difficult to understand how a system of indeterminate sentencing, wherein a jury would only determine guilt and a judge would use total discretion in sentencing, could be less harmful to a defendant’s Sixth Amendment rights than a move towards guided judicial discretion in the form of Washington State’s sentencing guidelines.

Justice Breyer’s List of Possible Legislative Solutions

While the Majority opinion in *Blakely* dwelt on the same history and logic used to decide *Jones* and *Apprendi*, the Dissent lamented the decision and examined its policy implications. Justice Breyer outlined some possible choices legislators have when trying to comply with *Blakely*.

“A first option for legislators is to create a simple, pure or nearly pure ‘charge offense’ or ‘determinate’ sentencing system.”⁷⁴ Not only does this system, which attaches a pre-determined sentence—not even a range—to each crime, sentence offenders

* Perhaps the lack of judicial discretion in felony cases can be attributed to the fact that “[a]t common law, each felony carried a fixed penalty.” (Stephanos Bibas, Article: *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1117).

who may have committed their crimes in very different ways the same, it also gives the prosecutor enormous power when deciding which crime to charge.⁷⁵

“A second option for legislators is to return to a system of indeterminate sentencing,”⁷⁶ such as the federal system justifiably criticized in the late 1970’s and early 1980’s. Such a system would allow the judge to do the same fact-finding the *Blakely* Majority ruled unconstitutional, though just in an informal, non-transparent manner.

“A third option is that which the Court seems to believe legislators will in fact take. That is the option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi*’s dictates.”⁷⁷ This system would allow judges to depart downward from sentencing guidelines, as *Apprendi* is only concerned with increases to statutory maxima. To make this reformed system work, the guidelines would have to be written in “a highly calibrated form of the ‘pure charge’ system.”⁷⁸ Because the prosecutor would have to charge all the details about how the crime was committed, he would, again, have enormous power when deciding exactly what to charge a defendant with.

Or, instead of this detailed “pure charge” system, each trial could be separated into the “guilt” phase and the “sentencing” phase, each with its own jury—much like many current death penalty schemes.⁷⁹ This bifurcated system would only be costly and time consuming if it were not the case that the vast majority of defendants give up their trial right anyway in the form of a plea agreement.⁸⁰ Justice Breyer expresses his confusion about the logic behind this system and how it correlates to the *Blakely* Majority’s Sixth Amendment claim, “I do not understand how the Sixth Amendment could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.”⁸¹

A possible fourth option is that “Congress and state legislatures might...rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts.”⁸² This solution would involve just another labeling choice, such as the one that differentiated “elements” of a crime from “sentencing factors,” so it may eventually fall under constitutional doubt as well.

Ill-Fated Attempts at Decreasing Over-all Discretion

Indeterminate sentencing schemes were “based on concepts of the offender’s possible, indeed probable, rehabilitation,”⁸³ wrote Justice Blackmun in *Minstretta v. United States*.⁸⁴ Rehabilitation, as a goal of the judicial system, was attacked as unreasonable and unattainable in the late 1970’s.⁸⁵ The end of rehabilitative justice also marked the end of enormous discretion on the part of judges in sentencing, as it was their job to assess the offender and hand down a sentence intended to rehabilitate, among other things.⁸⁶

Judicial discretion was blamed for the wide disparities in sentencing when measured by region, race, and gender, so it was believed that a reduction in discretion would make the judicial system fairer.⁸⁷ The new sentencing guideline systems were supposed to guide the discretion of judges by instructing them “on which facts to consider at sentencing and how much weight to give each fact.”⁸⁸ By taking discretion

* *Minstretta*, 488 U.S. 361 (1989), upheld The Sentencing Reform Act of 1984 and with it the Federal Sentencing Guidelines and the United States Sentencing Commission.

away from judges for the noble purpose of eliminating disparities in sentencing, Congress has increased the discretion given to prosecutors, which has perpetuated disparities.⁸⁹

Mandatory Minimum Sentencing

At the same time the U.S. Sentencing Commission was writing the Federal Sentencing Guidelines, Congress in a spasm of anti-drug legislating restricted judicial discretion further by enacting “mandatory minimum” sentences.⁹⁰ These mandatory minimum offenses achieved their goal of limiting judicial discretion, but “the decision to charge a defendant with a statute that carries a mandatory minimum is in the sole, unreviewable discretion of the prosecutor.”⁹¹ Thus, another attempt at limiting over-all discretion simply created a shift in discretion from the judge to the prosecutor. Mandatory minimums are also notorious, especially in drug cases, for resulting in incredibly lengthy, often unjust prison terms for small-time offenders.⁹² Despite constant criticism, mandatory minimums are still the law.*

PROTECT Act and the Feeney Amendment

Congress recently passed the PROTECT Act,⁹³ to which the Feeney Amendment was attached.⁹⁴ The Feeney Amendment not only prohibits all unenumerated downward departures for a number of crimes, but also changes jurisprudence pertaining to appellate review,[†] orders the Sentencing Commission to collect more data on departures, gives more power to prosecutors in the form of an additional “acceptance of responsibility” sentence reduction, disallows a sentence reduction in some immigration cases, forbids the Sentencing Commission from amending the “acceptance of responsibility” provision, and changes the number of federal judges allowed on the Commission.⁹⁵ Bibas notes that it is important to see the “target of the amendment: unilateral judicial downward departures.”⁹⁶

The Feeney Amendment continues the trend, begun with the initial Sentencing Guidelines, of limiting judicial discretion. It does not, due to the water-like nature of discretion in the judicial system, cut down on the discretion allotted to prosecutors. For example, it increases the prosecutor’s ability to attain a plea agreement by filing a motion to grant the defendant an additional point reduction for “accepting responsibility.” It also does nothing to hinder the “substantial assistance” departures prosecutors file during certain plea agreements.^{‡97} Bibas likens the criminal justice system to a tube of

* In *Harris v. United States*, 536 U.S. 545 (2002) (holding that *Apprendi* rule does not extend to mandatory minimum sentences that are within the statutory maximum), Justice Breyer notes, “mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest and rational system through the use of Sentencing Guidelines.” (*Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring)).

† Bibas claims the Feeney Amendment overturns *Koon v. United States* (518 U.S. 81 (1996)) (establishing “abuse-of-discretion” standard when appellate court reviews decision to depart from Guideline sentencing range). The amendment also forbids a district court from supplying an alternate reason for departure upon remand from a circuit court.

‡ These prosecutor initiated additional “acceptance of responsibility” reductions are granted in 63.7% of all federal criminal adjudications, and “substantial assistance” departures are granted in 17.4% of federal criminal adjudications. (U.S. SENTENCING COMMISSION: 2002 Sourcebook of Federal Sentencing Statistics).

toothpaste, “departures that are squeezed out of the judge’s end of the tube will wind up in the prosecutor’s domain. This hydraulic pressure means that departures will still exist, but they will now occur more often on prosecutor’s terms”⁹⁸

Prosecutor’s Discretion in Context: The Plea Agreement

It is important to remember that all of the Supreme Court rhetoric in *Blakely* about jury trials is almost a moot point. 97.1% of federal criminal adjudications are resolved by plea agreement, not by trial.⁹⁹

For defendants who enter a plea agreement, the only time for them to plead their case, or mercy, to a judge is during the sentencing phase. If all facts must be charged in the indictment, prosecutors will force defendants to admit to things otherwise contestable during sentencing, such as racial-bias, use of a gun, threatening force, personal injury, etc. Defendants “must now surrender hearings on these issues with their guilty pleas, because they must plead guilty to every element of each offense.”¹⁰⁰

The Sentencing Guidelines themselves encourage defendants to plead guilty. Besides the “acceptance of responsibility” reduction, most judges sentence defendants at the bottom portion of the sentencing range when they plead guilty.¹⁰¹ Also, there is an “obstruction of justice” enhancement that can be added to sentences of defendants who perjure themselves during testimony.

The most important power the prosecutor wields during a plea agreement is the “power to select what offenses to charge.”¹⁰² The Supreme Court’s adoption of the “elements” rule enhances this power, as prosecutors will now be able to threaten and rescind any number of elements of the crime the defendant will agree to plead guilty to. As Bibas summarizes:

“What matters is no longer the defendant’s real offense, but the statutory maximum of the statute cited in the indictment. It is up to the prosecutor to decide which statute to cite. These statutory maxima bind the court, no matter how arbitrary or disparate the results. Thus, judges now have less power to check prosecutors.”¹⁰³

Blakely: A Step Backwards

The *Blakely* decision is a step backwards in sentencing reform. As Justice O’Connor suggests in her dissenting opinion, “[t]he consequences of today’s decision will be as far reaching as they are disturbing.”¹⁰⁴ Congress may attempt to solve the current sentencing confusion by passing more mandatory minimum laws, which evade the Sixth Amendment problem by taking any sentencing discretion away from judges. Mandatory minimums, however, are notoriously unjust[†] and give prosecutors unbridled discretion in sentencing because they choose which crimes to charge. The Supreme Court may attempt to differentiate the Federal Sentencing Guidelines from Washington State’s, but that will probably only lead to another confusing sentencing situation.

* Justice O’Connor’s dissenting opinion claims “on March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant’s sentence was at issue” and between “June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court.” (*Blakely v. Washington*, No. 02-1632, 2004 U.S. LEXIS 4573, at *48 n. 2 (2004) (O’Connor, J., dissenting)).

† See U.S. SENTENCING COMMISSION: SPECIAL REPORT TO THE CONGRESS: Mandatory Minimum Sentences in the Federal Criminal Justice System, August, 1991.

Twenty years of sentencing reform now seems dangerously close to being a waste, but there is still some hope that *Blakely* can be used for good ends.

Blakely: A Step Forward?

Supreme Court Challenges of the Federal Sentencing Guidelines

On August 2, 2004, the Supreme Court granted certiorari to two cases to be heard on the first day of oral argument in October, 2004 to resolve the post-*Blakely* confusion.* *United States v. Fanfan*¹⁰⁵ was appealed from the United States District Court for the District of Maine. Together with *United States v. Booker*,¹⁰⁶ which was appealed from the United States Court of Appeals for the Seventh Circuit, they were granted certiorari to resolve the following questions:

“Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant;” and, if the answer to that question is “yes,”

“Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.”¹⁰⁷

The Circuit Court opinion in *Booker* rules the Federal Sentencing Guidelines unconstitutional for the following reason: “[t]he 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)...and that the judge’s findings largely determine the sentence, given the limits on upward and downward departures.”¹⁰⁸ (Italics in original) What doomed the Federal Guidelines in *Booker* was the scientific, overt way in which a judge’s findings enhance the maximum sentence.

If the answer to the first question before the Court turns out to be “yes and the second question is answered in a way that makes the Guidelines wholly inapplicable for purposes of “severability analysis,” then many defendants would be sentenced under the old system of indeterminate sentencing.

The Future of Sentencing

It seems possible that *Blakely* could be used to usher in a new tide of sentencing reform, much like that in the early 1980’s. This sentencing reform is much needed, as the current sentencing guideline system, as noted above, is not perfect—even before *Jones*, *Apprendi*, and *Blakely*. Additionally, the new system of sentencing needs to comply with *Blakely*, and must confront the same compromises and areas of debate that Justice Breyer and the original Sentencing Commissioners did when they developed the Guidelines.

A system of sentencing needs to be developed that understands most criminal defendants plead guilty. Prosecutor’s power during the plea bargaining process must be

* *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. Wis., July 9, 2004), *cert. granted*, 2004 U.S. LEXIS (U.S. Aug. 2, 2004) (No. 04-104) and *United States v. Fanfan*, *cert. granted*, 2004 U.S. LEXIS 4789 (U.S. Aug. 2, 2004) (No. 04-105).

checked by the judge. One way of increasing judicial discretion and decreasing prosecutor's discretion is to make the Federal Sentencing Guidelines merely strong suggestions. Without the force of law, prosecutors will be less sure what the judge will sentence the defendant to. This return to indeterminate sentencing, albeit in a modified form, will return the powers of sentencing to the judge. The prosecutor has held the power to "charge bargain" for too long, and has had too powerful an ability to lower the defendant's sentence by filing motions of "acceptance of responsibility" and "substantial assistance." Defendants should be advised of the maximum sentence, with any possible sentence enhancements, before deciding to forgo the right to a trial in favor of a plea agreement.

Judges would sentence in a less formal, scientific way than they currently do. Instead of each aggravating or mitigating factor having a point value attached, the listing of sentencing factors would be suggestions, which the judge would be strongly encouraged to abide by. As written in the opinion in *Booker*, "there is a difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds...and commanding him to make factfindings and base the sentence (within a narrow band) on them."¹⁰⁹ Appellate review could determine the fairness of a district judge's sentencing decisions, thus providing a check to unbridled judicial discretion.

By shifting discretion back to the judge, the prosecutor-driven criminal justice system of the past fifteen years will abate. By continuing the use of the Guideline Manual as purely a guide to sentencing, federal district judges would all be on the same wavelength during sentencing, and disparities should decrease. By utilizing appellate review of federal sentencing, judicial discretion would be limited and Districts and Circuits would develop norms and regularity in sentencing.

Indeterminate sentencing created unhealthy disparities, as did the past twenty year's attempts at determinate sentencing. A compromise has to be struck which combines the best parts of both. There is no way to know whether these changes would create a perfectly just and workable sentencing system, and likely they would not. Hopefully, however, these changes would improve the current mess resulting from *Blakely*. Like cases should be treated alike; different cases should be treated differently.

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- ¹ Blakely v. Washington, No. 02-1632, 2004 U.S. LEXIS 4573 (2004).
- ² Apprendi v. New Jersey, 530 U.S. 466 (2000).
- ³ See Blakely, *supra* note 1, at *10 (2004), quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
- ⁴ David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 682 (2004).
- ⁵ Stacey C. Koon v. United States 518 U.S. 81, 96 (1996).
- ⁶ Skye Phillips, Notes and Comments: *Protect Downward Departures: Congress and the Executive's Intrusion into Judicial Independence*, 12 J.L. & POL'Y 947, 956-9 (2004).
- ⁷ Morse, *Report of the Committee on Sentencing, Probation, Prisons, and Parole*, 1939 A.B.A. SEC. CRIM. L. REP. 37, 38.
- ⁸ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017, 2023 (codified as amended at 28 U.S.C. § 994(o) (Supp. IV 1986)).
- ⁹ Stephen Breyer, Article: *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).
- ¹⁰ *Id.*
- ¹¹ *Id.*, at 5.
- ¹² *Id.*, at 9.
- ¹³ *Id.*
- ¹⁴ *Id.*, at 13.
- ¹⁵ *Id.*, at 17.
- ¹⁶ *Id.*, at 28.
- ¹⁷ *Id.*, at 10.
- ¹⁸ *Id.*, at 10-11.
- ¹⁹ *Id.*, at 9.
- ²⁰ *Id.*, at 13.
- ²¹ *Id.*, at 15.
- ²² *Id.*, at 17.
- ²³ *Id.*, at 28.
- ²⁴ UNITED STATES SENTENCING COMMISSION, Guidelines Manual, §3E1.1 (Nov. 2003).
- ²⁵ See Breyer, *supra* note 9, at 28.
- ²⁶ In re Winship, 397 U.S. 358 (1970).
- ²⁷ *Id.*, at 364.
- ²⁸ Stephanos Bibas, Article: *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103.
- ²⁹ Mullaney et al. v. Wilbur, 421 U.S. 684 (1975).
- ³⁰ Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964).
- ³¹ See Bibas, *supra* note 28, at 1103.
- ³² *Id.*, at 1104.
- ³³ See Mullaney, *supra* note 29, at 703.
- ³⁴ *Id.*, at 698.
- ³⁵ See Bibas, *supra* note 28, at 1104.
- ³⁶ *Id.*, at 1104.
- ³⁷ Patterson v. New York, 432 U.S. 197 (1977).
- ³⁸ N.Y. Penal Law § 125.20(2) (McKinney 1975).
- ³⁹ See Patterson, *supra* note 37, at 200.
- ⁴⁰ *Id.*, at 205.
- ⁴¹ *Id.*, at 205-6.
- ⁴² See Bibas, *supra* note 28, at 1105.
- ⁴³ McMillan et al. v. Pennsylvania, 477 U.S. 79 (1986).
- ⁴⁴ *Id.*, at 81 *internal quotation from Pennsylvania's Mandatory Minimum Sentencing Act*, 42 Pa. Cons. Stat. § 9712 (1982).
- ⁴⁵ *Id.*, at 85-6.
- ⁴⁶ Hugo Roman Almendarez-Torres, Petitioner v. United States, 523 U.S. 224 (1998).

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- ⁴⁷ 8 U.S.C. § 1326(b)(2) (1994).
- ⁴⁸ See *Almendarez-Torres*, *supra* note 46, at 226.
- ⁴⁹ See *Bibas*, *supra* note 28, at 1108.
- ⁵⁰ See *Almendarez-Torres*, *supra* note 46, at 249.
- ⁵¹ *Nathaniel Jones, Petitioner v. United States*, 526 U.S. 227 (1999).
- ⁵² 18 U.S.C. § 2119.
- ⁵³ 18 U.S.C. § 2119(2).
- ⁵⁴ See *Jones*, *supra* note 51, at 232-4.
- ⁵⁵ *Id.*, at 248.
- ⁵⁶ *Id.*, at 243 n. 6.
- ⁵⁷ *Id.*, at 271 (Kennedy, J., dissenting).
- ⁵⁸ *Charles C. Apprendi, jr. v. New Jersey*, 530 U.S. 466 (2000).
- ⁵⁹ *Id.*, at 476.
- ⁶⁰ *Id.*, at 478-9.
- ⁶¹ *Id.*, at 544 (O'Connor, J., dissenting).
- ⁶² *Id.*, at 557 (Breyer, J., dissenting).
- ⁶³ See *Blakely*, *supra* note 1, at *13-4.
- ⁶⁴ *Id.*, at *47 (O'Connor, J., dissenting).
- ⁶⁵ *Id.*, at *10.
- ⁶⁶ See *Jones*, *supra* note 51, at 244.
- ⁶⁷ *Id.*, at 244.
- ⁶⁸ See *Apprendi*, *supra* note 58, at 478.
- ⁶⁹ See *Almendarez-Torres*, *supra* note 46, at 228 and 241-2.
- ⁷⁰ See *Blakely*, *supra* note 1, at *18.
- ⁷¹ *Id.*, at *23.
- ⁷² *Id.*, at *19.
- ⁷³ *Id.*, at *23.
- ⁷⁴ *Id.*, at *59 (Breyer, J., dissenting).
- ⁷⁵ *Id.*, at *60 (Breyer, J., dissenting).
- ⁷⁶ *Id.*, at *61 (Breyer, J., dissenting).
- ⁷⁷ *Id.*, at *64 (Breyer, J., dissenting).
- ⁷⁸ *Id.*, at *66 (Breyer, J., dissenting).
- ⁷⁹ *Id.*, at *69 (Breyer, J., dissenting).
- ⁸⁰ *Id.*, at *70-1 (Breyer, J., dissenting).
- ⁸¹ *Id.*, at *72 (Breyer, J., dissenting).
- ⁸² *Id.*, at *74-5 (Breyer, J., dissenting).
- ⁸³ *Mistretta v. United States*, 488 U.S. 361, 363 (1989).
- ⁸⁴ *Mistretta v. United States*, 488 U.S. 361 (1989).
- ⁸⁵ *Id.*, at 365.
- ⁸⁶ *Id.*, at 364.
- ⁸⁷ Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236, 1249 (2004).
- ⁸⁸ *Id.*, at 1250.
- ⁸⁹ See *Zlotnick*, *supra* note 4, at 682.
- ⁹⁰ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).
- ⁹¹ Ian Weinstein, Article: *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 94 (2003).
- ⁹² *Id.*, at 107.
- ⁹³ PROTECT Act, Pub. L. No. 108-21, 401(a), (b), 117 Stat. 650, 667-8 (2003).
- ⁹⁴ H. Amend. 19 to H.R. 1104, 108th Cong. (2003).
- ⁹⁵ Stephanos Bibas, Criminal Law: *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 296-7 (2004).
- ⁹⁶ *Id.*, at 297.
- ⁹⁷ *Id.*, at 299.

⁹⁸ *Id.*, at 300.

⁹⁹ U.S. SENTENCING COMMISSION: 2002 Sourcebook of Federal Sentencing Statistics.

¹⁰⁰ *See* Bibas, *supra* note 28, at 1158.

¹⁰¹ *Id.*, at 1153.

¹⁰² *Id.*, at 1168.

¹⁰³ *Id.*, at 1169-70.

¹⁰⁴ *See* Blakely, *supra* note 1, at *47 (O'Connor, J., dissenting).

¹⁰⁵ *United States v. Fanfan*, D. Me. No. 03-47-P-H (Jun. 28, 2004).

¹⁰⁶ *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. Wis., July 9, 2004).

¹⁰⁷ *United States v. Fanfan*, *Petition for Cert.* (Jul. 16, 2004).

¹⁰⁸ *See* Booker, *supra* note 106, at *8.

¹⁰⁹ *Id.*, at *9-10.