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# The Next Era of Sentencing Reform

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## ARTICLES

### THE NEXT ERA OF SENTENCING REFORM

*Steven L. Chanenson\**

Criminal sentencing is in turmoil. The Supreme Court has revealed a new understanding of the Sixth Amendment. The very foundation of many sentencing schemes now seems unstable. Yet, we still have the ability to craft a rational, balanced approach to sentencing. The rules may have changed, but the game is the same, and it is winnable.

In *Blakely v. Washington*,<sup>1</sup> the U.S. Supreme Court delivered a legal haymaker that has sent the criminal sentencing world reeling. The Court had previously held that the Sixth Amendment requires a jury to find all facts (other than the existence of a prior conviction) that increase the statutory maximum punishment.<sup>2</sup> *Blakely* concluded that the tops of Washington State's sentencing guideline ranges are themselves so-called "statutory maxima,"

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<sup>1</sup> 124 S. Ct. 2531 (2004).

<sup>2</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

which under the Sixth Amendment can only be transcended based on a jury's factual finding or a defendant's admission of an aggravating factor.<sup>3</sup>

Before *Blakely*, several states and the federal government supplied structure or guidance, often in the form of sentencing guidelines, for judges imposing criminal sentences. To varying degrees, these guidelines systems relied on facts that the judges found by a preponderance of the evidence, a procedure the Supreme Court had approved time and again.<sup>4</sup> Many guidelines schemes provided presumptive sentencing ranges for typical cases. The top of the presumptive range was below the traditional statutory maximum for the offense of conviction. The actual sentence imposed might be higher or lower than the presumptive range, in part because of judicially found aggravating or mitigating facts. *Blakely* effectively invalidated key aspects of several sentencing systems because these systems permitted judges to impose sentences higher than the presumptive guideline range based on facts found by the judge, using the preponderance of the evidence standard, instead of by the jury, using the beyond a reasonable doubt standard.<sup>5</sup>

In the words of the Ninth Circuit, *Blakely* “worked a sea change in the body of sentencing law.”<sup>6</sup> Many states are struggling to determine what parts of their systems survived *Blakely* and how they should respond. Because *Blakely* concerned a sentence from Washington State—where the legislature directly passed the sentencing guidelines—the case did not squarely resolve the fate of the Federal Sentencing Guidelines,<sup>7</sup> which are largely a creature of rulemaking

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<sup>3</sup> *Blakely*, 124 S. Ct. at 2537.

<sup>4</sup> *E.g.*, *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) (concerning acquitted conduct that a judge found, by a preponderance of the evidence, actually took place). Arguably, however, the Supreme Court had never before squarely addressed the issue of judicial factfinding in the context of a Sixth Amendment challenge.

<sup>5</sup> *See, e.g.*, Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, 17 FED. SENT. REP. 60, 60 (2004) (noting that several states “employ presumptive sentencing guidelines systems that enable judges to enhance sentences by finding aggravating facts, as does the Washington system addressed by the Court” in *Blakely*); *id.* at 61 (“It is evident that the four other states . . . with presumptive sentencing guidelines systems—Minnesota, North Carolina, Oregon, and Tennessee—will be affected by the decision to the same extent as Washington.”); Impact of *Blakely v. Washington* on Tennessee’s Sentencing Scheme, 04-131 Op. Tenn. Att’y Gen. 2 (2004) (“While Tennessee’s sentencing scheme differs in certain respects from the Washington guideline sentencing scheme at issue in *Blakely*, the differences do not appear to be constitutionally significant.”).

<sup>6</sup> *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004).

<sup>7</sup> *Blakely*, 124 S. Ct. at 2538 n.9 (“The Federal Guidelines are not before us, and we express no opinion on them.”).

by the U.S. Sentencing Commission.<sup>8</sup> In the months immediately after *Blakely*, federal courts divided over the constitutionality of the Federal Sentencing Guidelines,<sup>9</sup> inducing the U.S. Supreme Court to grant certiorari and expedite argument in *United States v. Booker* and *United States v. Fanfan*.<sup>10</sup> Meanwhile, chaos reigned in many state and federal courts across the land.

Regardless of what the Supreme Court decides in *Booker* and *Fanfan*, *Blakely* presents legislatures, courts, and sentencing commissions with an opportunity to re-examine and improve their sentencing systems. As such, *Blakely* can be a lever or a tool to advance the law. We have a natural opening to ask ourselves what sort of a sentencing system we should have. Which actors should possess what kind and degree of discretion? This is an opportunity many legislatures appear determined to take. For example, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, seems poised to take federal legislative action regardless of the Supreme Court's decisions.<sup>11</sup> With the ferment of sentencing reform in the air, now may be the time not only to revamp the sentencing systems *Blakely* has damaged or destroyed, but to usher in the next era of sentencing reform as well.<sup>12</sup>

Yet are alternatives available? The *Blakely* dissenters predicted "disastrous" consequences and the destruction of almost a quarter century of progress.<sup>13</sup> For example, Justice O'Connor lamented that "[o]ver 20 years of

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<sup>8</sup> The Federal Sentencing Guidelines do not exclusively reflect an administrative nature. See Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENT. REP. 20 (2004) (showing how the PROTECT Act undermined the administrative nature of the federal Guidelines and may lead to the guidelines' demise post-*Blakely*).

<sup>9</sup> Compare *United States v. Booker*, 375 F.3d 508, 515 (7th Cir. 2004) (finding federal guidelines unconstitutional), with *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004) (finding federal guidelines constitutional). As time went on and the Supreme Court agreed to resolve whether *Blakely* applied to the Federal Sentencing Guidelines, more and more federal courts of appeals decided to keep applying the Federal Sentencing Guidelines even though many people believe that the Supreme Court will ultimately conclude that *Blakely* damages or destroys that system.

<sup>10</sup> *United States v. Booker*, 125 S. Ct. 11 (2004); *United States v. Fanfan*, 125 S. Ct. 12 (2004).

<sup>11</sup> See 108 CONG. REC. S8572 (daily ed. July 21, 2004) (statement of Sen. Hatch) ("As we go forward, I believe we should adopt legislation that would render the Federal sentencing guidelines constitutional regardless of whether *Blakely* applies [to the Federal Sentencing Guidelines.]).

<sup>12</sup> This is particularly important in the roughly one-half of all states that still use largely unguided, indeterminate sentencing. See Marc L. Miller, *Sentencing Reform "Reform" Through Sentencing Information Systems*, in THE FUTURE OF IMPRISONMENT 121, 121 (Michael Tonry ed., 2004); Wool & Stemen, *supra* note 5, at 67.

<sup>13</sup> 124 S. Ct. 2531, 2544 (2004) (O'Connor, J., dissenting).

sentencing reform are all but lost.”<sup>14</sup> Not only is Justice O’Connor overreacting, but she may be fundamentally wrong. All is most assuredly not lost. In fact, history’s verdict on *Blakely* may be kind if legislatures seize the opportunity before them.

Viable options exist. The choices that have already begun to percolate to the top of the legislative, judicial, and academic agendas include fully advisory guidelines, boundless guidelines, inverted guidelines, and guidelines with extended jury factfinding.<sup>15</sup> While no sentencing system is perfect, each of these popular contenders has substantial drawbacks that outweigh their advantages.

I offer a different way to approach sentencing. Capitalizing on the window of opportunity afforded by *Blakely*, we can devise a better sentencing system by remembering some core principles that have animated modern sentencing reform. Legislatures should adopt what I call “Indeterminate Structured Sentencing” (“ISS”), an indeterminate sentencing system (that is, a system that includes discretionary parole release authority) in which a Super Commission promulgates two sets of coordinated guidelines that constrain both sentencing and release powers. This balanced approach rejects both extremely uniform sentences and extremely individualized sentences while pursuing relative proportionality in a *Blakely*-compliant way.

An ISS system respects judicial sentencing judgment while also acknowledging the value of structural checks and balances. It permits severe sentences when judges believe them appropriate but also limits the pressure to increase sentences across the board. Although the ISS model draws on aspects of various sentencing systems, it is a distinctive hybrid approach. ISS sentencing guidelines channel a judge’s decisional authority while preserving important nodes of judicial discretion. Through its parole release guidelines, ISS encourages the predictable exercise of discretionary, yet modestly conceived, parole release authority. Nevertheless, ISS parole release guidelines allow for departures when appropriate, and provide for some form of appellate review. Thus, ISS satisfies *Blakely* while simultaneously increasing practicality and justice.

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<sup>14</sup> *Id.* at 2550. Also in dissent, Justice Kennedy contended that the majority “disregard[ed] the fundamental principle under our constitutional system that different branches of government ‘converse with each other on matters of vital common interest.’” *Id.* at 2550 (Kennedy, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 408 (1989)).

<sup>15</sup> See *infra* text accompanying notes 157–249.

This Article proceeds in four parts. Part I explores the fundamental elements of sentencing. It hones sentencing's common language and presents tools for evaluating competing sentencing systems. Part II demonstrates how *Blakely* has created both short-term chaos and long-term opportunities for sentencing reform. Part III evaluates four popular possibilities for sentencing systems after *Blakely*, and finds them all suffering from significant limitations. These flaws range from too much judicial discretion, which can invite invidious disparity, to too little judicial discretion, which can result in unwarranted uniformity. Each of these possibilities fails to provide sufficient assurances that a resulting sentence is likely to be relatively proportional to the crime and criminal involved. Finally, Part IV introduces the new ISS model. An ISS system affords greater confidence that sentences will be fair and just and provides a workable balance between uniformity and individualization while effectively pursuing relative proportionality.

## I. FUNDAMENTAL ELEMENTS OF SENTENCING

To understand what *Blakely* has done and to see how the various state and federal sentencing systems could or should respond, this Article employs a common language to describe these systems and crafts a functional model to evaluate them. Armed with those tools of common language and evaluation, it is possible to understand the broad historical contours of American sentencing that set the stage for *Blakely*.

### A. A Common Descriptive Language

To discuss sentencing systems effectively, a common descriptive language is essential. Even though a common sentencing language exists,<sup>16</sup> it is often badly mangled. Sentencing systems frequently bear the label of “determinate” or “indeterminate.” Too frequently, however, courts and commentators apply those terms imprecisely or improperly, leading to confusion. This problem, which apparently has been brewing for some time,<sup>17</sup> has become more acute in

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<sup>16</sup> See, e.g., Richard Singer, *In Favor of “Presumptive Sentences” Set by a Sentencing Commission*, 24 CRIME & DELINQUENCY 401, 403–06 (1978).

<sup>17</sup> See, e.g., Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 634 (2002) (referring, incorrectly, to “determinate, or structured, sentencing”). The perils of this definitional imprecision are highlighted within this same article when the authors appropriately describe Utah's efforts to provide some guidance for its indeterminate sentencing system. *Id.* at 638–39 (noting that “Utah has made

the immediate aftermath of *Blakely*.<sup>18</sup> Arguably, even the Supreme Court in *Blakely* deployed the terminology imprecisely.<sup>19</sup> It need not nor should not be that way. We need once again to sharpen our terms.<sup>20</sup>

The key difference between indeterminate and determinate sentencing systems is uncomplicated. Indeterminate systems use discretionary parole

some reforms that nod in the direction of structured sentencing without changing its essential sentencing scheme, which provides for indeterminate sentencing”).

<sup>18</sup> *E.g.*, *United States v. Hakley*, 2004 U.S. Dist. LEXIS 15784, at \*21 (W.D. Mich. Aug. 12, 2004) (displaying an incorrect understanding of “indeterminate” sentencing); *United States v. Agett*, 327 F. Supp. 2d 899, 906 (E.D. Tenn. 2004) (same); *United States v. Sisson*, 326 F. Supp. 2d 203, 205 (D. Mass. 2004) (finding the Federal Sentencing Guidelines unconstitutional in light of *Blakely* and erroneously describing the Court’s “return to an indeterminate sentencing scheme” when the context indicates that the court will employ a discretionary, determinate sentencing system and apparently treat the Guidelines as fully voluntary); *United States v. Lockett*, 325 F. Supp. 2d 673, 677–78 (E.D. Va. 2004); *cf. Constitutionality of Federal Sentencing Guidelines: Hearing Before the Senate Judiciary Comm.*, 108th Cong., available at 2004 WL 1571026 (July 13, 2004) (statement of Paul G. Cassell) (describing post-*Blakely* practice of Western District of Texas Judge as being “indeterminate,” although context indicates an unguided, discretionary, determinate approach). Some courts have employed the proper terminology. *E.g.*, *United States v. Mueffelman*, 327 F. Supp. 2d 79, 96 (D. Mass. 2004) (Gertner, J.) (observing that “there is a problem with reinstating an indeterminate system, when there is no longer parole”).

Unfortunately, at least one sentencing scholar has intentionally decided to use “indeterminate” and “unstructured” interchangeably. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 n.12 (2004). In his otherwise excellent article, Professor Bibas states:

The term “indeterminate sentences” used to refer to broad ranges set by judges (for example, five to ten years). Within these broad ranges, parole boards often determined the ultimate release dates. Determinate sentences, in contrast, were precise sentences set by judges (for example, eight years). In more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges. This Article uses the more modern parlance. In other words, I use “indeterminate” to mean unfettered judicial discretion up to the statutory maxima and “determinate” to mean judicial discretion constrained by sentencing guidelines or mandatory minima.

*Id.* The use of this shorthand approach promotes confusion in both the academic literature and the case law. Furthermore, it ignores that approximately half of American jurisdictions actually maintain an indeterminate sentencing system—some guided or structured and others not. *Cf.* Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, SENTENCING & CORRECTIONS, Sept. 1999, at 3 (noting that indeterminate sentencing “remains the majority approach”). Particularly after *Blakely*, the distinction between a true indeterminate and a true determinate sentencing systems matters. While precision frequently eludes us all, it is easy enough to use more precise words like “structured” or “guided” to mean judicial discretion restricted, guided, or channeled by some form of sentencing guidelines or rules.

<sup>19</sup> See, e.g., Wool & Stemen, *supra* note 5, at 60 n.7.

<sup>20</sup> My concern about the misuse of these terms—a transgression of which I have also been guilty—stems largely from my experience with Pennsylvania’s guided, discretionary, indeterminate sentencing system and the increased national importance of precise terminology post-*Blakely*. My understanding and discussion of these concepts draws heavily from Professor Richard Singer’s work. See Singer, *supra* note 16, at 403–06. More than twenty-five years ago, Professor Singer provided a clear exposition of the core terms. See *id.*

release while determinate systems do not.<sup>21</sup> Determinate and indeterminate sentencing schemes can take various forms. Either sort of system may be discretionary or nondiscretionary. Discretionary systems—be they determinate or indeterminate—may be guided or unguided.<sup>22</sup> “Guided” or “unguided” systems may also be referred to as “structured” or “unstructured.”<sup>23</sup>

In setting a determinate sentence, a judge announces a particular length of sentence in a system that does not have parole release but may offer other sentence reductions. “A determinate sentence is simply a sentence for a specified length of years. It does not necessarily indicate that the offender will serve all of those years.”<sup>24</sup> Through the award of so-called good time or earned time, a jurisdiction employing a determinate sentencing regime may release a defendant before the expiration of the announced sentence.<sup>25</sup> If there is no possible reduction in the time served, the determinate sentence is called a “flat sentence.”<sup>26</sup> “Although a flat sentence must always be determinate, not all determinate sentences . . . are flat.”<sup>27</sup> In fact, many jurisdictions with determinate sentencing systems have nonflat sentences because they offer some degree of good time or earned time reductions in time served.<sup>28</sup>

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<sup>21</sup> *E.g.*, NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 46 (1974) (“If the judge determines that a prison sentence is appropriate, then the most usual practice in this country is that he will impose a minimum-maximum term, an indefinite or indeterminate sentence, with the boundaries more or less precisely defined . . .”); Singer, *supra* note 16, at 404; Tonry, *supra* note 18, at 3 (noting that the Bureau of Justice Assistance’s “key” to distinguishing between determinate and indeterminate “systems was whether parole release remained available for a sizable fraction of cases”); Wool & Stemen, *supra* note 5, at 61 (defining determinate sentencing as “a system in which there is no discretionary releasing authority and an offender may be released from prison only after expiration of the sentence imposed (less available good or earned time)”); *id.* at 64 (referring to the discretionary parole release authority as the “hallmark of indeterminate sentencing”).

<sup>22</sup> *E.g.*, *id.* at 61.

<sup>23</sup> *See, e.g.*, *id.* (defining a structured sentencing system as “a system providing some form of recommended sentences within statutory sentence ranges”). Thus, a structured sentencing system need not have sentencing guidelines as commonly envisioned.

<sup>24</sup> Singer, *supra* note 16, at 404.

<sup>25</sup> *See, e.g.*, Wool & Stemen, *supra* note 5, at 61.

<sup>26</sup> Singer, *supra* note 16, at 404. Flat sentences also assume no possible increase in time served beyond the sentence imposed. A true flat sentence requires the defendant to be incarcerated for the precise amount of time stated by the judge. *Id.* (“A flat sentence of five years would mean that the defendant would serve *no more and no less* than five years in prison . . . . No variations in the sentence imposed by the judge are possible.”).

<sup>27</sup> *Id.*

<sup>28</sup> For example, the federal system—at least pre-*Blakely*—was largely a guided, discretionary, nonflat, determinate system because it offered up to approximately 15% off for good behavior for all (nonlife) sentences greater than one year. *See* 18 U.S.C. § 3624(b)(1) (2000) (allowing credit of up to fifty-four days per year if an inmate displays “exemplary compliance with institutional disciplinary regulations”). With respect to sentences for less than one year, it was a guided, discretionary, flat, determinate system because it offered no good time reductions. *Id.*; *see also* *United States v. Crecelius*, 751 F. Supp. 1035, 1037 (D.R.I.



A determinate system may be discretionary or nondiscretionary. A discretionary, determinate system allows a judge to pick the actual sentence (one number, such as ten years) from a statutory range of punishments. In a nondiscretionary, determinate system, the legislature specifies the actual sentence (again one number, such as ten years) that the judge must impose for the offense of conviction.<sup>29</sup>

Finally, a discretionary, determinate system may also be guided or unguided. Unguided systems were the dominant sentencing approach in the years leading up to the advent of the sentencing guidelines reform movement.<sup>30</sup> Judges could largely exercise their discretion as they saw fit. One major result of the modern sentencing guidelines reform movement has been the introduction of varying degrees of guidance to discretionary sentencing systems.

Sentencing guidelines reflect a common way to provide guidance in discretionary, determinate sentencing systems. In broad strokes, sentencing guidelines can be either "presumptive" or "voluntary," although there can be many variations under these labels. Presumptive sentencing guidelines require judges to follow the guidelines' sentencing recommendations or justify their deviation from them.<sup>31</sup> Legislatures often authorize appellate judicial review to enforce these guidelines. Fully voluntary guidelines, in contrast, are true recommendations; they rely on reason and moral suasion to encourage compliance.<sup>32</sup>

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1990) (noting that a sentence of a year and a day can be functionally shorter than a sentence of a year because of the availability of good time credits).

<sup>29</sup> Singer, *supra* note 16, at 404.

<sup>30</sup> Most of those systems, however, were indeterminate.

<sup>31</sup> *E.g.*, Wool & Stemen, *supra* note 5, at 61.

<sup>32</sup> *Id.* at 61, 66. There are, of course, systems that are not easy to categorize as either presumptive or voluntary.

The critical distinguishing factor for indeterminate sentencing is the existence of discretionary parole release.<sup>33</sup> Jon Wool and Don Stemen of the Vera Institute of Justice define an indeterminate sentencing system as one

in which a discretionary releasing authority, such as a parole board, may release an offender from prison prior to expiration of the sentence imposed. It may also, but need not, allow judges to impose a sentence range, such as three-to-six years, rather than a specific period of time to be served.<sup>34</sup>

In one approach to indeterminate sentencing, the parole board may release the defendant no earlier than the lower number in the range and no later than the higher number in the range. This approach to indeterminate sentencing, including a sentence range, will provide the best opportunity for reform in the post-*Blakely* world.

As with determinate sentencing, indeterminate sentencing may be discretionary or nondiscretionary. The discretionary approach, reflected in the classic, indeterminate scheme, allows a judge to pick a sentencing range anywhere within the statutorily authorized spectrum of punishments. For example, the legislature may have determined that robbers may be sentenced anywhere from probation to twenty years in prison. The judge could then choose an indeterminate sentence within that wide span. The nondiscretionary approach may involve the legislature setting an indeterminate range that the judge must impose based on the conviction offense.<sup>35</sup>

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<sup>33</sup> This is consistent with the definition provided in the U.S. Code for purposes of truth-in-sentencing grants. Specifically, 42 U.S.C. § 13701 (2000) provides:

- (1) the term “indeterminate sentencing” means a system by which—
- (A) the court may impose a sentence of a range defined by statute; and
  - (B) an administrative agency, generally the parole board, or the court, controls release within the statutory range.

<sup>34</sup> Wool & Stemen, *supra* note 5, at 61. It is also possible to have indeterminate sentencing with the judge just deciding whether to incarcerate the defendant and the parole board setting the sentence served later. *E.g.*, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 161 (1993).

<sup>35</sup> Singer, *supra* note 16, at 405 (“For example, the judge must impose the statutorily mandated indeterminate scheme, such as zero to three years. Paroling and correctional authorities determine release time, but the only sentence available to the judge is zero to three years.”). A different, nondiscretionary, indeterminate system could involve a judge being able to impose only one sentence of incarceration (the maximum) with earlier release at the discretion of the paroling authority. *See* State v. Rivera, 2004 WL 2955940, at \*10 (Haw. Dec. 22, 2004) (“An indeterminate sentence is ‘[a] sentence to imprisonment for the maximum period defined by law, subject to termination by the parole board or other [authorized] agency at any time after service of the minimum period’ ordinarily set by the paroling authority.”) (quoting BLACK’S

Finally, consistent with determinate sentencing schemes, discretionary, indeterminate sentencing systems may be guided or unguided. The classic indeterminate sentencing approach was unguided and discretionary. Within the wide expanse of statutorily authorized punishments, the judge could impose a sentencing range based completely on her own discretion and sense of justice. However, another option is available: There can be a guided, discretionary, indeterminate sentencing system. Under this approach, used in states such as Michigan and Pennsylvania, a commission or legislature provides sentencing guidelines for setting the minimum of the indeterminate sentencing range. Regardless, the paroling authority decides when to actually release the defendant.

Thus, sentencing systems can be broken down into two broad camps: determinate and indeterminate. Within those categories, however, extensive variation remains. Either approach may be discretionary or nondiscretionary. Discretionary schemes—determinate or indeterminate—may also be guided or unguided. Of course, degrees of discretion and guidance can also vary widely.<sup>36</sup>

*B. How To Evaluate a Sentencing System: A Map for the Mystified*

There is no perfect sentencing system.<sup>37</sup> Each approach involves tradeoffs of various kinds, yet all sentencing systems should have a normative goal of striving for equilibrium between uniformity and individualization in a way that is likely to yield a fair and just result. Judges need the genuine ability to consider “all ethically relevant differences between cases.”<sup>38</sup> Sentencing systems, however, must recognize that “disparities matter, that safeguards should be created against aberrant and invidious exercises of discretion, that sentencing . . . should be subject to rules, and that judges should be accountable for their correct application of sentencing rules by means of appeals to higher judicial authority.”<sup>39</sup>

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LAW DICTIONARY 911 (4th ed. 1968)).

<sup>36</sup> Cf. Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 734 (1999) (“[C]hoices about sentencing rules that once appeared to offer choices of either black or white now appear in shades of gray.”).

<sup>37</sup> MICHAEL TONRY, SENTENCING MATTERS 195 (1996) (“No sentencing system will ever be perfect or free from risks of injustice in individual cases.”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

Given the complexity of sentencing, it is difficult to make quick and useful comparisons across systems. Nevertheless, one can identify certain important features to facilitate that task. I have found two related markers to be helpful in evaluating sentencing systems. By considering the tradeoff between uniformity of sentences and individualization of sentences, as well as what I will call the “proportionality confidence index,” it is possible to get a decent shorthand view of a particular sentencing system.

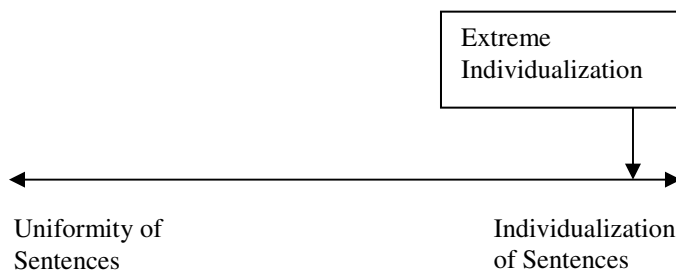
The question of uniformity versus individualization is a radically simplified model of sentencing, although all sentencing systems can be plotted on the continuum between these two poles. For ease of administration, I will employ five points on the continuum with the center reflecting the desired balance between the two extremes. The extreme uniformity side of the model might be the Code of Hammurabi, which is largely a collection of criminal tariffs,<sup>40</sup> or mandatory (minimum) sentences. As a specific example, in a system of extreme uniformity all robbers might receive ten years in prison regardless of their criminal history or personal circumstances. This could be represented graphically as:<sup>41</sup>



<sup>40</sup> See, e.g., NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 88 (2004) (“Sentences dominated by legislative choices go back to some of the earliest recorded sources of law, including the Code of Hammurabi . . .”); *id.* (providing examples from the Code, including “Section 196: If a man has caused the loss of a gentleman’s eye, his eye one shall cause to be lost”).

<sup>41</sup> There are other ways to map out sentencing systems. See, e.g., Mark W. Osler, Written Testimony of Mark W. Osler Before the U.S. Sentencing Commission (Nov. 17, 2004), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/written\\_testimony\\_of\\_mark\\_w.%20Osler-Final.doc](http://sentencing.typepad.com/sentencing_law_and_policy/files/written_testimony_of_mark_w.%20Osler-Final.doc).

An example of the extreme individualization side of the model is a system in which a judge, acting completely on the basis of her own unguided discretion, may impose a flat determinate sentence of anywhere from probation to life in prison for every robber that appears before her. It might be represented graphically as:



Yet, even as a simplified paradigm, the uniformity versus individualization model is inadequate; it does not address the likelihood of relative proportionality. While many highly uniform systems will have a lower likelihood of relative proportionality than many highly individualized systems, there is no guarantee of that correlation. As such, we need to consider this factor separately. More specifically, I will evaluate sentencing schemes based on what I call the “proportionality confidence index.” The proportionality confidence index provides a rough measure of the likelihood that specific sentences will be proportional on a relative scale.<sup>42</sup> Again recognizing that this is a simplified model of very complex sentencing phenomena, I will break the proportionality confidence index down into just five categories or scores: high, medium high, medium, medium low, and low.

Most sentencing schemes that reflect an extreme uniformity of sentences will have a low proportionality confidence index. For example, if all thieves

<sup>42</sup> This is only addressing *relative* proportionality—that is, whether a more serious crime committed by a more serious criminal is treated more seriously. Cf. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 156 (2001) (“[T]he principle of proportionality is a principle of *relative* proportionality. . . . Doing justice to individual offenders is therefore a matter of doing justice *between* offenders. We punish *this* offender justly by ensuring that her sentence is proportionate to her crime, relative to the sentences imposed on *other* offenders.”); Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 596 (2002). The proportionality confidence index does not address questions of absolute severity.

receive a sentence of ten years of incarceration regardless of how much money they stole, why they stole it, or what they did in the past, there is a low chance that the individual sentences will be relatively proportional. Accordingly, this system would rate a low score on the proportionality confidence index.

The story is more complicated for sentencing schemes that lean heavily toward individualization. Individualization does not necessarily equate with proportionality. In a system of complete individualization in which there is no guidance for, or review of, a judge's actions, the result is unlikely to be a high score on the proportionality confidence index; there is too great an opportunity for irrational and inconsistent results across cases. However, a moderately—though not extremely—individualized system may attain a reasonable proportionality confidence index score through the use of upfront guidance and appellate review of sentences. Thus, I have separated out the relative proportionality component.

The combination of the uniformity versus individualization balance and the proportionality confidence index provides a snapshot of how a sentencing system operates on the macro level. Certain factors, including the degree of guidance to the sentencing judge and appellate review, influence these evaluations. It is important, however, to remember that this is just a model and that it does not guarantee any specific outcome, certainly not in individual cases.<sup>43</sup>

Furthermore, this model does not address questions of absolute severity. This is an intentional decision. While vitally important, questions of absolute severity travel independently of the framework of the sentencing system.<sup>44</sup> As

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<sup>43</sup> There are other limitations of the model as well. For example, transparency and accountability are also key aspects of a good sentencing system. See, e.g., Steven L. Chanenson, Statement at Initial Hearing of the ABA Justice Kennedy Commission (Nov. 13, 2003), at [http://www.abanet.org/crimjust/kennedy/steve\\_chanenson1.html](http://www.abanet.org/crimjust/kennedy/steve_chanenson1.html) (“Our sentencing systems should be able to withstand the closest scrutiny . . . . Openness is a good in and of itself; more information is better than less.”).

<sup>44</sup> My focus here is on relative proportionality. By focusing on relative proportionality, I am attempting to assess the ability of a sentencing system to order punishments logically. I am assuming that each jurisdiction will endeavor to achieve absolute proportionality as well, although each jurisdiction's vision of that absolute proportionality will no doubt vary. Indeed, tying punishment recommendations to a vision of absolute proportionality is one of the key recommendations of the American Law Institute's current draft effort to revise the sentencing portions of the Model Penal Code. MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i), § 1.02(2)(a) cmt. at 8 (Preliminary Draft No. 3, 4) (adopting Norval Morris's “Limiting Retributivism” approach and encouraging punishments “within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders”); *id.* (“Deontological concerns of justice or ‘desert’ place a ceiling on governments’ legitimate power to attempt to change an offender or otherwise influence future events.”).

I have argued elsewhere,

there can and will be future changes—down and up—in the particular levels of severity for any sentencing system. However, if those changes occur in the context of a reasonable and logical sentencing framework, the end results are more likely to reflect fairness and engender greater public confidence.<sup>45</sup>

C. “*The Past Is a Foreign Country*”<sup>46</sup>

In order to understand where sentencing systems should go in the post-*Blakely* era, it is important to have a basic understanding of where sentencing has been. At least by the late nineteenth century, most American jurisdictions started to move toward increased, but unguided, judicial sentencing discretion. More recently, many American jurisdictions have experimented with some form of guided sentencing, typically in the form of sentencing guidelines. To improve the prospects for the future, we must remember some of the perils of the past.

1. *Making the Punishment Fit the Crime: Tariffs*

English punishment in the mid- to late-1700s reflected what might be referred to as the tariff system.<sup>47</sup> In its purest form, each offense yielded a particular punishment by operation of law.<sup>48</sup> Although these punishments were evaded in various ways, the sentencing judge played little overt substantive role in determining a defendant’s sentence. A common punishment for various offenses, ranging from murder to theft, was death.<sup>49</sup> This system was extremely uniform (at least in theory):<sup>50</sup>

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<sup>45</sup> Chanenson, *supra* note 43.

<sup>46</sup> Cf. L.P. HARTLEY, *THE GO-BETWEEN* 9 (Hamish Hamilton 1978) (1954) (“The past is a foreign country: they do things differently there.”).

<sup>47</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (“[W]ith respect to the criminal law of felonious conduct, ‘the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense.’”) (citation omitted).

<sup>48</sup> See, e.g., Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 891 (1990).

<sup>49</sup> See FRIEDMAN, *supra* note 34, at 41–44.

<sup>50</sup> See *id.* (discussing the mitigation device to avoid the gallows called “benefit of clergy,” which became widely available—far beyond its original intention—by about 1700).



Logically, this system fares poorly on the relative proportionality index, rating a score of low.<sup>51</sup>

There is a debate among legal scholars as to how much of this general tariff approach was imported into early America. Some argue that “up through 1870, legislators retained most of the discretionary power over criminal sentencing. Each crime had a defined punishment . . . .”<sup>52</sup> Indeed, the Supreme Court has stated that in “the early days of the Republic . . . the period of incarceration was generally prescribed with specificity by the legislature. Each crime had a defined punishment.”<sup>53</sup> Others contend that since “the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.”<sup>54</sup>

<sup>51</sup> As Professor Marc Miller has noted, “Absolute apparent equality can be demonstrably unjust.” Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 272, 275 (2005).

<sup>52</sup> Nagel, *supra* note 48, at 892; *see also* Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. 316, 325 (2004) (discussing 18th century approach which imposed “identical punishments on defendants who commit their crimes quite differently, and thus fails to provide individual justice”); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 227 (“The English practice at the time of our nation’s founding was determinate sentencing of those convicted of a felony offense; there was one possible sentence for each offense, imposed after a jury verdict based on proof beyond a reasonable doubt of every element constituting that offense.”); *cf.* U.S. SENT. COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 26 (1991) (“Years ago, Congress used tariff sentences in sanctioning broad categories of offenses,” ranging from homicide to theft); Nagel, *supra* note 48, at 892 (“Judges were given some sentencing discretion, but only within ranges that were narrow compared to later developments.”).

<sup>53</sup> *United States v. Grayson*, 438 U.S. 41, 45 (1978) (citation omitted).

<sup>54</sup> KATE STITH & JOSE CABRANES, *FEAR OF JUDGING* 9 (1998); *see also* Albert W. Alschuler, *To Sever or Not To Sever? Why Blakely Requires Action by Congress*, 17 FED. SENT. REP. 11, 14 n.39 (2004) (“The frequent claim that judges had little or no sentencing discretion during the early stages of our nation’s history is bunk.”).



## 2. *The Wild West: Unguided, Indeterminate Sentencing*

At least by the 1800s, however, some American judges had considerable sentencing discretion.<sup>55</sup> The Supreme Court has recognized that judges started to possess “broad discretion in sentencing—since the nineteenth century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range.”<sup>56</sup> Frequently, these systems were both unguided and indeterminate.<sup>57</sup> Expansive, unguided, and largely unreviewable discretion was the common thread running through many, if not most, such systems.<sup>58</sup> Based on a rehabilitative model of punishment, these unguided, indeterminate sentencing schemes prized individualization in an effort to rehabilitate the offender.<sup>59</sup> The idea was to incarcerate, and thus work to rehabilitate, the inmate “until he or she had reformed—which was by definition an indeterminate time.”<sup>60</sup> Despite their noble intentions, these unguided, indeterminate sentencing schemes presented a host of problems and inequities.

At least as recently as the mid-1960s, it was difficult to say that there was much of a “law” of sentencing.<sup>61</sup> It was a Wild West of unregulated discretion.

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<sup>55</sup> Cf. *Grayson*, 438 U.S. at 45–46.

<sup>56</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); see also *Harris v. United States*, 536 U.S. 545, 558 (2000).

<sup>57</sup> At times, this unguided, indeterminate regime is referred to as “classic,” indeterminate sentencing or “stereotypical,” indeterminate sentencing. Many of the problems with unguided, indeterminate sentencing came from the “unguided” aspect, although the indeterminate nature of these systems contributed additional layers of unfairness and unpredictability through the also often-unguided black box of parole release authority.

This classic indeterminate sentencing approach reigned in the United States for decades. E.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 25 (2000) (“For the first three-quarters of the twentieth century, vast and virtually unlimited discretion was the hallmark of the sentencing enterprise.”); see *Grayson*, 438 U.S. at 47; TONRY, *supra* note 37, at 7.

<sup>58</sup> E.g., Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner’s Perspective*, 2004 BYU L. REV. 935, 939 (“Prior to 1984, federal judges enjoyed wide discretion in sentencing offenders. A judge could impose any punishment within the statutory maximum and still stand virtually immune from appellate review.”).

<sup>59</sup> See, e.g., Nagel, *supra* note 48, at 893 (“Concomitant with the theories of prison as a rehabilitative institution, and justice as aimed at individual restoration, was the development of the then innovative indeterminate sentence.”).

<sup>60</sup> *Id.* at 894; see also FRIEDMAN, *supra* note 34, at 160 (“When a man or woman was convicted of a crime, the judge should no longer fix the sentence by himself. Rather, the criminal would go to prison for an indefinite period—until he was ready to be foisted back on the world.”); *id.* (noting that taken to its extreme the person might stay in prison for the rest of his life, but that “the indeterminate sentence never went to its theoretical extreme”).

<sup>61</sup> Cf. Rupert N. Cross, *Paradoxes in Prison Sentences*, 81 LAW Q. REV. 205, 205 (1965) (“Am I not a professor of law, and have prison sentences really got much to do with law?”).

Unguided sentencing resulted in a “gross disparity in sentencing, with different sentences imposed upon similar offenders who have committed similar offenses by the same judge on different days, different judges on different days, different judges on the same day, and different judges in different jurisdictions.”<sup>62</sup> There were similar inequities concerning when a particular defendant was released from prison by the paroling authorities.<sup>63</sup> The disparity that flowed from unguided, indeterminate sentencing schemes “often seem[ed] tinted with racism, and the studies confirm[ed] this to some degree: Black offenders receive[d] somewhat longer sentences for the same offenses than [did] white offenders.”<sup>64</sup> The great criminologist and law professor Norval Morris noted that:

Within this wide discretion left to courts to determine the appropriate punishments for crime they have failed to develop any agreed principles or practices and that consequently judicial sentencing lacks uniformity and equality of application, is considerably capricious, and can be shown to fit neither the crime nor the criminal . . . . The individual personality of the judge or magistrate plays too large a part in the assessment of the punishment.<sup>65</sup>

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<sup>62</sup> Singer, *supra* note 16, at 402; *see also* TONRY, *supra* note 37, at 7 (“Unwarranted disparities, explicable more in terms of the judge’s personality, beliefs, and background than the offender’s crime or criminal history, have repeatedly been demonstrated.”) (citation omitted).

<sup>63</sup> *See, e.g.*, JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 62 (2004) (discussing how personal preferences of parole board members often determined release behavior and “often resulted in unwarranted sentencing disparities or racial and gender bias”); *id.* at 62–63 (noting that parole release was criticized in part because there was little evidence it reduced recidivism, it was viewed as unjust to force rehabilitation on them under pain of longer imprisonment, and there was vast, unregulated discretion in the exercise of parole release authority).

Judges in the federal system had some control over a defendant’s eligibility for parole. *See* 18 U.S.C. § 4205(a)–(b) (repealed 1984). Although the judge could frequently authorize an earlier parole eligibility date, most courts appeared to require the defendant to serve at least one-third of the imposed sentence (or ten years of a sentence for more than thirty years or life) before becoming eligible for parole. *E.g.*, *United States v. Scroggins*, 880 F.2d 1204, 1207 n.7 (11th Cir. 1989).

<sup>64</sup> Singer, *supra* note 16, at 402; *see also* *Blakely v. Washington*, 124 S. Ct. 2531, 2544 (2004) (O’Connor, J., dissenting) (“Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.”) (citations omitted); Nagel, *supra* note 48, at 895 (“Discretion seemed inextricably linked with discrimination.”). Professor Tonry notes that “[t]here was substantial gender disparity in indeterminate sentencing—in favor of women. The evidence is unclear on the causes of racial disparities, but their existence is well documented.” TONRY, *supra* note 37, at 7 (citations omitted).

<sup>65</sup> Norval Morris, *Sentencing Convicted Criminals*, 27 AUSTL. L.J. 186, 186, 188 (1953).

Professor Morris's concerns were far from theoretical. One of the most powerful examples of the unfairness that can flow from unguided sentencing was described by public defender John Packel as part of a 1976 sentencing conference held at Villanova University School of Law. Packel described the "unique sentencing device" employed by Judge Carroll, a state court judge in Philadelphia, operating under an unguided, indeterminate sentencing scheme:

A defendant would appear before him convicted of a significant, substantial crime. Judge Carroll used very liberal terms in what he considered a serious crime. He would order the defendant to stand up and turn around, and he would tell [the defendant] to count the number of spectators in the courtroom. And his courtrooms were invariably packed. The defendants would count the spectators and Judge Carroll would say, "How many people are in the courtroom?"

The defendant would say "Seventeen." And the Judge would say, "That's your sentence. 8½ to 17 years."

. . . [O]ccasionally defendants got wise, like one defendant who stood up in front of a packed courtroom and counted, and then turned around and said, "One, your Honor." The Judge said, "One?" And the defendant said, "I only see one that counts." And Judge Carroll said, "Six months to one year."<sup>66</sup>

As shocking as this vignette is, it was not necessarily unprecedented.<sup>67</sup> Given so much discretion, it is not surprising that judges, as mere mortals, would at least at times exercise their discretion in unpredictable and irrational ways.<sup>68</sup> This unguided, indeterminate approach has both a low score on the

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<sup>66</sup> INSTITUTE FOR CORRECTIONAL LAW, SENTENCING IN PENNSYLVANIA 60–61 (D.W. Dowd ed., 1976).

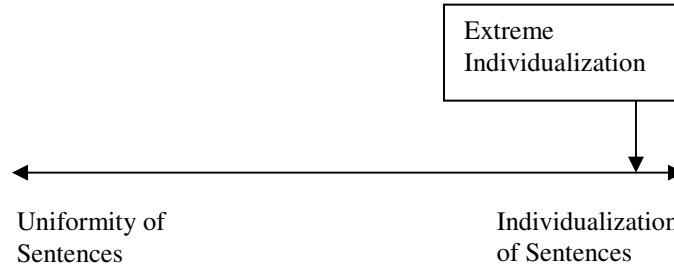
<sup>67</sup> More famously, Judge Marvin Frankel described a judge who had in advance planned to sentence a defendant to four years in prison. MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 18 (1973). At sentencing, however, the defendant "exoriated the judge, the 'kangaroo court' in which he'd been tried, and the legal establishment in general." *Id.* In response, the judge reported that he "listened without interrupting. Finally, when [the defendant] said he was through, I simply gave the son of a bitch five years instead of the four." *Id.* Judge Frankel highlighted much of what was wrong with the unguided system by observing:

Would we tolerate an act of Congress penalizing such an outburst by a year in prison? The question, however rhetorical, misses one truly exquisite note of agony: that the wretch sentenced by [the judge] never knew, because he was never told, how the fifth year of his term came to be added.

*Id.* at 19. Frankel observed further that "every criminal lawyer knows cases in which sentencing judges have done crazy and horrible things." *Id.* at 41.

<sup>68</sup> *Blakely*, 124 S. Ct. at 2544 (O'Connor, J., dissenting) ("This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories.").

proportionality confidence index and an extreme ability to individualize punishment, as shown below:



Following in Professor Morris's footsteps, Judge Marvin Frankel launched a sustained attack on unguided sentencing discretion in his 1973 book *Criminal Sentences: Law Without Order*. After describing the injustices of an unguided sentencing system and the unfulfilled aspirations of the rehabilitative model, Frankel laid out a vision for what has become modern sentencing commissions and sentencing guidelines, although these have developed in ways he did not anticipate and may not have approved.<sup>69</sup>

Many people view the era of unguided sentencing as the "bad old days" because "improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence."<sup>70</sup> Spurred on by Morris, Frankel, and others, many American sentencing systems slowly yielded to reform.

### 3. *The Last Reform: Sentencing Guidelines*

Ushered in by the attacks on unguided sentencing systems, legislative, judicial, and administrative bodies started to experiment with guidance for sentencing decisions.<sup>71</sup> This guidance often, but not always, took the form of

<sup>69</sup> See, e.g., Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043 (1992); cf. FRANKEL, *supra* note 67, at 92–93.

<sup>70</sup> 108 CONG. REC. S8573 (daily ed. July 21, 2004) (statement of Sen. Leahy). Senator Leahy referred to this approach as "fully indeterminate sentencing" and appears to have been referring to the traditional, unguided, indeterminate sentencing scheme although he did not discuss the perils of parole release authority. *Id.*

<sup>71</sup> Cf. Miller, *supra* note 12, at 121 ("Sentencing has undergone more reform over the past several decades than any other area of criminal justice, and perhaps as much reform as any area of the law.").

sentencing guidelines.<sup>72</sup> “[O]ne way to describe sentencing reform over the past half century is that law came to sentencing.”<sup>73</sup>

By the late-1970s, states took the lead on presumptive sentencing guidelines with Minnesota and Pennsylvania in the vanguard. In the following quarter century, several states adopted some form of sentencing guidelines. These jurisdictions attempted to develop systems with an acceptable amount of judicial discretion.<sup>74</sup> This would prove to be an enduring challenge.

Guidelines systems “all seek to eliminate both actual and perceived disparities in criminal sentencing by making it more regular and more transparent.”<sup>75</sup> Sentencing guidelines systems approach this common goal through a wide assortment of methods.<sup>76</sup> As noted above, some guidelines systems are presumptive while others are, to varying degrees, voluntary or advisory. Some use a permanent sentencing commission; others do not. Some systems use a grid with offense severity typically traveling along the vertical axis and criminal history along the horizontal axis; the intersection of those lines produces the suggested or presumptive sentence or sentencing range. Some guidelines are more descriptive, simply reflecting pre-guidelines sentencing practices, while others are more prescriptive, attempting to change pre-guidelines practices.

However a particular system reaches it, the central point is the suggested or presumptive sentence or sentencing range. The idea is that judges should impose a sentence pursuant to these suggestions in the typical case. With respect to guidelines that are presumptive to at least some degree, the better approaches retain flexibility.<sup>77</sup> Professor Douglas Berman noted that “reformers believed that sentencing guidelines, by codifying standards which would direct judges’ sentencing decisions in most but not all cases, could reduce sentencing disparities and maintain sentencing flexibility, while

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<sup>72</sup> See, e.g., Wool & Stemen, *supra* note 5, at 62–63 (discussing presumptive nonguidelines systems).

<sup>73</sup> Miller, *supra* note 12, at 121.

<sup>74</sup> “Reformers recognized that, to be fair and effective, a sentencing system had to strike an appropriate balance in the amount of judicial sentencing discretion.” Berman, *supra* note 57, at 31. Indeed, sentencing guidelines “were promulgated in order to structure the trial court’s exercise of its sentencing power and to address disparate sentencing.” *Commonwealth v. Mouzon*, 812 A.2d 617, 620 n.2 (Pa. 2002).

<sup>75</sup> Brief of Alabama et al. at 1, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632), available at [http://www.dwt.com/pdfs/01-04\\_BlakelyBriefofAlabama.pdf](http://www.dwt.com/pdfs/01-04_BlakelyBriefofAlabama.pdf).

<sup>76</sup> E.g., Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 427–28 (2000).

<sup>77</sup> By definition, fully voluntary guidelines systems allow flexibility. In fact, a prime concern about fully voluntary guidelines is that they are too flexible.

promoting the development of principled sentencing law and policy.”<sup>78</sup> A key to realizing this vision is the ability to deviate from the suggested or presumptive sentencing range through mitigated and aggravated ranges and/or departures from the guidelines. Departures from the guidelines are an important judicial power in well-crafted, presumptive guidelines systems.<sup>79</sup> Effective departure schemes allow the judge, based on good reason and subject to traditional appellate review, to deviate from the presumptive sentence when the facts before the court take the case outside the ordinary circumstances for which the guidelines were written.<sup>80</sup>

With varying degrees of success, sentencing guidelines appear to have reduced unwarranted disparity and brought a degree of rationality to sentencing.<sup>81</sup> No sentencing system is perfect, nor will one ever be.<sup>82</sup> As Professor Richard Frase has aptly noted, “[S]entencing policy is very complex, requiring compromise and careful balancing of numerous, often-competing goals.”<sup>83</sup> In part by regulating, but not eliminating, judicial discretion, many state sentencing guidelines systems have produced pleasant results.<sup>84</sup>

#### 4. *Reform that Lost Its Way?: The Federal Sentencing Guidelines*

The Federal Sentencing Guidelines are a guided, discretionary, (largely nonflat) determinate system. They reflect a fairly rigid form of presumptive sentencing guidelines. Unlike many state guidelines systems, the Federal Sentencing Guidelines are quite complex and detailed. This combination of rigidity and complexity has contributed to their reputation in many circles as a “dismal failure.”<sup>85</sup>

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<sup>78</sup> Berman, *supra* note 57, at 35.

<sup>79</sup> “The departure power is designed to address a wide universe of special circumstances, which may call for small deviations from presumptive penalties in some cases, and dramatic changes in others.” MODEL PENAL CODE: SENTENCING § 6B.04, at 184 (Preliminary Draft No. 3, 2004).

<sup>80</sup> *Id.* § 7.XX, at 202–03; *see also* MINN. SENTENCING GUIDELINES AND COMMENTARY § II.D, at 24 (2004), available at <http://www.msgc.state.mn.us/Guidelines/guide04.doc> (“When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances, and which demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence.”).

<sup>81</sup> *E.g.*, Frase, *supra* note 76, at 443 (“[G]uidelines systems in a number of states have succeeded in improving sentencing policy and practice reducing bias and disparity in sentencing . . .”); *id.* at 436.

<sup>82</sup> *Cf.* Blakely v. Washington, 124 S. Ct. 2531, 2560 (2004) (Breyer, J., dissenting) (“[T]hese systems are imperfect and they yield far from perfect results.”).

<sup>83</sup> Frase, *supra* note 76, at 436.

<sup>84</sup> *E.g.*, *id.* at 443.

<sup>85</sup> Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J. 2 (1992).

The Federal Sentencing Guidelines are “not based solely on the circumstances involved in the actual crime of conviction, and the defendant’s criminal history.”<sup>86</sup> Rather, the total offense level consists of the sum of the “base offense level,” any relevant “specific offense characteristics,” and any applicable adjustments.<sup>87</sup> The total offense level encompasses “relevant conduct” as well.<sup>88</sup> Relevant conduct includes other acts similar to the offense of conviction even if the government never charged the defendant with those acts or the jury acquitted the defendant of those acts; the government need only prove relevant conduct to the judge by a preponderance of the evidence.<sup>89</sup> The specific offense characteristics used to alter the base offense level include such facts as the amount of money taken, the amount of drugs involved, and the presence or use of a weapon. Additionally, judges make adjustments for other facts such as whether the defendant was an organizer or leader of the criminal activity and whether the defendant accepted responsibility for his actions.<sup>90</sup> The end result is the total offense level, which, when paired with the defendant’s Criminal History Category, effectively produces a presumptive guideline range.<sup>91</sup> This range is on the narrow side. By law, the top of the range cannot be more than six months or 25% above the bottom of the range, whichever is higher.<sup>92</sup>

Typically, a judge must sentence the defendant within that presumptive guideline range. Currently, under some circumstances, a judge may sentence

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<sup>86</sup> United States v. Shamblin, 323 F. Supp. 2d 757, 765 (S.D. W. Va. 2004).

<sup>87</sup> *Id.* As noted below, the final sentence may also include departures—up or down—depending on the circumstances.

<sup>88</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004).

<sup>89</sup> *E.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (approving judicial consideration of acquitted conduct if proved by a preponderance of the evidence); U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.3, 6A1.3 (policy statement). Relevant conduct includes:

(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) . . . all reasonably foreseeable acts and omissions of others in furtherance of . . . 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 . . .

*Id.* § 1B1.3(a)(1). Under various circumstances, relevant conduct also includes “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.” *Id.* § 1B1.3(a)(2).

<sup>90</sup> *E.g.*, *id.* § 3B1.1, 3E1.1.

<sup>91</sup> *Id.* § 1B1.1.

<sup>92</sup> 28 U.S.C. § 994(b)(2) (2000). If the bottom of the range is thirty years or more, the top of the range may be life in prison. *Id.*

above or below the applicable guideline range if she concludes that there is 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.”<sup>93</sup> Many critics believe that, from their inception, the Federal Sentencing Guidelines were too rigid and unnecessarily restrictive of a judge’s ability to depart from the presumptive sentencing range.<sup>94</sup> Furthermore, since 2003, a judge’s ability to depart downward from the Federal Sentencing Guidelines has been sharply restricted both through the enactment of various exclusions and limitations on kinds of departures and through the reintroduction of de novo appellate review of such departures.<sup>95</sup> Judges may still depart downward, however, on the government’s motion to reward defendants who cooperate with the government.

The end result is a sentencing guidelines system that is rather inflexible, not respectful of judicial discretion, and frequently criticized for being overly harsh and unfair, particularly as it relates to certain narcotics offenses.<sup>96</sup> For example, concerning the lack of flexibility and an emphasis on uniformity, judges are strongly discouraged from taking into account much about the defendant’s noncriminal life before the offense in question.<sup>97</sup> Concerning proportionality, critics sometimes point to the fact that the drug guidelines revolve almost exclusively around the weight of the drugs involved and provide comparatively limited sentencing relief for those low-level drug dealers who control virtually nothing in the criminal operation, but through whose hands large quantities of drugs pass.<sup>98</sup>

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<sup>93</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1). Different rules apply for crimes against children and sexual crimes. *Id.*; 18 U.S.C. § 3553(b) (2000).

<sup>94</sup> *See, e.g.*, Berman, *supra* note 57, at 58–59 (“By overly restricting the availability of departures, the Guidelines’ initial departure jurisprudence created a system that was unduly and harmfully rigid in most cases.”); Nagel, *supra* note 48, at 934 (observing that initial federal commission focused “more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment”); Stephen J. Schulhofer, *Excessive Uniformity—And How To Fix It*, 5 FED. SENT. REP. 169, 169 (1992) (noting that the federal “guidelines require undue uniformity by blocking needed differentiation among offenders”).

<sup>95</sup> *E.g.*, Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. REP. 310 (2003).

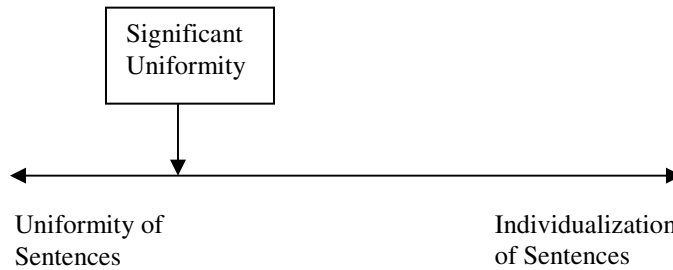
<sup>96</sup> *See, e.g.*, United States v. Shamblin, 323 F. Supp. 2d 757, 768 (S.D. W. Va. 2004) (describing federal sentencing of drug offenders as “draconian”).

<sup>97</sup> *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (“Age (including youth) is not ordinarily relevant in determining whether a departure is merited.”); *id.* § 5H1.11 (“Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”).

<sup>98</sup> *See, e.g.*, Shamblin, 323 F. Supp. 2d at 765 (discussing role of drug weight in base offense level).



The Federal Sentencing Guidelines prize uniformity to the substantial exclusion of reasonable individualization and at the cost of relative proportionality. Graphically represented, they lean heavily toward uniformity:



Relative proportionality has been a recurring problem under the Federal Sentencing Guidelines. In part as a consequence of its significant uniformity and limited departure power, there has been a substantial amount of evasion of the Guidelines through plea agreements and concealment of facts.<sup>99</sup> Because of these and other problems, including an alleged overemphasis on the amount of financial loss or drugs involved, the Federal Sentencing Guidelines yield a score of medium low on the relative proportionality index.

## II. THE *BLAKELY* BLOCKBUSTER

The Supreme Court's decision in *Blakely* is the culmination of several years of cases that blazed a path toward a new conception of the Sixth Amendment jury right. Despite *Blakely*'s blockbuster status, much of this line of cases started with a footnote.<sup>100</sup>

<sup>99</sup> See, e.g., Berman, *supra* note 57, at 62 (noting that, while the extent of Guideline circumvention is disputed, "no one disputes that such evasions through sentencing bargains have impacted a significant number of cases"); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning To Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 729 n.177; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 526, 542 (1992); David N. Yellen, *Two Cheers for A Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569-71 (1992).

<sup>100</sup> Although for purposes of this discussion, I point to *Jones v. United States*, 526 U.S. 227 (1999), as the starting point, there are other options. One top contender that leaps to mind is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the Supreme Court rebuffed a request to treat recidivism as an "element" of the offense. *Id.* at 247. Justice Thomas later appeared to regret his vote with the majority in

In *Jones v. United States*, the Court interpreted the federal carjacking statute and found that it actually contained three separate offenses with different punishments.<sup>101</sup> In the process, the Court dropped an important clue to its future jurisprudence in the now infamous sixth footnote. There, the *Jones* Court wrote that “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.”<sup>102</sup> The Court did concede that “[b]ecause our prior cases suggest rather than establish this principle, our concern about the Government’s reading of the [carjacking] statute [as one offense with an enhanced penalty that may be found by the judge] rises only to the level of doubt, not certainty.”<sup>103</sup> Yet the Court quickly dispelled any such doubt.

The following year, the Supreme Court took its suggestion in the *Jones* footnote and made it the law of the land. In *Apprendi v. New Jersey*, the Supreme Court concluded that every fact that increases an individual’s maximum potential sentence—other than the fact of a prior conviction—must be proven to the jury beyond a reasonable doubt.<sup>104</sup> Therefore, some argue that these facts are considered “elements” of the offense.<sup>105</sup> *Apprendi* involved a New Jersey hate crime provision that increased the statutory maximum from ten to twenty years if the judge determined that the crime was committed with the intent to intimidate on the basis of such factors as race or religion.<sup>106</sup> The Supreme Court concluded that the jury needed to decide this fact because it increased the statutory maximum. In 2002, the Court explicitly extended this reasoning to the capital context in *Ring v. Arizona*.<sup>107</sup>

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*Almendarez-Torres* and sought to overturn it. *Apprendi v. New Jersey*, 530 U.S. 466, 500, 518–19 (2000) (Thomas, J., concurring).

<sup>101</sup> 526 U.S. 227, 229, 243–44 (1999).

<sup>102</sup> *Id.* at 243 n.6.

<sup>103</sup> *Id.*

<sup>104</sup> 530 U.S. 466, 476, 490 (2000).

<sup>105</sup> See, e.g., Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT. REP. 333, 340 (2004).

<sup>106</sup> *Apprendi*, 530 U.S. at 468–69.

<sup>107</sup> 536 U.S. 584, 609 (2002) (“The right to a trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.”). A jury verdict of guilty under the capital statute at issue in *Ring* only authorized a maximum punishment of life in prison. *Id.* at 597. Additional judicial factfinding of an aggravating factor was required before the death penalty could be imposed. *Id.* at 609. Language endorsing this scheme in *Apprendi* led to confusion in the lower courts, which the Supreme Court resolved in *Ring*. See, e.g., *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. Ct. 2000) (“[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the [Supreme] Court has endorsed this precise principle, and we are in no position to second-guess that decision here.”), *cert. denied*, 540 U.S. 1199 (2004).

Although the lower federal courts and the state courts confined *Apprendi* and its progeny<sup>108</sup> to the traditional, legislatively enacted statutory maximum,<sup>109</sup> there was “great speculation among academics, judges, and lawyers about how far it would go.”<sup>110</sup> Would, for example, *Apprendi* be extended to, and thus invalidate, determinate sentencing guidelines systems?

The Supreme Court seemed to allay those fears in *Harris v. United States*.<sup>111</sup> In *Harris*, a wobbly majority of the Court concluded that *Apprendi* did not invalidate mandatory minimum sentencing schemes in which the judge found the triggering event, such as the presence of a gun, and did so by a preponderance of the evidence.<sup>112</sup> The *Harris* majority was wobbly because of Justice Breyer. In *Harris*, Justice Breyer concurred in the judgment and joined selected parts of Justice Kennedy’s lead, and at times majority, opinion.<sup>113</sup> Justice Breyer said that he could not “easily distinguish” *Apprendi* from *Harris* “in terms of logic” and thus did not join “the plurality’s opinion insofar as it finds such a distinction.”<sup>114</sup> He went on to observe that “because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join the Court’s judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.”<sup>115</sup>

As long as the fact that triggered the mandatory minimum did not increase the statutory maximum, which many, if not most, courts and commentators understood to be the maximum punishment available according to the legislature for the offense of conviction, *Apprendi* did not require the fact to be found by the jury beyond a reasonable doubt. The *Harris* message received by many, if not most, observers was that presumptive sentencing guidelines with judicial factfinding did not offend the Sixth Amendment.<sup>116</sup> The low end of

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<sup>108</sup> See, e.g., *Ring*, 536 U.S. at 602 (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”) (internal citations omitted).

<sup>109</sup> See, e.g., *United States v. Smith*, 223 F.3d 554, 565 (7th Cir. 2000).

<sup>110</sup> *Bibas*, *supra* note 105, at 333.

<sup>111</sup> 536 U.S. 545 (2002).

<sup>112</sup> *Id.* at 557; see also *Ring*, 536 U.S. at 604 n.5; *Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000).

<sup>113</sup> 536 U.S. at 569.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 569–70.

<sup>116</sup> See, e.g., Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi To Upset Most Sentencing*, 15 FED. SENT. REP. 79, 79 (2002) (“The upshot is that *Apprendi*, which once threatened the sentencing guidelines and the national trend toward determinate sentencing, is now a caged

the presumptive guideline range can be set based on judicially found facts. In the federal context, this meant that judges could continue to sentence based on their own factual findings about the offense and relevant conduct so long as the sentence did not exceed the often high—for example, twenty years or more—maximum penalty for the offense of conviction as set by Congress. Thus, “the *Apprendi* hurricane appeared to have petered out.”<sup>117</sup> That was before *Blakely v. Washington*.<sup>118</sup>

Ralph Blakely pled guilty to the second-degree kidnapping of his wife involving both domestic violence and the use of a gun.<sup>119</sup> According to the Washington Criminal Code, Blakely’s offense of conviction, second-degree kidnapping, carries a statutory maximum of ten years in prison.<sup>120</sup> Washington has a discretionary, determinate sentencing system. It also has legislatively enacted, presumptive sentencing guidelines. Washington based its guidelines primarily on the offense of conviction and the defendant’s criminal history.<sup>121</sup>

Pursuant to the Washington sentencing guidelines, Blakely’s presumptive sentencing range was forty-nine to fifty-three months in prison.<sup>122</sup> Washington’s guidelines—like virtually all presumptive sentencing guidelines—recognized that the presumptive range would not always be appropriate.<sup>123</sup> As such, the sentencing judge could impose a sentence in excess of the presumptive range, a so-called “exceptional sentence,” under certain circumstances.<sup>124</sup> If the judge made factual findings of “substantial and

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tiger. And the irony is that Justice Antonin Scalia, the only Justice who voted to strike down the Sentencing Guidelines fourteen years ago, provided the fifth vote that ensures that the Guidelines will survive today.”).

<sup>117</sup> Bibas, *supra* note 105, at 333.

<sup>118</sup> 124 S. Ct. 2531 (2004).

<sup>119</sup> *Id.* at 2534.

<sup>120</sup> *Id.* at 2535; *see also* WASH. REV. CODE § 9A.20.021(1)(b) (West Supp. 2005).

<sup>121</sup> *See, e.g.,* United States v. Shamblin, 323 F. Supp. 2d 757, 764 (S.D. W. Va. 2004) (“The Washington Sentencing Reform Act establishes ‘presumptive sentencing ranges’ based on the ‘seriousness level’ of the offense and the defendant’s ‘offender score.’ The offense seriousness level is determined by the offense of conviction and the offender score is based upon the defendant’s criminal history.”); Brief for Petitioner at 2, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632) (“The core of the [Washington] Sentencing Reform Act . . . is a grid of relatively narrow ‘standard ranges,’ or ‘presumptive sentences,’ calculated according to the seriousness of the offense and the criminal history of the offender.”).

<sup>122</sup> *Blakely*, 124 S. Ct. at 2535.

<sup>123</sup> *See id.*

<sup>124</sup> *Id.* The imposition of an “exceptional sentence” is analogous to an upward departure under the Federal Sentencing Guidelines. *Shamblin*, 323 F. Supp. 2d at 766.

compelling reasons justifying an exceptional sentence,” she could, but was not required to, impose a sentence higher than the top of the presumptive range.<sup>125</sup>

In *Blakely*, the trial judge concluded that Blakely used “deliberate cruelty,” which is a statutory justification for an exceptional sentence.<sup>126</sup> The judge found the facts necessary to reach the deliberate cruelty conclusion by a preponderance of the evidence and without the aid of a jury. Based on this finding of deliberate cruelty, the judge imposed an exceptional sentence of ninety months in prison.<sup>127</sup> Although Blakely claimed that this procedure violated the Sixth Amendment, the Washington courts affirmed his sentence.<sup>128</sup>

Blakely brought his case to the Supreme Court of the United States and alleged that his Sixth Amendment rights had been violated because the judge, and not a jury, determined that he had committed his crime with “deliberate cruelty,” exposing him to the exceptional sentence.<sup>129</sup> Washington and its *amici* sought a reading of *Apprendi* that would preserve the existing approach to presumptive sentencing guidelines.<sup>130</sup> They claimed that there is no constitutional violation as long as the sentence stays within the traditional statutory maximum for the offense of conviction.<sup>131</sup>

Justice Scalia, writing for a five Justice majority, employed formalistic reasoning, took an expansive view of *Apprendi*, and reversed Blakely’s sentence.<sup>132</sup> The majority focused on the “statutory maximum” language in *Apprendi*; in fact, it redefined that term.<sup>133</sup> Justice Scalia stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge

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<sup>125</sup> WASH. REV. CODE. § 9.94A.535; *see also* *Blakely*, 124 S. Ct. at 2535; Brief for Petitioner at 3, *Blakely*, (No. 02-1632) (“In other words, a court may deviate upward from the standard sentencing range only on the basis of factual findings beyond those required by the elements of the underlying offense.”).

<sup>126</sup> *Blakely*, 124 S. Ct. at 2535; *see also* WASH. REV. CODE. § 9.94A.535(2)(h)(iii).

<sup>127</sup> *Blakely*, 124 S. Ct. at 2535.

<sup>128</sup> *Blakely v. Washington*, 47 P.3d 149, 159 (Wash. App. 2002).

<sup>129</sup> *Blakely*, 124 S. Ct. at 2536.

<sup>130</sup> Brief of Alabama et al. at 10, *Blakely*, (No. 02-1632), *available at* [http://www.dwt.com/pdfs/01-04\\_BlakelyBriefofAlabama.pdf](http://www.dwt.com/pdfs/01-04_BlakelyBriefofAlabama.pdf).

<sup>131</sup> *See, e.g., id.*

<sup>132</sup> *See, e.g.,* Bibas, *supra* note 105, at 333.

<sup>133</sup> *See, e.g.,* United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004) (“*Blakely* redefined ‘statutory maximum.’”); Goldsmith, *supra* note 58, at 952 (“*Blakely*, however, subsequently transformed the meaning of the term ‘statutory maximum.’”); Steven G. Kalar et al., *A Blakely Primer: An End to the Federal Sentencing Guidelines?*, CHAMPION, Aug. 2004, at 10, 11, *available at* <http://www.nacdl.org/public.nsf/championarticles/a0408p10?opendocument> (“[T]he key turning point in the [*Blakely*] decision is the definition of ‘statutory maximum.’ The Court could have defined this term to mean only the legislative maximum sentence for a given offense.”).

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*<sup>134</sup> He went on to note that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>135</sup> Thus, because of the Washington guidelines, the jury’s verdict only authorized a sentence up to the top of the guidelines’ presumptive sentencing range.

The *Blakely* Court did not attempt to overrule *Harris*.<sup>136</sup> In fact, it arguably reaffirmed a judge’s ability to find facts that trigger mandatory minimum penalties.<sup>137</sup> Boiled down to its essence, *Blakely* appears to view *Apprendi* as a protection against increasing the statutory maximum, and to view the top of a legislatively enacted, presumptive sentencing guideline range as being just such an *Apprendi-Blakely* statutory maximum. Accordingly, *Blakely* does not implicate typical mandatory minimum sentences or the bottoms of presumptive guideline ranges set by judicial factfinding.<sup>138</sup>

Working from the majority’s novel definition of a statutory maximum, it appears that juries must now find all facts—at least in jurisdictions with legislatively enacted sentencing guidelines—that increase a defendant’s maximum potential guidelines punishment. Professor Stephanos Bibas has argued that “[t]hese facts are now elements of the offense.”<sup>139</sup> If so, it appears that these guidelines have effectively *created* new offenses.<sup>140</sup> Despite

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<sup>134</sup> *Blakely*, 124 S. Ct. at 2537 (emphasis in original).

<sup>135</sup> *Id.* (emphasis in original).

<sup>136</sup> *Cf. Spero v. United States*, 375 F.3d 1285, 1286 (11th Cir. 2004) (“Whatever other effect . . . [*Blakely*] may have, it does not undermine the validity of minimum mandatory sentences, at least not where the enhanced minimum does not exceed the non-enhanced maximum.”).

<sup>137</sup> *Cf. Goldsmith*, *supra* note 58, at 976 (stating that *Blakely* “confirmed prior case law establishing that the Court’s Sixth Amendment analysis does not apply to sentencing factors that trigger mandatory minimum penalties”); *id.* at 978 (“*Blakely* . . . confirms that mandatory minimum statutes operate outside the protection of the Sixth Amendment jury trial and burden of proof requirements.”).

<sup>138</sup> *Blakely*, 124 S. Ct. at 2538 (distinguishing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which dealt with a judicially found mandatory minimum, as not involving “a sentence greater than what state law authorized on the basis of the verdict alone”). As discussed below, some commentators question whether *Harris* will survive post-*Blakely*. Professor Michael Goldsmith and others make a strong case that these two lines of authority can co-exist. *See, e.g., infra* text accompanying note 190.

<sup>139</sup> Bibas, *supra* note 105, at 333.

<sup>140</sup> For this reason, it is possible that all nonlegislatively enacted guidelines could fall under a separation of powers analysis. *See United States v. Hammoud*, 381 F.3d 316, 357–60 (4th Cir. 2004) (Wilkinson, J., concurring) (arguing against the application of *Blakely* to the Federal Sentencing Guidelines in part because such an application would unconstitutionally allow the Sentencing Commission to create offense elements).

objections that this ruling re-writes the criminal code,<sup>141</sup> the *Blakely* majority seemed unconcerned with the consequences of its actions.<sup>142</sup> Although Justice Scalia mounted a heated defense of the jury,<sup>143</sup> he would seem to permit the classic, unguided sentencing system, in which the jury is at least as irrelevant as it was in *Blakely*'s sentencing.<sup>144</sup> In such a system, the jury simply authorizes imposition of the criminal code's maximum punishment for the offense of conviction and gets out of the way. Justice Scalia's approach would presumably approve of a return to tariffs where each crime yields a specific, legislatively set punishment. In other words, Justice Scalia's approach to sentencing led him to effectively endorse the extremes while throwing much of the middle into confusion.<sup>145</sup>

The dissenters predicted much confusion and turmoil in *Blakely*'s wake.<sup>146</sup> In that, they were correct. They also predicted, however, that *Blakely* would result in "greater judicial discretion and less uniformity in sentencing."<sup>147</sup> While certainly possible, that need not be true.

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<sup>141</sup> Cf. Brief of Alabama et al. at 12, *Blakely* (No. 02-1632) ("Under this interpretation of *Apprendi*, the 'maximum penalty' for a crime—and thus the definition of the elements of a crime—is no longer a matter of legislative intent."), available at [http://www.dwt.com/pdfs/01-04\\_BlakelyBriefofAlabama.pdf](http://www.dwt.com/pdfs/01-04_BlakelyBriefofAlabama.pdf).

<sup>142</sup> See, e.g., *Blakely*, 124 S. Ct. at 2552 (Breyer, J., dissenting) ("The majority ignores the adverse consequences inherent in its conclusion."). While the *Blakely* opinion is open to serious criticism because its extension of *Apprendi* is questionable, Professor Albert Alschuler properly notes that just because a decision is "breath-takingly unpragmatic," does not mean that it is improper. Alschuler, *supra* note 54, at 17. In fact, he notes that "[t]rue restraint (that is, true respect for the limits of the judicial office) may consist of deciding legal questions as legal questions without giving extraordinary weight to the political consequences of one's decisions." *Id.* (emphasis in original). Nevertheless, this lack of concern for the real world consequences of its actions leaves the *Blakely* majority open to charges of scholasticism. Cf. Thomas J. Curry, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, 16 J.L. & RELIGION 309, 309 (2001) ("The late medieval period provides an historical parallel. By that time, Scholasticism had degenerated into a sterile intellectualism and an exercise in logic chopping. Scholastics of that time are sometimes described as debating how many angels could dance on the head of a pin. Renaissance Humanists, however, characterized them as assembling in classrooms to ascertain by logical deduction, the number of a horse's teeth.").

<sup>143</sup> See, e.g., *Blakely*, 124 S. Ct. at 2543 ("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.'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*343).

<sup>144</sup> See *Blakely*, 124 S. Ct. at 2541.

<sup>145</sup> Wool & Stemen, *supra* note 5, at 64 (noting that "the *Blakely* decision allows for some seemingly perverse effects").

<sup>146</sup> See *Blakely*, 124 S. Ct. at 2561 (Breyer, J., dissenting) (discussing uncertainty following *Blakely* in the federal system).

<sup>147</sup> *Id.* at 2543 (O'Connor, J., dissenting).

First to chaos and confusion: In the short term, *Blakely* left disorder and uncertainty in its wake all across the country.<sup>148</sup> As the dust started to settle, many jurisdictions realized that *Blakely* harmed at least parts of their sentencing schemes, but the full extent of the damage was hard to assess. Guidelines sentencing systems in Minnesota, North Carolina, Oregon, and Tennessee now appear to face the same basic *Blakely* problems as Washington.<sup>149</sup> Thus, at a minimum, these states will have to revise significant aspects of their presumptive sentencing guidelines. The Vera Institute of Justice has identified eight other states with presumptive, structured sentencing systems—but without guidelines—that will be “fundamentally” affected by *Blakely* as well as others that may feel *Blakely*’s bite.<sup>150</sup> Many of the states will need to revise or totally overhaul their sentencing laws. The process of determining exactly what survives and what falls after *Blakely* could occupy the courts for months, if not years. The federal courts have split, both on the question of whether *Blakely* applies to the Federal Sentencing Guidelines, and if so, on the issue of what that means.<sup>151</sup> The Supreme Court promptly agreed to resolve at least some of these questions,<sup>152</sup> but regardless of what the Court decides, the genie of substantial sentencing reform—state and federal—may have been released. It is rare, if not unprecedented, that a single Supreme Court decision not only forces changes in so many jurisdictions but does so in a way that results in such intense confusion and uncertainty.

Nevertheless, *Blakely* may go down in history as a force for positive, substantive sentencing reform. If so, it will be because of the responses of various legislatures. How should legislatures proceed in the post-*Blakely*

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<sup>148</sup> See, e.g., Joan Biskupic, *High Court Ruling Sows Confusion*, USA TODAY, July 12, 2004, at 3A (stating that early indications vindicate Justice O’Connor’s fear of *Blakely* wreaking havoc in the trial courts); Tracy Johnson, *Serious Crimes, Less Severe Sentences: Judges Try To Discern How Badly the System Has Been Upended*, SEATTLE POST-INTELLIGENCER, July 12, 2004, at A1 (quoting District Court Judge Robert Lasnik as stating, “What [*Blakely*] means now is complete and utter chaos”); Matt O’Connor, *Lawyer Invokes Sentencing Ruling*, CHI. TRIB., July 2, 2004, at 2 (quoting Chief District Court Judge Charles Kocoras as stating that *Blakely* created “mass uncertainty”).

<sup>149</sup> Wool & Stemen, *supra* note 5, at 61. For example, the Tennessee Court of Criminal Appeals recently stated that *Blakely* “may well obliterate Tennessee’s procedure for determinate sentencing by a judge utilizing statutory enhancement factors.” *State v. Ramey*, 2004 Tenn. Crim. App. LEXIS 636, at \*30 n.4 (July 15, 2004) (citation omitted); see also *State v. Whitley*, 682 N.W.2d 691, 696–97 (Minn. Ct. App. 2004) (reversing a sentence containing an upward departure in light of *Blakely*). Kansas also faces these issues but addressed them earlier because of a ruling similar to *Blakely* by its state supreme court. *State v. Gould*, 23 P.3d 801 (Kan. 2001).

<sup>150</sup> Wool & Stemen, *supra* note 5, at 60.

<sup>151</sup> See, e.g., Chanenson, *supra* note 8.

<sup>152</sup> *United States v. Booker*, 125 S. Ct. 11 (2004); *United States v. Fanfan*, 125 S. Ct. 12 (2004).



world? The Court has provided scant guidance on what might satisfy its vision of the Sixth Amendment. In some ways, since its 1999 decision in *Jones*, the Supreme Court has played an elaborate game of Marco Polo<sup>153</sup> in which it tells legislatures the general location of the goal of constitutional sentencing, but keeps moving the precise target. With *Blakely*, some state legislatures have finally caught the target, but their systems need to change; the question is how. The next Part explores and evaluates some leading options.

### III. NOW WHAT? MANY OPTIONS AFTER *BLAKELY*

Justice O'Connor's fear of losing decades of sentencing reform need not materialize.<sup>154</sup> Nor is Justice's Kennedy's prediction that *Blakely* will extinguish "alternative, nonjudicial, sources of ideas and experience"<sup>155</sup> inevitable. It is true that legislatures *could* return to either tariffs or fully discretionary sentencing, be it determinate or indeterminate. Unquestionably, either of these options would be tragic. It would throw away decades of hard work and productive thought, resulting in less justice for offenders and society at large.

Fortunately, however, legislatures have several options for structuring sentencing in a way that complies with *Blakely*. The four such options discussed below range from light guidance (fully voluntary guidelines) to relatively firm guidance (*Blakely*-izing traditional presumptive guidelines in determinate systems<sup>156</sup>). Yet, they all come at a significant cost in either the relative uniformity versus relative individualization tradeoff, or proportionality, or both. They careen from nearly wide-open sentencing discretion both up and down to discretion primarily reserved for sentence increases to stunted discretion to lengthen sentences when appropriate. Unlike the new Indeterminate Structured Sentencing approach discussed in Part IV, these four options do not strike an acceptable balance between reasonable uniformity and reasonable individualization while maintaining a high likelihood of relatively proportional results.

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<sup>153</sup> See Rules of Marco Polo, available at <http://www.partygamecentral.com/pgcstandard/gametmpstd.asp?gn=MARCO+POLO> (last visited Jan. 28, 2005).

<sup>154</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2550 (2004) (O'Connor, J., dissenting).

<sup>155</sup> *Id.* at 2551 (Kennedy, J., dissenting).

<sup>156</sup> See *infra* text accompanying note 210.

### A. *The Fully Voluntary Approach*

Fully voluntary guidelines provide nonbinding suggestions that the judge is free to adopt, modify, or disregard when imposing a sentence.<sup>157</sup> There is no need for the judge to provide a reason for declining to follow the guidelines. All that would be necessary is to take pre-*Blakely* presumptive guidelines, such as the Federal Sentencing Guidelines, and make them completely advisory or fully voluntary.<sup>158</sup>

Fully voluntary sentencing guidelines survive *Blakely*.<sup>159</sup> The Sixth Amendment is not offended if judges have complete discretion to impose any sentence up to the statutory maximum. Under this approach, the *Blakely* statutory maximum and the traditional statutory maximum converge. The judge can impose whatever sentence she deems appropriate. The fact that a sentencing commission promulgates fully voluntary guidelines is effectively irrelevant to the Sixth Amendment analysis. Unfortunately, as with other post-*Blakely* options, the aspect of the fully voluntary guidelines system that ensures its compatibility with the Sixth Amendment (the nonbinding nature of the guidelines) is also a prime substantive liability.

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<sup>157</sup> I adopt the phrase “fully voluntary guidelines” from Wool and Stemen. See Wool & Stemen, *supra* note 5, at 66.

The fully voluntary guideline approach is to be compared to a “voluntary” guidelines system where a judge must give a reason before departing from the “voluntary” guidelines range. Conceivably, there could be appellate review of those reasons. See, e.g., *id.* However, the availability of meaningful appellate review of sentences under such a system is, at best, in question because of *Blakely*. If an appellate court provides greater scrutiny to sentences that deviate from the “voluntary” guidelines, one could argue that the top of the allegedly “voluntary” guideline range should be viewed as a *Blakely* statutory maximum. Therefore, departures above that point would not be possible without jury factfinding or a defendant’s admission. See, e.g., *id.* at 63 (“[T]he requirement that a judge state reasons as a pre-condition of an enhanced sentence may establish the top of the guidelines range as the effective maximum sentence—a situation no different from the one presented in *Blakely*.”). As such, I will discuss the fully voluntary guideline approach.

<sup>158</sup> See, e.g., Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, at A27; see also *United States v. Hakley*, 2004 U.S. Dist. LEXIS 15784, at \*21 (W.D. Mich. Aug. 12, 2004) (“By treating the [Federal Sentencing] Guidelines as advisory rather than mandatory, judges will gain the benefits of having a comprehensive set of recommendations available to them while avoiding the drawbacks of being forced to follow those recommendations even when they are clearly inapplicable.”).

<sup>159</sup> Perhaps for this reason, they appear to have been a popular choice of federal district courts in the months immediately after *Blakely*. “Among the courts that have held that *Blakely* applies to the federal guidelines, the most common response appears to be to treat the guidelines as advisory.” U.S. SENTENCING COMMISSION, PRELIMINARY FINDINGS: FEDERAL SENTENCING PRACTICES SUBSEQUENT TO THE SUPREME COURT’S DECISION IN *BLAKELY V. WASHINGTON 2* (2004), available at <http://www.ussc.gov/Blakely/blakelyourtr eachpreliminaryfindings.pdf>. However, at least one commentator has questioned whether such guidelines and wide judicial discretion *should* be permissible. See Mark D. Harris, *Blakely’s Unfinished Business*, 17 FED. SENT. REP. 83, 85–87 (2004) (arguing that *Blakely* undermines *Williams v. New York*, 337 U.S. 241 (1949)).

Fully voluntary sentencing guidelines present many—but not all—of the problems inherent in unguided, discretionary sentencing system. Fully voluntary sentencing guidelines can, however, provide judges with guidance that is more useful than the often vast statutory punishment range. Indeed, despite the absence of binding rules, many judges would still want some form of guidance so as to avoid the pitfalls of the past unguided, discretionary system. Judge Gerard Lynch describes it well from the federal perspective: “After nearly two decades of Guideline sentencing, which followed decades of criticism of the unconstrained discretion that culminated in the Sentencing Reform Act of 1984[, which ushered in the federal guidelines], it is doubtful that any federal court would be comfortable wielding such extraordinary discretion.”<sup>160</sup> Judge Lynch has noted that a fully voluntary approach could work to reduce disparity.

But the use of the Guidelines as *guidelines*—that is, as an advisory system of principles that both (1) sets a general level of severity of sentences deemed appropriate by a judicious body of politically responsible experts and (2) creates a methodology and enumerates factors to be applied to assess the seriousness of criminal conduct and the severity of an offender’s criminal record—would be a significant step toward controlling unwonted disparity and giving meaningful structure to the exercise of discretion.<sup>161</sup>

Judge Lynch nicely describes a fully voluntary guidelines system that works well. Having fully advisory guidelines is substantially better than having no guidance whatsoever. Given the current composition of the federal bench—with the majority of judges never having imposed a sentence without Sentencing Guidelines<sup>162</sup>—a considerable degree of compliance with federal, fully voluntary guidelines seems likely.

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<sup>160</sup> United States v. Emmenegger, 329 F. Supp. 2d 416, 426 (S.D.N.Y. 2004).

<sup>161</sup> *Id.*

<sup>162</sup> David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 224 (2004) (“[T]he majority of sitting federal judges have experienced only the Guidelines and hence there was no golden era to which they harkened back.”).

Yet fully voluntary systems might not work well—certainly not for the long haul.<sup>163</sup> This is an unusual moment in the history of the federal bench. Judges see the prospect of escaping from the yoke of the pre-*Blakely* Federal Sentencing Guidelines. It would not be surprising for these federal judges to follow such fully voluntary guidelines closely but not “slavishly.”<sup>164</sup>

Fast forward another twenty years and the picture may not be so rosy. The next generation of federal judges would grow up on the fully voluntary guidelines system and never experience the rigid pre-*Blakely* Federal Sentencing Guidelines. How closely would they follow the fully voluntary guidelines? It is, of course, impossible to say with certainty. It seems, however, that without some galvanizing experience (like toiling under the pre-*Blakely* Federal Sentencing Guidelines), many judges spread out across the country would start to use more and more of their discretionary powers.<sup>165</sup> The range of sentences would likely expand—both up and down—in a fashion similar to the pre-Guidelines experience, although perhaps not to that same extent.

Furthermore, even a fully advisory guidelines system that works well and yields substantial compliance will be cold comfort to the defendant who receives, inappropriately in his view, a sentence that is too harsh. Similarly, the prosecutor who sees a defendant sentenced as a lenient outlier is not likely to be mollified by the knowledge that this does not happen *too* often. A system of fully advisory guidelines is better than one of unguided discretion, but it still does not provide significant protection against invidious bias and other unwarranted disparities.

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<sup>163</sup> See, e.g., TONRY, *supra* note 37, at 193 (“[E]xperience with voluntary guidelines in a number of states (excluding Delaware, which is a special case) shows that judges seldom follow them and that disparities are unaffected.”). It appears that Missouri employs a fully voluntary guidelines system, but it is unclear how well it works. See MISSOURI SENTENCING ADVISORY COMMISSION, REPORT ON RECOMMENDED SENTENCING 4 n.1 (2004), available at <http://www.doc.missouri.gov/pdf/Missouri%20Sentencing%20Advisory%20Commission.pdf> (“The commission labels its work as Sentencing Recommendations because that is what they are.”); 32 ROBERT H. DIERKER, MISSOURI PRACTICE SERIES § 57.1 (1st ed. 1998) (“The Guidelines are gaining currency among trial judges, at least in metropolitan areas. However, the suspicion persists that many prosecutors merely pay them lip service, while adhering to their previous plea-bargaining practices.”). Virginia has had a generally positive experience with voluntary guidelines; but it, too, may be a special case, perhaps in part because of the legislative role in selecting judges. See Adam Liptak, *Judges’ New Leeway in Choosing Sentences May Result in Little Change*, N.Y. TIMES, Jan. 18, 2005, at A14.

<sup>164</sup> *Emmenegger*, 329 F. Supp. 2d at 426.

<sup>165</sup> The prospects may be brighter for smaller, more cohesive benches—particularly those in which all the judges are located in one courthouse—where the informal pressure to conform may well be greater.

As shown below, this fully voluntary sentencing guidelines approach has a very high, but not extreme, degree of individualization.



Relatedly, it rates a medium-low score on the proportionality confidence index. A fully voluntary system may often yield a relatively proportional sentence, but there are still many opportunities for disproportionate sentences (on a relative scale). Judges could exercise their right to hyper-individualize as well as impose their own sense of justice, thus imperiling relative proportionality, with impunity.

An example may be helpful. While grappling with his first post-*Blakely* sentencing, the very wise and thoughtful Judge Lynch recently noted that he would sentence a securities fraud defendant to twenty-four months if the Federal Sentencing Guidelines were advisory. This is nine months less than the bottom of the applicable guideline range. Judge Lynch justified the twenty-four month sentence by noting that the “Guidelines place undue weight on the amount of loss involved in the fraud . . . . In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”<sup>166</sup> He went on to observe, consistent with many critics of the Guidelines, that

while the Guidelines appropriately steer the Court toward a significantly punitive and deterrent sentence, and counsel against giving undue weight to other facts, they err in giving virtually no weight to the ‘history and characteristics of the defendant,’ which

<sup>166</sup> *Emmenegger*, 329 F. Supp. 2d at 427. Ultimately, Judge Lynch found the Guidelines binding and sentenced the defendant to thirty-three months in prison. *Id.* at 436.

Congress instructs the sentencing courts to consider equally with 'the nature and circumstances of the offense.'<sup>167</sup>

Judge Lynch is probably correct that the Federal Sentencing Guidelines are too rigid and perhaps better-drafted guidelines would allow for this kind of latitude from the ends of the current Guidelines range.<sup>168</sup> Yet, a judge's ability to dispense with the fully voluntary guidelines simply because she disagrees with the *policy* choices inherent in those guidelines can rapidly lead to both unwarranted disparity and a greater chance of disproportionality.<sup>169</sup> In similar cases across the jurisdiction—be it state or federal—not every judge is going to agree. Some judges will follow the voluntary guidelines and operate within the latitude they provide as written. Other judges will disagree with the guidelines and sentence the defendant to a lesser (or greater) sentence with a smaller (or larger) amount of variance from the advisory markers. By discounting fully voluntary guidelines with which she disagrees, a judge may (or may not) achieve a better measure of justice in the individual case before her. Nevertheless, it is very questionable that the sentencing *system* itself is better off.

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<sup>167</sup> *Id.* at 428 (quoting 18 U.S.C. § 3553(a)(1) (2000)).

<sup>168</sup> Some people (presumably not the defendant) would view the difference of nine months as not being a substantial deviation from the guidelines in a fully voluntary system. *See id.* ("The sentence is also of the same general level of magnitude as that provided in the Guidelines; it can hardly be said that a sentence of two years rather than two years and nine months disrespects the policies underlying the Guidelines or undermines deterrence."). Judge Lynch astutely notes this general concern:

In setting this particular length of imprisonment as satisfying the Court's analysis of the factors relevant to sentencing, the Court takes account not merely of the facts to which the Guidelines direct attention, but also of the overall level of severity proposed by the Guidelines. While any individual judge might prefer an overall more lenient or more severe table of punishments, a principal value of the Guidelines is in freeing defendants from disparities created by such preferences, and providing benchmarks for what society as a whole, and judges in particular, consider the appropriate scale of punishment for different degrees of crime.

*Id.* at 425 n.11.

The nine month difference in this case as a *percentage* (27%), however, translates to a much larger absolute number at higher levels of severity. It becomes disturbingly large even when seen in the full context of *Emmenegger*. If 27% below the bottom of the range is consistent with the intent of the Guidelines, then certainly a sentence 27% above the top of the range is also consistent with the intent of the Guidelines. Yet, Judge Lynch does not address either the size of the sentencing range he has just created (a 27% extension to both the top and the bottom of the otherwise-applicable range yields a span from 24–52 months), or the fact that different judges could disagree with other parts of the guidelines and then set their own appropriate sentencing ranges. Indeed, a critical objection to fully voluntary guidelines is that an individual judge can freely disagree with the *policy* choices reflected in the guidelines.

<sup>169</sup> *Cf.* MODEL PENAL CODE: SENTENCING § 7.XX, at 207 (Preliminary Draft No. 3, 2004) (discussing draft provision which "excludes departures premised on bare disagreement with the commission's judgment concerning an appropriate penalty for an 'ordinary case' under the guidelines").

Fully voluntary sentencing guidelines help judges to know what their colleagues are doing and encourage them, in part through a desire to stay with the pack, to conform. The assumption that fully voluntary guidelines mean absolutely no controls on sentencing discretion is neither true nor fair. However, by providing weak protections in individual cases, this approach could easily deteriorate into little more than the discredited unguided, discretionary approach.

*B. The Inversion Approach*

The inversion approach would take a presumptive guidelines system, like the Federal Sentencing Guidelines, and turn it on its head. All presumptive sentences would start at the traditional statutory maximum and the judge would then mitigate in either a guided or an unguided fashion.<sup>170</sup> Instead of starting at a comparatively low base offense level and asking how much the particular nature of the offense (e.g., presence of a gun) and the offender *increases* the sentence, the judge would start at the statutory maximum and ask how much the particular nature of the offense (e.g., absence of a gun) and the offender *decreases* the sentence. The system would simply start high and move low instead of starting low and moving high. The end result can, in theory, be the same as the presumptive sentencing guidelines system it might replace.

At first blush, this would not seem to offend *Blakely*.<sup>171</sup> Under this approach, the *Blakely* statutory maximum and the traditional statutory maximum converge. The court does not increase a defendant's potential maximum sentence based on judicial factfinding.<sup>172</sup> Yet it may not be that simple. Unlike some other options that make slight modifications from past practices to comply with *Blakely*, the inversion approach turns the entire system upside down. This may be too much for the Supreme Court.

The Supreme Court was aware of this general method of responding to its initial *Apprendi* opinion. The *Apprendi* Court brushed aside concerns about raising all statutory maxima to, say, life in prison, because it felt that undefined

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<sup>170</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2558 (2004) (Breyer, J., dissenting) ("Congress and state legislatures might, for example, 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.") (citation omitted).

<sup>171</sup> *Id.*

<sup>172</sup> *Cf. Bibas*, *supra* note 105, at 339 ("The utterly formalistic logic of *Apprendi* permits this [Inversion Approach] gimmick, as a defendant supposedly has fair warning of the highest possible sentence.").

“structural democratic constraints” would prevent such a move.<sup>173</sup> Some commentators have responded that the Court overestimated the power of such nebulous constraints.<sup>174</sup> Nevertheless, the Supreme Court left itself some wiggle room in *Apprendi* to thwart legislatures from attempting this kind of a response.<sup>175</sup> As Professor Bibas has noted, “*Apprendi* hinted . . . that if a legislature redrafted its entire criminal code to turn aggravators into mitigators, the Court might invalidate this [inversion] gimmick.”<sup>176</sup>

Substantively, this approach may or may not make sense. It all depends on the way in which a judge’s discretion to mitigate down from the traditional statutory maximum is controlled. It can skew toward uniformity or individualization. Even more than the typical system, the devil would be in the details.

At the policy level—if not the constitutional level—there may be a burden shifting concern. Is it wise and appropriate to require the defendant to demonstrate the existence of mitigating facts? This is one potential solution: The initial guideline sentence would be the statutory maximum.<sup>177</sup> However, there could be a rebuttable presumption that the defendant is entitled to have that sentence mitigated.<sup>178</sup> The government would then have the burden to actually rebut the presumption—to disprove any claimed mitigating factor—if it wants the higher sentence. This rebuttable presumption twist is arguably *Blakely* compliant because there is no Sixth Amendment problem with mitigating sentences irrespective of the jury’s findings. Nevertheless, as noted above, the Court may regard this entire inversion approach with suspicion.

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<sup>173</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000).

<sup>174</sup> See, e.g., Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1490–92, 1546 (2001).

<sup>175</sup> 530 U.S. at 490 n.16 (“In all events, if such an extensive revision of the State’s entire criminal code were enacted for the purpose [of evading *Apprendi*’s rule], or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be required to question whether the revision was constitutional under this Court’s prior decisions.”) (citations omitted).

<sup>176</sup> Bibas, *supra* note 105, at 339; see also Stephanos Bibas, *Reforming the U.S. Sentencing Guidelines After Blakely* 5–6 (U. Iowa Legal Studies Research Paper No. 01-01, 2004), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID634202\\_code537666pdf?abstractid=634202&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID634202_code537666pdf?abstractid=634202&mirid=1).

<sup>177</sup> I thank Professor Alan Michaels for this idea. He made this point during a conference call with Professor Douglas Berman and me on June 24, 2004, the day the Supreme Court decided *Blakely*. Cf. Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating Apprendi*, 12 FED. SENT. REP. 320 (2000).

<sup>178</sup> In other words, what are now aggravating factors, would become mitigating factors by stating them in the negative—e.g., not being a leader or organizer, not having vulnerable victims.



Some commentators view this option as a “more threatening response[] to *Blakely*.”<sup>179</sup> Particularly, Wool and Stemen note that “there is no reason to believe this option will prove attractive to state policymakers as it would be costly and might lead to harsh, perhaps unpredictable, sentences.”<sup>180</sup> While odd, this inversion approach will not necessarily produce unpleasant results. A judge might be less willing to mitigate and risk a reputation of being “soft” on crime, but much depends on how the power or responsibility to mitigate is constructed. The inversion approach need not be any worse (or any better) than the presumptive guidelines schemes it may replace.

Ultimately, however, it is that uncertainty that makes the inversion approach unappealing. It *may* pass constitutional muster, but any legislature that adopts it is daring the Supreme Court to make good on its threat in *Apprendi* and to strike it down. It *may* result in a sensible sentencing system, but it may also end up being nothing more than a convoluted way to reintroduce disparity. This option is just not worth the risk.<sup>181</sup>

### C. The Tops-Off Approach

The tops-off approach, championed by Professor Frank Bowman as an interim measure for the Federal Sentencing Guidelines,<sup>182</sup> would raise the top of each sentencing range to the statutory maximum. It would leave the bottom of the range unchanged. Under this model, the sentencing judge would have, by virtue of the jury verdict or guilty plea, the ability to impose a sentence up to the legislatively enacted statutory maximum for the offense of conviction. As a result, the judge would be able to impose a sentence anywhere from the bottom of the current presumptive sentencing range to the legislatively enacted statutory maximum. Although initially designed for the federal system, legislatures could apply this general approach to virtually any presumptive guidelines system.

The tops-off approach should satisfy the requirements of *Blakely*. This scheme permits judges to sentence up to the traditional statutory maximum without further factfinding. As such, the *Blakely* statutory maximum and the

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<sup>179</sup> Wool & Stemen, *supra* note 5, at 67.

<sup>180</sup> *Id.*

<sup>181</sup> Cf. Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 263 (2004) (“This scheme seems so counterintuitive that one can hardly believe that it would be seriously contemplated.”).

<sup>182</sup> Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENT. REP. 364, 367–68 (2004).

traditional statutory maximum converge. Courts would only set the bottom of the guideline range by judicial factfinding, which remains permissible under *Harris*.<sup>183</sup> Some opponents of this plan argue that it will be found unconstitutional, because *Harris* will be reversed (perhaps imminently),<sup>184</sup> or it is at best an inappropriate circumvention of *Blakely*.<sup>185</sup> While there are significant problems with this approach, neither of these claims is persuasive for at least two reasons.

First, as at least one of the tops-off approach's critics acknowledges,<sup>186</sup> and Professor Bowman confirms,<sup>187</sup> this proposal passes muster as long as *Harris* remains good law. While there is tension between *Blakely* and *Harris*, it is far from clear that the Supreme Court will overrule its recent precedent of *Harris*.<sup>188</sup> In fact, it should be noted that Justice Scalia—the author of *Blakely*—joined the *Harris* majority.<sup>189</sup> Furthermore, Professor and former Federal Sentencing Commissioner Michael Goldsmith reads the *Blakely* majority as having “confirmed prior case law establishing that the Court’s Sixth Amendment analysis does not apply to sentencing factors that trigger mandatory minimum penalties.”<sup>190</sup> Similarly, the Eleventh Circuit concluded

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<sup>183</sup> In some ways, this is the determinate sentencing analogue to the ISS approach discussed below. See *infra* Part IV. For the reasons discussed in the text, however, it is a far less attractive option.

<sup>184</sup> E.g., Letter from Jon M. Sands, Sentencing Guidelines Committee of the Federal and Community Public Defenders, to Commissioners of the U.S. Sentencing Commission 5 (July 9, 2004) [hereinafter Letter from Jon M. Sands], available at <http://www.ussguide.com/members/BulletinBoard/Blakely/SandsLtr7-09-04.pdf> (arguing that the tops-off approach is unconstitutional, although acknowledging that it remains viable under *Harris*).

<sup>185</sup> Letter from Amy Baron-Evans & Mark Flanagan, Practitioners’ Advisory Group, to the Honorable Ricardo H. Hinojosa, Chair Judge, U.S. Sentencing Commission 2 (July 9, 2004), available at [http://www.sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/pag\\_letter.doc](http://www.sentencing.typepad.com/sentencing_law_and_policy/files/pag_letter.doc) (stating that “this proposal would simply evade *Blakely*”); Letter from Jon M. Sands, *supra* note 184 (arguing that this approach “seeks to evade the rule enunciated in *Blakely*”).

<sup>186</sup> Letter from Jon M. Sands, *supra* note 184 (noting that the proposal “is viable only so long as the opinion of the Court in *Harris* survives”).

<sup>187</sup> Frank Bowman, *Memorandum Presenting the Case for Rapid Congressional Action in Response to Blakely v. Washington*, 16 FED. SENT. REP. 369, 370–71 (2004) (noting that the constitutionality of his proposal “hinges on the continued viability of the *Harris* decision”).

<sup>188</sup> *Id.* at 371 (“I concede that *Harris* seems at odds with the emphasis placed by Justice Scalia in *Blakely* on the importance of the jury as indispensable sentencing fact-finder. However, *Harris* was equally at odds with the spirit of *Apprendi*, a point which did not deter the Court, including Justice Scalia from deciding *Harris* as it did.”); see also Spero v. United States, 375 F.3d 1285, 1286–87 (11th Cir. 2004) (noting that *Blakely* and *Apprendi* “explicitly distinguished minimum mandatory sentences from the circumstances involved in those cases and indicated that *McMillan v. Pennsylvania* [477 U.S. 79 (1986)] is still good law”).

<sup>189</sup> *Harris v. United States*, 536 U.S. 545, 548 (2000).

<sup>190</sup> Goldsmith, *supra* note 58, at 976; see also *id.* at 977 (“*Blakely* . . . confirms that mandatory minimum statutes operate outside the protection of the Sixth Amendment jury trial and burden of proof requirements.”); Bibas, *supra* note 176, at 2 (noting the compatibility between *Blakely* and *Harris* on issues of lack of historical

that “[w]hatever other effect . . . [Blakely] may have, it does not undermine the validity of minimum mandatory sentences, at least not where the enhanced minimum does not exceed the non-enhanced maximum.”<sup>191</sup> Finally, Professor Bibas powerfully argued that “[t]here is no obvious way that the Court could or would extend *Apprendi* to forbid [the tops-off approach]. On the contrary, the Court has repeatedly reaffirmed that judges may find facts and set sentences within ranges, so long as they do not increase the tops of those ranges.”<sup>192</sup> Mere speculation that *Harris* may not endure is a thin reason to denigrate the broad contours of the tops-off approach.

Second, it is difficult to call this approach an evasion of *Blakely*. For better or worse, *Blakely* is a formalistic decision.<sup>193</sup> To cry foul when a legislative response works within the boundaries of that formalism is both erroneous and disingenuous. This type of a response is simply “a natural application of the Constitution.”<sup>194</sup> Whether it is sound policy is another matter entirely.

Though viable, the tops-off approach is problematic, risking both the reasonable uniformity versus reasonable individualization tradeoff and relative proportionality. It will also be difficult for this approach to enable serious appellate review of a judge’s sentence within the potentially enormous sentencing range. In fact, the American Bar Association has argued that this approach “is conducive to the very sort of unbridled judicial discretion that guidelines sentencing was intended to eliminate.”<sup>195</sup>

Given its genesis in the federal system, it makes sense to examine how the tops-off approach might work in that environment. It would likely re-inject into the federal sentencing system excessive unregulated discretion that would,

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role for juries in “find[ing] facts that trigger minima,” fair warning to defendant of potential punishment and judicial discretion). *But see* Kalar et al., *supra* note 133, at 15 (noting that *Harris* and *McMillan* “appear increasingly incompatible with the reasoning of *Apprendi* and now *Blakely*”).

<sup>191</sup> *Spero*, 375 F.3d at 1286.

<sup>192</sup> Bibas, *supra* note 105, at 339.

<sup>193</sup> *See, e.g.*, *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004) (approving schemes where judicial factfinding does “not pertain to whether the defendant has a legal *right* to a lesser sentence” and asserting that “that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned”); *id.* at 2547 (O’Connor, J., dissenting) (“[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today’s decision.”).

<sup>194</sup> *United States v. Booker*, 375 F.3d 508, 519 (7th Cir. 2004) (Easterbrook, J., dissenting) (approving open-ended sentencing and concluding that the Supreme Court “saw this not as an ‘evasion’ but as a natural application of the Constitution”).

<sup>195</sup> Letter from Dennis W. Archer, President of the American Bar Association, to the Honorable Orrin G. Hatch, Chairman of the Committee on the Judiciary, and the Honorable Patrick Leahy, Ranking Democrat on the Committee on the Judiciary (July 12, 2004) (on file with author).

at a minimum, result in dangerous outliers. This newfound discretion would only operate to lengthen sentences. The Federal Sentencing Guidelines have numerous restrictions on mitigating departures below the otherwise applicable range.<sup>196</sup> These restrictions do not and, under *Blakely*, *could not* apply to sentences of increased severity. As such, the system could become more “asymmetrical,”<sup>197</sup> and potentially yield longer sentences.

For example, before *Blakely*, a first-time offender convicted of one count of federal mail fraud for defrauding one person out of \$4500 would face a guideline range of zero to six months in prison. Under the tops-off approach, this same defendant would face a guideline range of zero to twenty years in prison.<sup>198</sup> In this admittedly stark example, this approach would effectively reproduce the old, pre-guidelines, unguided, indeterminate system with the added difficulty of lacking the potential “leveling” effect of parole release authority.

With sentencing ranges of this sort, the tops-off approach runs the very real risk of sparking a significant degree of individualization, as shown below.



It avoids an extreme degree of individualization for the disturbing reason that judges cannot easily tailor sentences below the applicable range. This largely one-way ratchet of discretion also translates into a low score on the proportionality confidence index.

<sup>196</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2004).

<sup>197</sup> Mark Osler, *The Blakely Problem and the 3x Solution*, 16 FED. SENT. REP. 344, 346 (2004); see also Letter from Amy Baron-Evans & Mark Flanagan, Practitioners’ Advisory Group, to the Honorable Ricardo H. Hinojosa, Chair Judge, U.S. Sentencing Commission 2 (July 9, 2004), available at [http://www.sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/pag\\_letter.doc](http://www.sentencing.typepad.com/sentencing_law_and_policy/files/pag_letter.doc) (asserting that “this proposal would add to the imbalance and create the unwarranted disparity the Guidelines were intended to eliminate”).

<sup>198</sup> See 18 U.S.C. § 1341 (2000); U.S. SENTENCING GUIDELINES MANUAL § 2B1.1.

In an effort to contain sentences, the Commission could make a fully advisory recommendation that, absent compelling, aggravating circumstances, judges should keep their sentences within 25% of the bottom of the range, which is the current spread for most ranges.<sup>199</sup> This could help persuade judges to rein in their broad, discretionary impulses. Unfortunately, this would have the same limitations as other fully advisory guidelines, and it would not be able to address outlier cases, whether relatively extreme or moderate.

Furthermore, appellate courts will not be able to intercede in a particularly effective fashion.<sup>200</sup> Appellate review could continue to police the bottom of the range by adjudicating disputes over which the guideline range applies and by regulating downward departures.<sup>201</sup> Concerning where *within* the newly expanded range the judge imposed sentence, however, the appellate court's involvement would be sharply restricted. The court of appeals could intervene if a judge expressly relied on improper factors (for example, race, religion, or gender).<sup>202</sup> Under *Blakely*, the appellate court could not view a sentence imposed outside of any voluntary or recommended part of the applicable range (for example, 25% above the bottom of the range) as presenting a reason to reverse. If it did, the Supreme Court would likely view that so-called voluntary recommendation as the equivalent of a now-typical presumptive guideline and treat it as a *Blakely* statutory maximum.<sup>203</sup> This would, of course, defeat the entire purpose of the tops-off approach. Accordingly, this approach would likely preclude meaningful appellate review.<sup>204</sup>

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<sup>199</sup> See, e.g., Bibas, *supra* note 105, at 339; Bowman, *supra* note 182, at 367 (“[T]he Commission might think it proper to enact a policy statement *recommending* that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure.”).

<sup>200</sup> In his initial proposal, Professor Bowman did not suggest appellate review of sentences imposed within these broad ranges. Bowman, *supra* note 182, at 367 (“Failure to adhere to this [25%] recommendation would not be appealable, and thus such a provision would not fall foul of *Blakely*.”). He now suggests appellate review but continues to wrestle with how much review and whether it would satisfy *Blakely*. Bowman, *supra* note 181, at 262, 263 & n.168.

<sup>201</sup> See, e.g., Vinegrad, *supra* note 95, at 312 (discussing searching appellate review of downward departures).

<sup>202</sup> See, e.g., Bowman, *supra* note 181, at 246.

<sup>203</sup> See Bibas, *supra* note 105, at 339 (“Appellate review might also scrutinize upward departures, [presumably from the recommended 25% range,] though searching review might make the upper bound seem too law-like and trigger *Blakely* protections.”); Bibas, *supra* note 176, at 3–4 (same); see also *supra* note 58.

<sup>204</sup> Congress could also impose many new mandatory minimum sentences, as long as *Harris* is good law. This approach, which has justifiably earned the contempt of most commentators and judges, could move the uniformity of the federal system toward levels that ignore the differences in offenses and offenders. It would also, for reasons similar to those concerning tariffs, promote selective prosecutorial application, encourage evasion, and reduce relative proportionality. See, e.g., Statement of Rachel E. Barkow Before the Senate

As a practical matter, however, there is some current appeal to this approach. Many federal judges now sentence at or near the bottom of the sentencing range and rarely depart above the range.<sup>205</sup> While this lowers the current risk of high-severity outlier sentences, it is not a guarantee of future behavior. Freed from both the narrow ranges of the current Federal Sentencing Guidelines and the oversight of upward sentences, it would not be surprising to see judges eventually raise their individual sentences—at least for some deserving, or just unlucky, defendants—and widen the spread of sentences as a group. Many district court judges perceive that the guidelines are too harsh; this belief at least partially motivates the current federal practice.<sup>206</sup> Not only can perceptions change, but judges do not necessarily hold that view concerning all offenses, particularly nondrug offenses.

The tops-off approach enjoyed significant Congressional support in the months after *Blakely*.<sup>207</sup> Applied to the Federal Sentencing Guidelines, it is an easy fix, requiring only a few legislative and guidelines changes.<sup>208</sup> It appears that several states, including Minnesota, could also take advantage of this relatively simple *Blakely* solution. In fact, that is one of the proposal's most attractive selling points. The ease of transition into a post-*Blakely* world, however, is more than offset by the dramatic, largely unreviewable increase in discretion to increase (but not decrease) sentences, and the sentencing disparity that will likely result. The pleasant part about the tops-off approach is the journey, not the destination.

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Judiciary Committee 5 (July 13, 2004), at <http://www.blakelyblog.com/Testimony%20Barkow.pdf> (noting that “the criticisms highlight mandatory minimums’ inequity and inconsistent application, which undermine the goals of uniformity and certainty”). While this may be a politically viable option, it is so objectionable as to warrant little discussion. See TONRY, *supra* note 37, at 134 (“The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners and social science researchers have long agreed, for practical and policy reasons . . . that mandatory penalties are a bad idea.”).

<sup>205</sup> See, e.g., U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 63 tbl.45 (2002), available at [www.ussc.gov/ANNRPT/2001/table45.pdf](http://www.ussc.gov/ANNRPT/2001/table45.pdf) (noting that overall upward departure rate is 0.2%).

<sup>206</sup> Bibas, *supra* note 105, at 339 (“What really does the work is not the top but the bottom of each range, where most sentences cluster and below which some judges strain to go. Judges currently depart upwards in fewer than 1% of cases, in part because many judges think the [Federal Sentencing] Guidelines are too harsh already.”). Additionally, judges in nonfederal jurisdictions need not have the same attitude toward their own presumptive guidelines ranges.

<sup>207</sup> *Id.* (“The most likely response is one proposed by Professor Frank Bowman, which is currently gathering steam on Capitol Hill.”).

<sup>208</sup> See Bowman, *supra* note 182, 367–68.

#### D. *The Blakely-izing Approach*

An approach adopted by Kansas and supported by some segments of the defense bar<sup>209</sup> would require jury findings (or defendant admissions) of aggravating facts before a sentence could exceed the top of the presumptive guideline range.<sup>210</sup> This logical effort, which can be called “*Blakely-izing*,” to modify traditional, presumptive guidelines in a determinate sentencing jurisdiction incorporates the jury’s role while keeping a good amount of sentencing guidance. Unfortunately, *Blakely-izing* presumptive guidelines imposes several distorting effects on the overall sentencing system. In Kansas, for example, it appears to have driven some judicial discretion further underground, potentially increasing individualization and decreasing relative proportionality. Minnesota seems likely to pursue this approach as well, but in that state, it is likely to increase uniformity and decrease relative proportionality. Ultimately, the *Blakely-izing* approach comes at a substantial cost and is far less advantageous than the ISS option discussed below.

This option satisfies *Blakely* without question. It requires the jury to find beyond a reasonable doubt (or the defendant to admit) all facts that would raise the defendant’s punishment above the top of the applicable presumptive guidelines range. Justice Scalia pointed to Kansas’s *Blakely-izing* experience as an example of how jurisdictions could react to *Blakely*.<sup>211</sup>

##### 1. *Limits on Upward Departures*

The *Blakely-izing* approach can take various forms. As applied in Kansas, which is similar to how Minnesota may respond, the tactic succeeds in making the sentencing system *Blakely*-compliant, but it does so by limiting the departure tool. This is a critical failing, because a fully developed departure power works to compensate for the fact that sentencing commissions and their guidelines cannot capture all of the relevant features of every case.<sup>212</sup> The

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<sup>209</sup> See, e.g., Letter from Jon M. Sands, *supra* note 184 (supporting the Kansas approach).

<sup>210</sup> That presumptive range would be authorized solely by the guilty verdict for the offense of conviction.

<sup>211</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2541 (2004).

<sup>212</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004) (discussing some of the many potential variations in just bank robbery); *id.* (“[A] sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect.”); MODEL PENAL CODE: SENTENCING § 7.XX, at 206 (Preliminary Draft No. 3, 2004) (“The guidelines do not enumerate as an aggravating factor that a defendant has feigned emotional involvement with a victim in furtherance of an offense. Nonetheless, the trial court may rely on this factor as basis for an upward departure if the court concludes that the defendant’s actions intensified the harms done to the victim, increased the offender’s blameworthiness in the commission of the crimes, or both, so long as the degree of departure is

upshot of *Blakely*-izing can be conflicting lurches toward leniency or severity at the cost of overall relative proportionality.<sup>213</sup> Ultimately, *Blakely*-izing's restriction of upward departures throws the entire guidelines approach out of balance.<sup>214</sup> Furthermore, it risks unwarranted increases in overall sentences. That risk of system wide sentence increases is real. If judges, commentators, legislators, or the general public view a sentence for a case with egregious facts as being too lenient because no upward departure was readily available, the political response may be to increase the standard presumptive range for all instances of that offense. A rising tide may indeed lift all sentencing boats.

Before *Apprendi*, Kansas had presumptive guidelines, in a discretionary, determinate sentencing scheme that, like many other state systems, required comparatively little judicial factfinding to reach the presumptive range.<sup>215</sup> Most courts around the nation interpreted *Apprendi* to apply only to the traditional statutory maxima, which kept their sentencing guidelines schemes intact. The Kansas Supreme Court, however, issued its own version of *Blakely* in 2001.<sup>216</sup> In response, Kansas retained its presumptive sentencing guidelines approach but added a jury factfinding mechanism to authorize departure sentences above the presumptive guidelines range.<sup>217</sup> The government must give at least thirty days notice if it intends to seek an enhanced departure sentence, and the judge decides whether those facts will be determined during trial or in a postverdict hearing as part of a bifurcated process.<sup>218</sup> If the jury unanimously finds the factor beyond a reasonable doubt, the judge may—but

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proportionate in light of those considerations."); see also *Apprendi v. New Jersey*, 530 U.S. 466, 557 (2000) (Breyer, J., dissenting) ("There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury.").

<sup>213</sup> If the presumptive sentencing range authorized by the offense of conviction is large enough, it is also possible for a nominally *Blakely*-ized system to resemble an unguided system in many (often unfortunate) respects. See *infra* text accompanying note 248.

<sup>214</sup> *Blakely* does not require restrictions on downward departures.

At this point, I do not necessarily challenge the wisdom of an increased role for jury sentencing (for those few defendants who have trials), although there are reasons to be concerned. See, e.g., Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004). Furthermore, I certainly do not dispute the need for serious federal criminal code reform. Rather, I focus on the need for meaningful, but bounded, judicial sentencing discretion, which is likely best achieved through a fully developed departure power.

<sup>215</sup> See, e.g., David Gottlieb, *Kansas Adopts Sentencing Guidelines*, in SENTENCING REFORM IN OVERCROWDED TIMES 106, 106 (Michael Tonry & Kathleen Hatlestad eds., 1997) ("On July 1, 1993, Kansas will add its name to the list of states that have scrapped an indeterminate sentencing system and replaced it with a determinate system of presumptive sentencing guidelines.").

<sup>216</sup> *State v. Gould*, 23 P.3d 801 (Kan. 2001).

<sup>217</sup> Wool & Stemen, *supra* note 5, at 64.

<sup>218</sup> *Id.* at 64–65 (citation omitted).



need not—depart and impose a sentence in excess of the otherwise-applicable guidelines range.<sup>219</sup> A similar response is being contemplated in Minnesota.<sup>220</sup>

At a minimum, obtaining an aggravated departure sentence under Kansas's *Blakely*-ized system is more complicated and cumbersome than in the past.<sup>221</sup> One likely practical result is that there will be fewer upward departures, perhaps because prosecutors may view them as unworthy of the time and effort required.<sup>222</sup> For whatever reason, initial reports from Kansas indicate that there have been almost no bifurcated jury proceedings.<sup>223</sup> Defenders of this approach point out that "it had always been rare for [Kansas] judges to sentence defendants to enhanced sentences after trial, largely because in a plea-driven system the available sentences after trial are already effectively 'enhanced.'"<sup>224</sup> However, this argument ignores the fact that more defendants likely accepted pleas because they knew that prosecutors could fairly easily persuade a judge to consider an enhanced sentence under the old judicial factfinding system. If prosecutors have a more difficult time proving to a jury

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<sup>219</sup> *Id.* at 65.

<sup>220</sup> See Minnesota Sentencing Guidelines Commission, *The Impact of Blakely v. Washington on Sentencing in Minnesota (Short Term Recommendations)*, 17 FED. SENT. REP. 75, 77–78 (2004).

<sup>221</sup> See, e.g., Bibas, *supra* note 105, at 338 ("Trying enhancements before the first jury . . . could prejudice it on the issue of guilt, while bifurcating or empaneling [sic] a second jury would be costly and time-consuming . . . . [M]ulti-part, complex verdict forms full of conditional questions would be hard for jurors to manage."); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1144 (2001) (asserting that bifurcation would be cumbersome and create improper incentives for prosecutors).

<sup>222</sup> See, e.g., Osler, *supra* note 197, at 346 (describing sentencing juries as "a process which would further bog down federal sentencing"); *Word on the Street in NC*, Sentencing Law and Policy, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/word\\_from\\_the\\_s.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/word_from_the_s.html) ("For high-volume crimes like drugs or property offenses, it is simply not worth the effort right now to move from the presumptive range (say, 16 to 20 months) up to the aggravated range (say, 20 to 24 months). Volume, combined with the limited benefits of upward adjustments, convince[s] most prosecutors not to bother with new techniques to obtain jury findings.") (Aug. 8, 2004) (posting by Ronald Wright); *Spanning the States*, Sentencing Law and Policy, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/spanning\\_the\\_st.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/spanning_the_st.html) ("One explanation could be the fear of the unknowns and the hassle that could accompany the new extended jury proceedings.") (Aug. 19, 2004) (quoting section by Ronald Wright); cf. Jennifer Sullivan, *Seattle Teens Won't Face Exceptional Sentences*, SEATTLE TIMES, Aug. 13, 2004, at B2 (noting that for undisclosed reasons prosecutors "backed off a plan to seek exceptional sentences against two Seattle teens accused of killing a fellow Roosevelt High School classmate"). However, at the 2004 annual conference of the National Association of State Sentencing Commissions, Judge Richard Walker of Kansas "discounted the possibility that the additional hassle of using the sentencing jury was a deterrent" to prosecutors. *Focus on the States—A Report from New Mexico* (Aug. 19, 2004), at <http://blakelyblog.blogspot.com/2004/08/focus-on-states-report-from-new-mexico.html>.

<sup>223</sup> As Professor Ronald Wright reports, "In most counties, there have been none at all; statewide, there may have been less than a half dozen." *Spanning the States*, Sentencing Law and Policy, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/spanning\\_the\\_st.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/spanning_the_st.html) (Aug. 19, 2004).

<sup>224</sup> Wool & Stemen, *supra* note 5, at 65 (citation omitted).

the facts necessary to authorize an enhanced sentence beyond a reasonable doubt, it seems logical that defendants will be less likely to accept such “enhanced” pleas.

Furthermore, when evaluating what may be lost—in terms of reasonable individualization and relative proportionality—by reducing upward departure sentences, it is not appropriate to think only about the number of upward departures granted. We also need to consider how many times a prosecutor sought an upward departure that the judge declined to impose. Comparing the success of departure requests before and after *Blakely*-ization may reveal an odd pattern. While the number of aggravated departures granted may fall, the percentage of such enhancements granted (deserved or not) may rise sharply. Once a jury has given its stamp of approval to an enhanced sentence, it is asking a great deal of any judge, particularly an elected judge, to exercise her discretion and deny that departure. No doubt judges denied these kinds of upward departures regularly under the previous system despite the existence of judicially found facts, but in that system, the judge was in control of the entire process. Once the jury finds the necessary facts, there is pressure on the judge to sentence more severely. The strength of that pressure may vary and is open to debate, but it is difficult to say it will be nonexistent.

Systemic pressure is likely as well. With fewer upward departures, it is inevitable that some more serious offenses and offenders will receive less severe sentences than in the past. This may lead to calls for an increase of the maximum in the presumptive range for the typical case. Although Kansas, at least for now, has avoided the impulse to increase all sentences, the push to increase sentences across the board will be irresistible in some jurisdictions.<sup>225</sup> Without the judicial flexibility to impose a more severe sentence for an unusually serious permutation of an offense, it is only logical that at least some legislators will agitate to shift the entire system up a notch or two in severity, thus ensuring sufficient punishment for the unusually serious, headline-grabbing offense. The traditional presumptive guidelines approach does not suffer from this limitation because it allows judges, to varying degrees, to increase sentences when appropriate without shifting the *entire* range of punishment upward. An approach reflecting a balance between uniformity and

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<sup>225</sup> See, e.g., ANNE SKOVE, *BLAKELY V. WASHINGTON: IMPLICATIONS FOR STATE COURTS* 8 (2004), at [http://www.ncsconline.org/wc/publications/kis\\_sentenblakely.pdf](http://www.ncsconline.org/wc/publications/kis_sentenblakely.pdf) (noting that “a state could rearrange its ‘presumptive’ guidelines to comport with *Blakely*. Under this plan, a state could increase the presumptive range to include room for what were once ‘departures.’ Thus, no additional findings of fact would be necessary. At least two states (Arizona and Tennessee) have considered such a change.”).

individualization may often achieve several goals. It may allow judges to respond to unusually egregious circumstances with more severe sentences. Simultaneously, it may maintain relative proportionality and limit the risk of general sentence creep for the more typical offense.

Furthermore, the question remains: What facts can be the basis of an upward departure? In Kansas, the list of aggravating factors is “nonexclusive.”<sup>226</sup> In other words, the prosecutor or the judge can create nonstatutory aggravating factors and, if the jury finds them beyond a reasonable doubt, use those factors to justify an enhanced sentence. This practice appears suspect after *Blakely*. Under these circumstances, arguably judges—not the legislature—are defining the offense. If the manner in which the offense is committed (for example, with deliberate cruelty as in *Blakely* itself) increases the *Blakely* statutory maximum, the defendant should have notice of that functional “element” of the offense—in the form of a statute or at least a sentencing guideline—before he commits the crime.<sup>227</sup> How is the prospective felon to know whether the manner in which he commits the crime will be a ground for a sentence enhancement?

This idea follows logically from the majority’s opinion in *Apprendi* and its progeny. The use of nonstatutory aggravating factors deprives defendants of the right, presumably, to choose whether to commit the crime in this more egregious fashion.<sup>228</sup> Thus, *Blakely*-izing will encourage a sentencing commission (or legislature) to define the entire universe of possible departure reasons.<sup>229</sup> The result will likely be a system that is either underinclusive of such factors (resulting in more sentences that may be inappropriately low and

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<sup>226</sup> KAN. CRIM. CODE ANN. § 21-4716(c)(2) (West Supp. 2004).

<sup>227</sup> Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000) (“Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”).

<sup>228</sup> Cf. *Bibas*, *supra* note 105, at 340 (“If the [Federal Sentencing] Guidelines stand, then *Blakely* makes each and every Guidelines enhancement, *upward departure*, or relevant conduct into an element of the offense. Put another way, *Blakely* shatters the criminal code into millions of pieces.”) (emphasis added); Bowman, *supra* note 182, at 365 (asserting that the *Blakely*-izing approach “would transform every possible combination of statutory elements and guidelines sentencing elements into a separate ‘crime’ for Sixth Amendment purposes”).

<sup>229</sup> Even if the courts do not conclude that aggravating factors must be legislatively codified, legislatures may feel compelled to further codify these aggravating circumstances because some judges are already reporting that they “might become less inclined to create new non-statutory aggravating circumstances, out of concern for how juries will carry out the factfinding in unknown territory. Similarly, the judges would be less likely to approve non-statutory aggravating circumstances if proposed by the prosecutor.” *Posts from Ron from NASC*, Sentencing Law and Policy, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/emblakelyem\\_all.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/emblakelyem_all.html) (Aug. 20, 2004) (posting by Ronald Wright).

inducing an effort to raise all sentence lengths) or overinclusive and provides almost meaninglessly broad factors (resulting in more sentences that may be inappropriately high because the departure grounds are not narrowly tailored). Regardless, the system is liable to be unbalanced, thus diminishing the utility of the departure power.

A fully developed departure power acts as an important safety valve in properly balanced, presumptive guidelines sentencing schemes. *Blakely*-izing presumptive sentencing guidelines sharply limits the functionality of this safety valve. What may have replaced that safety valve in Kansas is the unguided use of the more opaque and less nuanced tool of concurrent and consecutive sentences. Minnesota has taken a more logical approach to its concurrent and consecutive sentences decisions and provided guidance, but that choice only serves to highlight the problems with limiting departure power.

The “pressure” that the safety valve in a fully developed departure power relieves is the pressure a presumptive sentencing guidelines system places on judges to sentence higher or lower than they believe is appropriate in a particular case, considering the purposes of sentencing.<sup>230</sup> The Minnesota Sentencing Guidelines Commission recently stated that it “strongly believes that preserving aggravated departures is necessary to ensure public safety and provide for appropriate sentencing when aggravated factors related to an offense are present and an enhanced sentence is in the interest of justice.”<sup>231</sup> We want presumptive sentencing guidelines to bind judges in an effort to obtain reasonable uniformity and relative proportionality in the system as a whole. In the context of fully advisory guidelines, the dangers of weak or nonexistent boundaries on a judge’s discretion are clear. Yet too little discretion can also be destructive. A well-developed departure power fosters a healthy balance between reasonable uniformity and reasonable individualization while striving to maintain relative proportionality.<sup>232</sup>

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<sup>230</sup> See John H. Kramer & Jeffrey T. Ulmer, *Downward Departures for Serious Violent Offenders: Local Court “Corrections” to Pennsylvania’s Sentencing Guidelines*, 40 CRIMINOLOGY 897, 925 (2002) (“Guidelines can provide a benchmark for courts, but there are distinct limitations to their ability to capture the full complexity of individual cases.”); cf. ALABAMA SENTENCING COMMISSION, 2004 ANNUAL REPORT A4, available at <http://sentencingcommission.alacourt.gov/publications/ASC%202004%20final%20report.pdf> (noting that the Commission expects that “25 percent of all cases will fall outside of the suggested range” of its proposed voluntary guidelines).

<sup>231</sup> Minnesota Sentencing Guidelines Commission, *supra* note 220, at 78.

<sup>232</sup> Kramer & Ulmer, *supra* note 230, at 925 (“Departures reflect the use of discretion to ‘correct’ guidelines. The ‘corrections’ may indicate offense behavior that is less serious than reflected in the guideline ranking, or factors not considered in the guidelines, but viewed as important to the court at sentencing.”).

## 2. *Concurrent—Consecutive Issues*

One possible reason why Kansas has been able to *Blakely*-ize its guidelines without an immediate increase in overall sentence severity is that judges retain the essentially unguided power to impose sentences concurrently or consecutively. Thus, roughly similar defendants convicted of roughly similar offenses may receive wildly disparate sentences simply because of the unguided, discretionary application of concurrent or consecutive sentences. In the absence of any direction from the sentencing commission, judges may functionally evade the guidelines.

Judge Richard Walker, an expert on Kansas sentencing, recently confirmed that Kansas prosecutors can avoid sentencing juries and still get aggravated sentences by seeking consecutive sentences.<sup>233</sup> Thus, it is unsurprising that Professor Ronald Wright reported that, in Kansas, “[p]rosecutors have begun more actively to charge additional counts, making possible these consecutive terms. For example, drug deals can also be charged as conspiracies and/or violations of the drug tax law.”<sup>234</sup> Put differently, judges need not bother with jury factfinding or bifurcated trials in order to impose lengthy sentences on deserving defendants; they can simply order the sentences for multiple counts to run consecutively. Unfortunately, the Kansas Sentencing Commission does not provide guidance to the judge in the exercise of this power.<sup>235</sup> Within broad limits, Kansas judges exercise unguided discretion whether to impose a consecutive sentence up to twice as long as that called for by the most serious offense.<sup>236</sup> Thus, by restricting the relatively transparent departure power that was in place before *Blakely*-ization, Kansas has pushed the more opaque discretionary decision to impose a consecutive sentence into greater use.

For example, the Supreme Court of Kansas rebuffed a defendant’s claim that the judge improperly bypassed jury factfinding required by *Apprendi* (and

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<sup>233</sup> *Focus on the States—A Report from New Mexico*, at <http://blakelyblog.blogspot.com/2004/08/focus-on-states-report-from-new-mexico.html> (Aug. 19, 2004) (reporting Judge Walker’s point that “if an extended sentence is desired, [District Attorneys] can easily move for the imposition of consecutive sentences under Kansas’s procedural rules. Often this method can be used to obtain increased sentences instead of separate jury factfinding.”).

<sup>234</sup> *Spanning the States*, Sentencing Law and Policy, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/spanning\\_the\\_st.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/spanning_the_st.html) (Aug. 19, 2004) (posting by Ronald Wright).

<sup>235</sup> *Cf.* KAN. CRIM. CODE ANN. § 21-4608(a) (West Supp. 2004) (“When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date . . . such sentences shall run concurrently or consecutively as the court directs.”); *cf. id.* (discussing certain situations when sentences shall run consecutively).

<sup>236</sup> *See State v. Bramlett*, 41 P.3d 796, 797 (Kan. 2002).

now *Blakely*) by imposing consecutive sentences.<sup>237</sup> Furthermore, the sentence was not subject to appellate review because the individual sentences were within the presumptive guidelines range. In other words, Kansas judges can still easily impose more severe sentences in cases with multiple offenses. Although this ability existed pre-*Apprendi*, there is now an incentive to use it more often. By using their power to sentence consecutively, judges are able to impose these more severe sentences, not only without the burden of jury factfinding, but also without the heightened transparency of an appealable departure sentence. In the absence of meaningful regulation of this discretionary concurrent versus consecutive decision, Kansas's system becomes more individualized and less likely to achieve relative proportionality.

Unlike the Kansas system, the Minnesota sentencing guidelines do provide for some guidance concerning concurrent versus consecutive sentences. The Minnesota approach groups offenses into three categories—presumptively concurrent, presumptively consecutive, and discretionary.<sup>238</sup> Judges who deviate from the presumptive disposition depart from the guidelines.<sup>239</sup> This treatment of concurrent and consecutive sentences is much more attractive and principled than the Kansas scheme. Before *Blakely*, the Minnesota model also worked well because the judge, based on written justifications subject to appellate review, could depart, dispensing with the presumption of either a concurrent or consecutive sentence when appropriate. If Minnesota *Blakely*-izes its sentencing guidelines, judges would likely have to base any move from presumptive concurrent to presumptive consecutive sentences on facts admitted by the defendant or proved to a jury beyond a reasonable doubt.<sup>240</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> MINN. SENTENCING GUIDELINES AND COMMENTARY, *supra* note 80, § II.F, at 34–37.

<sup>239</sup> While Justice Breyer would disapprove of this approach as too blunt and categorical, it does afford a decent amount of guidance without making the rules too complex, which is a criticism leveled at the relevant provisions of the Federal Sentencing Guidelines. Cf. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 26 (1988).

<sup>240</sup> When the decision whether to impose a concurrent or consecutive sentence is left to the discretion of the sentencing judge, it seems as though there is no *Blakely* problem. See, e.g., *State v. Wallace*, 2004 WL 2671619, at \*7 (Tenn. Crim. App. Nov. 23, 2004) (concluding that *Apprendi* and *Blakely* “have no application to a judge’s consecutive sentencing determination,” and endorsing the “time-honored view that, once convictions and the lengths of individual sentences are determined, the judge is the arbiter of whether the sentences shall run concurrently or consecutively”); *People v. Sykes*, 16 Cal. Rptr. 3d 317, 326–27 (Cal. App. 2004); cf. *Apprendi v. New Jersey*, 530 U.S. 466, 474 (2000) (noting that it was irrelevant to the Sixth Amendment question at issue in *Apprendi* that the defendant could have been sentenced to just as much time in prison without the increased term had other sentences been imposed consecutively instead of concurrently); Impact of *Blakely v. Washington* on Tennessee’s Sentencing Scheme, 04-131 Op. Tenn. Att’y Gen. 4 (2004)

This raises all of the problems, discussed above, with the stunted, post-*Blakely* departure power.

### 3. *Blakely-izing the Feds?*

Thus far, the discussion of *Blakely*-izing guidelines systems has covered state systems like Kansas and Minnesota where the transition to a *Blakely*-ized system would be relatively easy. It is also possible to *Blakely*-ize the current Federal Sentencing Guidelines. However, the federal system's extensive reliance on judicial factfinding to set even the presumptive sentencing range, let alone to depart from that range, would make such a transition difficult.<sup>241</sup> One option would create a stripped-down version of the guidelines that reduces the number of facts (now to be found by the jury) needed to reach the presumptive range, and then allow jury authorized departures.<sup>242</sup>

Professor Mark Osler, in his provocative article, *The Blakely Problem and the 3x Solution*, suggested this type of option.<sup>243</sup> To allow more flexibility, he proposes to “[s]uper-size the Guideline ranges to three times their current size (thus the ‘3x solution’).”<sup>244</sup> This will “allow judges to continue to exercise discretion and engage in judicial fact-finding, while maintaining some limits on the effect of disparities between fact-finders.”<sup>245</sup> Unfortunately, the resulting presumptive ranges could be so large, particularly at higher offense levels, as to throw into question both reasonable uniformity and proportionality. While this approach would attempt to counteract some of the

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(stating that “[w]hile the imposition of consecutive sentences, in practice, lengthens the actual amount of time a defendant serves, it does not increase the punishment for any individual offense”). *But see* *People v. Black*, 2004 Cal. LEXIS 6905, at \*1 (Cal. July 28, 2004) (granting petition for review and directing parties to brief two issues, including “[w]hat effect does *Blakely* have on the trial court’s imposition of consecutive sentences?”).

If a factual finding were required to impose a consecutive sentence that would otherwise run concurrently, the standard *Blakely* rules would seem to apply. The Minnesota Commission notes that a slight statutory change is required to ensure that this approach, which differentiates the groups of offenses by whether they are “person” offenses, survives *Blakely*. Minnesota Sentencing Guidelines Commission, *supra* note 220, at 79–80.

<sup>241</sup> *See, e.g.*, *United States v. Croxford*, 324 F. Supp. 2d 1230, 1243 (D. Utah 2004).

<sup>242</sup> *See, e.g.*, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of Rachel E. Barkow), available at <http://www.blakelyblog.com/Testimony%20Barkow.pdf>.

<sup>243</sup> Osler, *supra* note 197, at 344.

<sup>244</sup> *Id.* Professor Osler recommends ranges of “either 18 months or 75% of the bottom of the range, whichever is higher.” *Id.* at 345. Of course, as Professor Osler notes, this “would affect all ranges except those mandating life sentences, which would remain the same.” *Id.* at 347 n.12 (presumably referring to Level 43).

<sup>245</sup> *Id.* at 345.

damage done by the loss of a fully developed departure system, it still comes at a high cost.

Some might reasonably object to these supersized ranges because they would allow judges to sentence lower level offenders more harshly within the now broader range. Conversely, others might reasonably object because the supersized ranges may, at times, still yield sentences that some perceive to be too low. For example, under Professor Osler's plan, a five kilogram cocaine dealer would face a presumptive range of 121–212 months, which is up to sixty-one more months than under the current approach.<sup>246</sup> The 150-plus kilogram dealer would also face 121–212 months, as opposed to the 235–293 months he would face under the current regime.<sup>247</sup> This is not meant to criticize Professor Osler, who produced a fine proposal. Rather, it is meant to highlight the difficulties inherent in crafting a balanced sentencing system without a fully developed departure power.<sup>248</sup>

The *Blakely*-izing option, while conforming to *Blakely*, is sorely lacking as a sentencing model. In some of its various possible permutations, the *Blakely*-izing option may provide for too much judicial discretion which will lead to increased (and perhaps invidious) disparity, or it may afford too little discretion and produce substantial upward pressure on all sentences. Kansas has thus far resisted the pressure to increase severity across the board by keeping the more opaque tool of discretionary, consecutive sentencing. Minnesota seems likely to restrict its departure power while keeping its curbs on concurrent and consecutive decisions. Neither option is particularly attractive. Kansas is merely driving largely unregulated discretion further

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* Professor Osler does suggest that *Blakely*-compliant upward departures be available in cases of “an especially large quantity of narcotics.” *Id.* at 246. Of course, this presents all of the difficulties of using juries to find facts that Professor Osler himself describes. *Id.* (noting that a “shift to jury findings of aggravating factors . . . could create a quandary for the courts”).

<sup>248</sup> A *Blakely*-ized system will also have a limited ability to fully address conduct occurring in multiple judicial districts or long-running schemes uncovered after some of the early events are beyond the statute of limitations. In an unguided system, judges properly could and did look at all the facts about the offense and the offender. *Williams v. New York*, 337 U.S. 241 (1949). Within their discretion, this information was then taken into account in imposing the sentence. The problem in the unguided system (determinate or indeterminate) was that the discretion to alter the sentence for whatever reason was too vast and effectively unreviewable. One of the significant problems with the pre-*Blakely* Federal Sentencing Guidelines is that, contrary to the prior regime, sentencing judges were *required* to increase sentences based on these other facts, like relevant conduct. *See United States v. Watts*, 519 U.S. 148, 159–60 (1997) (Stevens, J., dissenting).



underground. Minnesota will be allowing upward pressure to build in its system that may erupt in a variety of unpleasant ways.<sup>249</sup>

These results, though unfortunate, are unsurprising. Without the ability to establish structural mechanisms such as transparent and fully developed judicial departures to individualize sentences when appropriate, legislatures will view some sentences as disproportionately low. Their suspicions will be confirmed when, as will undoubtedly happen, a judge declares that she would have imposed a more severe sentence if only allowed to do so. It may just take one such case for a legislature to broaden the sentencing ranges radically, inviting unreviewable disparity, or to increase all sentences, impacting every defendant regardless of culpability.

Overall, *Blakely*-ized presumptive guidelines are still likely to be superior to the completely unguided systems of old. They will provide guidance for the majority of typical cases. Yet these replacement sentencing guidelines will be a mere shadow of the pre-*Blakely* presumptive guidelines with fully developed departure powers. As a result, justice will suffer.

#### IV. THE NEXT ERA UNFOLDS

There is a way to provide meaningful and fully responsive sentencing guidelines after *Blakely*. A system of Indeterminate Structured Sentencing, which improves on classic indeterminate sentencing, both avoids a return to the “bad old days”<sup>250</sup> of unguided, indeterminate sentencing and is *Blakely*-compliant. Remaining true to sentencing’s first principles, ISS may well usher in the next era of sentencing reform. While this system, aspects of which are practiced in such states as Pennsylvania and Michigan, is not perfect, it may be the best bet in the post-*Blakely* age.

A model ISS system has two key, coordinated components: (1) complete presumptive sentencing guidelines and (2) a reconceptualized form of parole

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<sup>249</sup> Cf. Goldsmith, *supra* note 58, at 975 (noting that “political pressure to ensure higher penalties will likely produce a more severe, determinate sentencing system”); *The Power of the Headline Making Crime*, Sentencing Law and Policy (“[T]he latest news from Minnesota highlights that even this state can have its sentencing policy influenced greatly by one headline-making crime.”) (posting by Douglas A. Berman), at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/01/the\\_power\\_of\\_th.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/the_power_of_th.html) (Jan. 6, 2005).

<sup>250</sup> 108 CONG. REC. S8573 (daily ed. July 21, 2004) (statement of Sen. Leahy).

release authority that is both modest in mission and guided in practice.<sup>251</sup> At the center of the ISS system is a “Super Commission” that promulgates both sentencing guidelines and parole release guidelines. This Super Commission has all the qualities of the best traditional sentencing commission but possesses expanded powers to channel back-end parole release authority as well as front-end sentencing authority. The combination of robust, presumptive sentencing guidelines and guided parole release authority works to pursue just results for individual defendants while coordinating the sentencing and release policies of the jurisdiction.

By definition, the ISS approach includes discretionary parole release authority.<sup>252</sup> As a result, judges operating under an ISS system impose a “minimum” and a “maximum” sentence—for example, two to four years. ISS presumptive sentencing guidelines address *only* the judge’s imposition of the minimum term, not the maximum term. Typically, the minimum sentence must be no more than some percentage of the maximum sentence in order to allow for an adequate period of potential postrelease supervision.<sup>253</sup> For example, in Pennsylvania, the minimum sentence typically cannot exceed one-half of the maximum sentence.<sup>254</sup> This so-called “min-max rule” would permit a sentence of two to four years, but not one of two to three years. The judge’s ability to impose a *maximum* sentence up to and including the traditional statutory maximum for the offense of conviction is unconstrained.<sup>255</sup> The

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<sup>251</sup> As noted above, presumptive sentencing guidelines have been described as “sentencing guidelines that require a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence.” Wool & Stemen, *supra* note 5, at 61.

<sup>252</sup> See *supra* note 21 and accompanying text.

<sup>253</sup> It is important to emphasize that I view postrelease supervision—under whatever moniker—as valuable (at least in theory). Although far beyond the scope of this Article, postrelease supervision is important but has had its own share of problems and critics. See, e.g., Joan Petersilia, *Parole and Prisoner Reentry in the United States*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 479, 499–500 (Michael Tonry ed., 1999) (“The major criticisms of parole release . . . were also levied at field supervision and caused major changes and reforms there as well.”). Done properly, postrelease supervision can provide benefits both to the offender and society not only by maintaining supervision but also by encouraging meaningful reintegration (or perhaps initial integration) into the community. See, e.g., *id.* at 522 (discussing new model that “involve[s] strengthening parole’s links with law enforcement and the community offering a ‘full-service’ model of parole and attempting to change the offenders’ lives through personal, family, and neighborhood interventions . . . . [In this new model,] agents are responsible for close supervision as well as procuring jobs, social support, and needed treatment.”).

<sup>254</sup> See, e.g., 42 PA. CONS. STAT. § 9756(b) (1998) (“The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.”). There are certain circumstances in Pennsylvania when the minimum sentence can exceed one-half of the maximum sentence.

<sup>255</sup> See, e.g., *Commonwealth v. Pugh*, 67 Pa. D. & C. 4th 458, 463 (Pa. Ct. Com. Pl. 2004) (“The maximum is set by the trial judge but cannot exceed the maximum set by law. The minimum is based on guideline ranges under the sentencing guidelines.”) (citation omitted); PENNSYLVANIA COMMISSION ON

maximum sentence, which of course cannot exceed the traditional, legislatively created statutory maximum for the offense of conviction, is the most time an offender can be required to spend in prison or, once released, on parole supervision.<sup>256</sup> The minimum sentence is the least amount of time an offender will spend in prison.<sup>257</sup> A defendant will be *eligible* for parole release at the expiration of his minimum sentence, but it will be the parole board—exercising its discretion as guided by the Super Commission—that decides precisely when to release the inmate on parole.<sup>258</sup>

Under the ISS method, the Super Commission acts as the central coordinator of the jurisdiction's sentencing and punishment policy. The Super Commission is thus able to harmonize otherwise potentially conflicting sentencing and parole release principles. As discussed below, ideal ISS sentencing guidelines embody a balance between reasonable uniformity and reasonable individualization while allowing a good chance of a relatively proportional sentencing result. This is possible, in part, because of bounded judicial discretion policed by appellate court review.

Through ISS parole release guidelines, the Super Commission directs the exercise of the discretionary parole release authority in such a way as to reduce the complaints of the past while taking advantage of the possibilities of the future. The parole release guidelines direct the exercise of the parole board's discretionary release decision, and usually work to channel the board's discretion in favor of releasing inmates at or near the expiration of their minimum sentence. The fact that the Super Commission guides the board's discretion is just one crucial feature. It is also vital that the board exercises that discretion openly, with appropriate process, and subject to some form of

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SENTENCING, ANNUAL REPORT 1980–1981, at 14 (1981) (“When considering guideline incarceration lengths, the Commission decided to set the minimum sentence and to defer establishment of the maximum sentence to the Court.”).

<sup>256</sup> See, e.g., 42 PA. CONS. STAT. § 9756(a) (Supp. 2004). This statutory maximum also limits the amount of time a defendant can spend on probation, either as the sole means of a sentence or as part of a so-called “split sentence.” See, e.g., *id.* § 9754 *et seq.* (1998 & Supp. 2004); *cf.* *Stallsmith v. Pa. Dept. of Corrections*, 846 A.2d 191, 192–93 (Pa. Commw. Ct. 2004) (noting that “split sentence” refers to incarceration and probation imposed on the same count of conviction).

<sup>257</sup> The ISS model does not engage in the old practice common in many indeterminate jurisdictions of releasing inmates long before they served their judicially announced sentences. Reflecting a form of “truth in sentencing,” a defendant sentenced under ISS is not granted so-called “early” parole release.

<sup>258</sup> See, e.g., PA. STAT. ANN. tit. 61, § 331.21(a) (West 1999). In Pennsylvania, if the maximum sentence is less than two years, the inmate is not sent to state prison, and the judge is the paroling authority. The judge, unlike the parole board, may parole an inmate at any time, including immediately upon imposition of sentence. This interesting feature of Pennsylvania's sentencing scheme warrants further exploration, but is beyond the scope of this Article.

review.<sup>259</sup> Ultimately, in part because of our limited ability to predict future behavior, we should be humble in our conception of the power and proper scope of parole release authority.

The combination of complete and balanced presumptive sentencing guidelines and coordinated parole release guidelines (as part of a restructured conception of parole release authority) yields a *Blakely*-compliant ISS system that should be attractive to legislatures and judges alike.

#### A. *ISS Sentencing Guidelines*

Presumptive sentencing guidelines in an ISS approach would be largely familiar to most pre-*Blakely* consumers of such systems. Ideally, these guidelines would provide both meaningful direction from the Super Commission and meaningful discretion for a sentencing judge in setting the *minimum* sentence.<sup>260</sup> As the Pennsylvania Commission on Sentencing declared, “The purpose of guidelines is to assist the judge and to reduce disparity, not to remove judicial discretion, creativity and wisdom.”<sup>261</sup>

These ISS presumptive sentencing guidelines would encompass several important attributes, including: (1) bounded judicial discretion within the presumptive standard sentencing range, (2) mitigated and aggravated

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<sup>259</sup> Professor Reitz notes that parole boards have an ignominious history of poor process and patronage appointments. Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in *THE FUTURE OF IMPRISONMENT*, *supra* note 12, at 199, 228. The ISS approach would change all of that, which is, admittedly, no small task. *Id.* at 228–29 (“It is always easy to say that more qualified persons should therefore be recruited to the task, but criminal justice reform is most likely to founder when it is built on the assumption that the human capital within the system can be dramatically improved.”). The imposition of guidelines through a Super Commission will help to implement the needed reform. The improvement in personnel is more likely to occur when the system becomes transparent and structured.

<sup>260</sup> For example, although they reflect a less-than-perfect variation on the ideal ISS sentencing approach, the Pennsylvania sentencing guidelines “were designed to constrain, but not eliminate, discretion in sentencing.” David Holleran & Cassia Spohn, *On the Use of the Total Incarceration Variable in Sentencing Research*, 42 *CRIMINOLOGY* 211, 216 (2004); *see also* *Commonwealth v. Moore*, 617 A.2d 8, 12 (Pa. Super. Ct. 1992) (noting that the “[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime”).

<sup>261</sup> PENNSYLVANIA COMMISSION ON SENTENCING, ANNUAL REPORT 17 (1980). The Commission also noted that it “will rely on the sentencing judge to examine the guidelines and then to assure fairness in sentencing by determining whether the guideline is appropriate in a particular case, and, if not, to enumerate why not and go outside the guidelines.” *Id.* This approach of respecting judicial discretion (in fact, according to some, being too deferential to judicial discretion) remains a part of the Pennsylvania guidelines today. As such, it stands in stark contrast to the path most recently taken by the U.S. Congress in enacting the PROTECT Act. *See* *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act* (“PROTECT Act”), Pub. L. No. 108-21, 117 Stat. 650 (2003).

sentencing ranges, (3) guidance concerning concurrent and consecutive sentences, (4) a fully developed departure power, and (5) meaningful review by appellate courts.

Judicial sentencing under the ISS scheme satisfies the Sixth Amendment as interpreted in *Blakely*. The critical component is the combination of (1) indeterminate sentencing (with parole release authority), and (2) presumptive sentencing guidelines that govern only the *minimum* sentence. The sentencing judge may impose a *maximum* sentence up to the traditional statutory maximum based exclusively on the jury's authorization (or the defendant's plea) inherent in the guilty verdict. As such, in the ISS system, the traditional statutory maximum is the same as the *Blakely* statutory maximum. Both are, in the *Blakely* Court's words, the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."<sup>262</sup> *Blakely*, in fact, specifically permitted the kind of judicial factfinding required in the ISS scheme. Justice Scalia approved of judicial factfinding concerning the discretionary imposition of a maximum sentence.<sup>263</sup> He noted that indeterminate sentencing<sup>264</sup> involves judicial factfinding, but "the 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."<sup>265</sup>

For example, Pennsylvania's basic sentencing structure<sup>266</sup> satisfies *Blakely*,<sup>267</sup> and is compatible with much, but not all, of the ISS sentencing

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<sup>262</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004).

<sup>263</sup> *Id.* at 2538.

<sup>264</sup> As discussed above, it is possible that Justice Scalia was imprecise with his use of language and was really referring to unguided, discretionary sentencing schemes. For the purpose of determining ISS's compliance with *Blakely*, that point is immaterial. Regardless of his terminology, Justice Scalia focused on the maximum sentence that could be imposed. Under the ISS approach, the maximum sentence that may be imposed by the sentencing judge—totally within the judge's discretion and based solely on the conviction (jury verdict or guilty plea)—is the traditional statutory maximum set forth in the criminal code.

<sup>265</sup> *Blakely*, 124 S. Ct. at 2540 (emphasis in original).

<sup>266</sup> Pennsylvania's parole release practice is quite different from the ISS model. In Pennsylvania, the parole board sets parole release policy for state prisoners and does so independently from the Pennsylvania Commission on Sentencing. In fact, Pennsylvania reflects the dangers of uncoordinated sentencing and parole release policies. See *infra* note 314.

<sup>267</sup> See, e.g., *Commonwealth v. Smith*, 863 A.2d 1172, 1178 (Pa. Super. Ct. 2004) ("As opposed to the determinate guidelines of Washington State at issue in *Blakely*, the Pennsylvania guidelines are indeterminate and *Blakely* is not applicable here . . . . Pennsylvania utilizes an indeterminate sentencing scheme with presumptive sentencing guidelines which limit the judge's discretion only concerning the minimum sentence."); *Commonwealth v. Bromley*, 862 A.2d 598, 602–03 (Pa. Super. Ct. 2004); *Commonwealth v. Pugh*, 67 Pa. D. & C. 4th 458, 463 (Pa. Ct. Com. Pl. 2004) ("[T]he Pennsylvania system is unaffected by the

approach. Pennsylvania's presumptive sentencing guidelines—like ISS presumptive sentencing guidelines—only impact the minimum sentence and the judge may, in her discretion, impose a maximum sentence up to the traditional statutory maximum for the offense of conviction.<sup>268</sup> Furthermore, Pennsylvania courts have held that the maximum sentence is the real sentence.<sup>269</sup> As the Pennsylvania Supreme Court recently stated, “[T]he maximum term represents the sentence imposed for a criminal offense, with the minimum term merely setting the date after which a prisoner may be paroled.”<sup>270</sup> By not regulating the judge's discretion to impose the maximum (or real) sentence, Pennsylvania's sentencing guidelines—like the sentencing aspect of ISS—do not run afoul of *Blakely*.<sup>271</sup>

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holding in *Blakely* that was designed to protect the defendant from a higher maximum sentence based on facts not found by the jury in violation of the Sixth Amendment.”)

<sup>268</sup> See, e.g., *Commonwealth v. Saranchak*, 675 A.2d 268, 277 n.17 (Pa. 1996) (“It is well-established that a sentencing court can impose a sentence that is the maximum period authorized by the statute.”) (citation omitted); *Commonwealth v. Boyer*, 856 A.2d 149, 153 (Pa. Super. Ct. 2004) (“[T]he sentencing guidelines provide for minimum and not maximum sentences . . . .”) (citation omitted); *id.* at 153–54 (affirming consecutive sentences with a minimum sentence within the standard range of the guidelines and a maximum sentence at the statutory maximum for the offenses of conviction); *id.* at 154 (“Appellant's argument that the sentences are excessive cannot stand. The trial court did not impose impermissibly excessive maximum sentences, as they are the maximum terms provided by the statutes of our Commonwealth.”) (citations omitted). *But see id.* at 156 (Klein, J., dissenting) (“Under these circumstances, I believe sentencing a nineteen year old defendant to a 100 year maximum sentence is excessive.”).

<sup>269</sup> *Krantz v. Pa. Bd. of Prob. & Parole*, 483 A.2d 1044, 1047 (Pa. Commw. Ct. 1984) (“We begin our analysis with the fact that under Pennsylvania law, the sentence imposed for a criminal offense is the maximum term. The minimum term merely sets the date prior to which a prisoner may not be paroled.”) (citation omitted); *Gundy v. Commonwealth*, 478 A.2d 139, 141 (Pa. Commw. Ct. 1984) (“The sentence imposed for a criminal offense is the maximum sentence and the minimum sentence merely sets the date prior to which a prisoner may not be paroled.”) (citation omitted); *Commonwealth ex rel. Nornhold v. Day*, 67 Dauph. 1, 2 (Pa. C. 1954) (“A sentence for an indefinite term is deemed to be a sentence for the maximum term.”); *see also Eccles v. Pa. Bd. of Parole*, 65 Dauph. 50, 52 (Pa. C. 1953) (“The maximum sentence . . . is the only portion of the sentence which has legal validity. The minimum sentence is merely an administrative notice by the Court to the executive department, calling attention to the legislative policy that, when a prisoner's so-called minimum sentence is about to or has expired, the question of grace and mercy ought to be considered and the propriety of granting a qualified pardon be determined.”).

<sup>270</sup> *Martin v. Pa. Bd. of Prob. & Parole*, 840 A.2d 299, 302 (Pa. 2003) (citation omitted); *see also Rogers v. Pa. Bd. of Prob. & Parole*, 724 A.2d 319, 321 n.2 (Pa. 1999) (The “minimum term imposed on a prison sentence merely sets the date prior to which a prisoner may *not* be paroled.”) (emphasis in original).

<sup>271</sup> *But see Wool & Stemen*, *supra* note 5, at 63 (arguing that it is unclear whether *Blakely* applies to the Michigan and Pennsylvania systems, which are variations on the ISS approach); *id.* (“Indeed, it is possible to construct equally compelling arguments that *Blakely* does or does not apply.”). Although Wool and Stemen's piece is excellent overall and reflects some of the most insightful thinking about *Blakely* to date, they are simply wrong to assert that *Blakely* may damage a guided indeterminate jurisdiction like Michigan or Pennsylvania. Wool and Stemen question whether the “effective maximum sentence,” which they define as “the maximum sentence authorized for an offense based solely on the facts reflected in the jury verdict or admitted by the defendant,” is the minimum term or the maximum term, which is limited solely by the statutory maximum punishment for the offense of conviction. *Id.* at 61. In Pennsylvania, the answer is clear.

A defendant committing a crime knows that he is *entitled* to no more than the traditional statutory maximum set by the legislature for the offense of conviction.<sup>272</sup> Thus, the ISS approach remains viable even using the Supreme Court's new definition of a *Blakely* statutory maximum.<sup>273</sup>

The Michigan Supreme Court recently confirmed that its own sentencing approach, which is similar for Sixth Amendment purposes to the sentencing features of ISS, survives *Blakely*. Michigan uses legislatively created guidelines to structure the imposition of minimum sentences and, in many cases, automatically assigns the offense's traditional statutory maximum as the

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As noted above, Pennsylvania courts have long held that the maximum sentence imposed is the true sentence. As Wool and Stemen properly note, the guidelines provide no limitation on the maximum sentence, and it is capped solely by the statutory maximum sentence as traditionally understood. In other words, pursuant to long-standing Pennsylvania law, the unguided, discretionary maximum sentence imposed is the relevant sentence for *Blakely* purposes. Given that there is no limitation other than that set by the legislature for the offense of conviction, *Blakely* does not interfere with the way sentencing was conducted in Pennsylvania before June 24, 2004. Similarly, the ISS approach survives *Blakely*.

<sup>272</sup> Cf. *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004). In his *Apprendi* concurrence, Justice Scalia emphasized the importance of this kind of notice to the potential criminal:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.

*Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (emphasis in original). The ISS approach does not offend this principle. Rather, by each defendant knowing that he or she may be incarcerated until the full expiration of his or her legislatively authorized sentence based on each offense of conviction, it provides the clearest of notice to all potential criminals.

<sup>273</sup> See, e.g., *People v. Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004); *Commonwealth v. Smith*, 863 A.2d 1172, 1178–79 (Pa. Super. Ct. 2004). Given that the *Blakely* “statutory maximum” and the legislature’s “statutory maximum” converge under the ISS system, the ability to use presumptive guidelines to channel judicial discretion concerning the minimum sentence seems unassailable. As the Supreme Court in *Apprendi* noted:

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.

*Apprendi*, 530 U.S. at 481 (emphasis in original). As the Court noted in *Harris v. United States*, “[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.” 536 U.S. 545, 558 (2000).

maximum sentence.<sup>274</sup> In *People v. Claypool*, the Michigan Supreme Court, in dicta, observed that the minimum sentence is based on guidelines while the “maximum is not determined by the trial judge but is set by law.”<sup>275</sup> “Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment.”<sup>276</sup>

Similar to the tops-off approach, the ISS sentencing system complies with both the spirit and the letter of the Sixth Amendment as understood after *Blakely*.<sup>277</sup> Relying on the minimum-maximum distinction to keep ISS

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<sup>274</sup> See MICH. COMP. LAWS § 769.8(1) (2000) (“The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.”); *id.* § 768.9(2) (“In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof . . . .”); *id.* § 768.9(3) (discussing similar approach for major controlled substance offense “for which the court is directed by law to impose a sentence which cannot be less than a specified term of years nor more than a specified term of years”). When the law does not automatically set the maximum sentence, the judge sets the maximum sentence within the legislatively established limits for the offense of conviction. *Id.* This sentencing approach, while similar to the sentencing aspect of ISS, falls short of the ideal ISS system in part because the sentencing court cannot always exercise its discretion to set the maximum sentence. As such, for many defendants, the traditional statutory maximum from the criminal code is the maximum sentence. A likely result is that at least some maximum sentences are disproportionately high.

<sup>275</sup> *Claypool*, 684 N.W.2d at 286 n.14; see also *id.* at 292 (Cavanagh, J., concurring in part and dissenting in part) (“I also agree with the majority’s determination that [*Blakely*] does not appear to affect scoring systems that establish recommended *minimum* sentences, such as we have in Michigan.”) (emphasis in original); *id.* at 293–94 (“I concur in the majority’s conclusion that [*Blakely*], which considered whether facts that increase the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to the jury, does not affect Michigan’s scoring system, which establishes the recommended *minimum* sentence.”) (emphasis in original); *id.* at 291 (Corrigan, C.J., concurring in part and dissenting in part) (“Although I agree that *Blakely* does not implicate our sentencing scheme, the full scope of the *Blakely* decision has yet to be determined. Given the response to *Blakely*, it appears likely that the issue of mandatory minimum sentences will need to be settled.”) (citation omitted); cf. *People v. Babcock*, 666 N.W.2d 231, 236 n.7 (Mich. 2003) (“It is only the minimum sentence that must presumptively be within the appropriate sentence range. M.C.L. § 769.34(2). The maximum sentence is either set by statute, e.g., the maximum sentence for extortion is twenty years, M.C.L. § 750.213, or it falls within the judge’s discretion.”); MICH. COMP. LAWS §§ 769.8, 768.9.

<sup>276</sup> *Claypool*, 684 N.W.2d at 286 n.14. The Pennsylvania Superior Court has reached a similar conclusion. *Smith*, 863 A.2d at 1178–79.

<sup>277</sup> As noted, the defendant in an ISS system cannot be released before the expiration of the minimum sentence, which can be set based in part on judicial factfinding. This aspect of ISS, like the tops-off approach, relies on the continued viability of *Harris*. See *supra* notes 186–87 and accompanying text. Although it is not guaranteed, there are many reasons to expect *Harris* to survive the next wave of Supreme Court decisions. See *supra* notes 188–90 and accompanying text. Even if *Harris* falls, ISS sentencing can survive largely in tact by making a simple but important change to its structure.

Without *Harris*, judges may not set minimum sentences of incarceration that must be served on the basis of judicial factfinding. Under this anti-*Harris* approach, individuals sentenced under an ISS approach would



systems beyond *Blakely*'s reach is neither a trick nor a gimmick. As Judge Easterbrook noted in a related context, the Supreme Court would see "this not as an 'evasion' but as a natural application of the Constitution."<sup>278</sup>

Most forms of indeterminate sentencing survived *Blakely* unscathed. As the Michigan Supreme Court observed, the *Blakely* majority "made clear that the decision did not affect indeterminate sentencing systems."<sup>279</sup> Indeed, an unguided, indeterminate sentencing scheme would also comply with *Blakely*. Classic unguided, discretionary, indeterminate sentencing, however, comes at a high price. It skews heavily toward extreme individualization at the expense of reasonable uniformity and, relatedly, scores poorly on the proportionality confidence index. The ISS method offers the benefit of being *Blakely*-compliant while still allowing for a balance of reasonable uniformity, reasonable proportionality, and at least a medium high score on the proportionality confidence index.

The ideal ISS sentencing guidelines reflect some of the best thinking from the presumptive sentencing guidelines concept. This model approach also includes features that were difficult to find even before *Blakely*. For example, it would be devoid of mandatory minimum laws. Mandatory minimum

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be statutorily eligible for parole release no later than the expiration of the top of the presumptive standard range (set solely by the offense of conviction) unless the judge imposed a lower minimum sentence. In that way, the judge is not "finding" any facts that would set a minimum sentence of incarceration that must be served. The judge would continue to have the discretion to set the maximum sentence subject to the individual's release by the parole board. A minimum sentence within the aggravated range or a departure above that range would not run afoul of the anti-*Harris* rule because it does not reflect the judge setting a "minimum" sentence of incarceration that must be served. Effectively, it would be the judge making a parole release recommendation to a parole board that is now legally empowered to release an individual no later than the expiration of the top of the standard range (and earlier if the judicial minimum is set lower than the top of the standard range). However, this judicial minimum recommendation is still going to be reviewable by the appellate courts just like any other minimum sentence regardless of whether *Harris* survives. In this way, the appellate court can continue to provide guidance.

In an ISS world without *Harris*, the parole board will still have its own Super Commission-written guidelines channeling its discretion. Through these guidelines, the parole board will consider and give substantial weight to the judge's minimum sentence (parole release recommendation), but the board will be legally able to release the prisoner at the expiration of the top of the presumptive standard range or the minimum sentence actually imposed, whichever is lower.

This modified ISS approach, which complies with both *Blakely* and the hypothetical anti-*Harris*, will not be as robust a defense against general sentence creep as the ISS Approach with *Harris* because the top of the standard range is the only "guaranteed" sentence a defendant must serve. As such, some legislators might find that to be inadequate and push for higher standard range sentences. However, parole release guidelines should help to keep the parole board focused on what the trial judge found important, which may well result in the minimum time actually served bearing a decent relationship to what the trial judge wanted.

<sup>278</sup> United States v. Booker, 375 F.3d 508, 519 (7th Cir. 2004) (Easterbrook, J., dissenting).

<sup>279</sup> *Claypool*, 684 N.W.2d at 286 n.14.

penalties thwart the balanced exercise of judicial discretion and can lead to increases in unwarranted uniformity and disproportionality.<sup>280</sup> They also have a distorting effect on the entire criminal justice system, including their ability to extract guilty pleas.<sup>281</sup> The ideal ISS sentencing system encourages, as do Pennsylvania's presumptive sentencing guidelines, the use of intermediate punishments that are well-funded by the legislature.<sup>282</sup> This exemplary system also guides judges in selecting which form of intermediate punishment might be appropriate. An ideal ISS system is unlikely to be achieved. Nevertheless, an achievable ISS approach would be welcome.

A system reflecting the five important attributes of presumptive sentencing guidelines in the ISS system enumerated above<sup>283</sup> offers a balanced and workable approach. First, the judge must start with the presumptive standard range of the guidelines and justify on the record any movements from that standard range.<sup>284</sup> This is because the Super Commission in an ISS system—like many traditional sentencing commissions—would create its presumptive standard range by considering the seriousness of the typical offense.<sup>285</sup> ISS

<sup>280</sup> Cf. Goldsmith, *supra* note 58, 941–42 (“Mandatory minimums . . . represent everything that sentencing guidelines are not.”); *see also supra* text accompanying note 204.

<sup>281</sup> Cf. TONRY, *supra* note 37, at 191; Chanenson, *supra* note 43.

<sup>282</sup> See MICHAEL TONRY, RECONSIDERING INDETERMINATE AND STRUCTURED SENTENCING 3 (1999); cf. TONRY, *supra* note 37, at 192; Chanenson, *supra* note 43.

<sup>283</sup> See *supra* text accompanying notes 261–62.

<sup>284</sup> The sentencing judge must be careful not to conflate an exercise of discretion and a mere disagreement with the guidelines. The Pennsylvania Superior Court recently described this concern as follows:

If the sentencing court, under the guise of exercising its discretion, imposes a sentence that deviates significantly from the guideline recommendations without a demonstration that the case under consideration is compellingly different from the “typical” case of the same offense, or without pointing to other sentencing factors that are germane to the case before the court, including the character of the defendant or the defendant’s criminal history, then the court is not, in reality, merely exercising its sentencing discretion. Rather, the court is, in effect, rejecting the assessment of the Sentencing Commission as to what constitutes just punishment for a typical commission of the crime in question.

Commonwealth v. Walls, 846 A.2d 152, 158 (Pa. Super. Ct. 2004); *see also* Commonwealth v. Vega, 850 A.2d 1277, 1281 (Pa. Super. Ct. 2004); Commonwealth v. Caraballo, 848 A.2d 1018 (Pa. Super. Ct. 2004); Commonwealth v. Begley, 780 A.2d 605, 643 (Pa. Super. Ct. 2001). Much of the Pennsylvania Superior Court’s increased focus on sentencing and appellate review of sentences, as manifested in such cases as *Walls*, *Caraballo*, and *Vega*, is of recent vintage and is not always uniformly followed by other panels of the Superior Court.

<sup>285</sup> See, e.g., PA. SENTENCING GUIDELINE MANUAL § 303.13(a), Commentary, at 228 (5th ed. 1997) (“The Commission cautions judges and others that the guidelines are written for the typical case and a standard sentence may not provide fair results for the atypical case.”); Commonwealth v. Gause, 659 A.2d 1014, 1016 (Pa. Super. Ct. 1995) (“[T]he guidelines provide the predesignated ranges of punishment for the offense

presumptive sentencing guidelines, however, would afford judges a *meaningful* amount of discretion to adjust the minimum sentence even within the presumptive standard range. This does not mean that the judge's discretion is vast and unfettered;<sup>286</sup> it simply means that there is breathing room. Although judges are strongly encouraged to sentence within the standard range,<sup>287</sup> the guidelines acknowledge that the standard range will not always be appropriate.<sup>288</sup>

Second, as an intermediate step between the presumptive standard range and a departure sentence, the guidelines would also provide mitigated and aggravated ranges for the minimum sentence.<sup>289</sup> Judges may, in the exercise of their discretion, sentence within the aggravated or mitigated range if they find and document on the record aggravating or mitigating circumstances warranting such a sentence.<sup>290</sup> While the justification need not be as

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considering the inherent egregiousness of the conduct which is generally associated with the commission of that offense.”).

<sup>286</sup> See, e.g., *Walls*, 846 A.2d at 154.

<sup>287</sup> See, e.g., *Gause*, 659 A.2d at 1016 (“[U]nless the particular facts of the case in question are distinguishable from the typical case of that same offense, a sentence in the standard range would be called for.”).

<sup>288</sup> See, e.g., 18 U.S.C. § 3553(b)(1) (West Supp. 2003) (allowing for departure from presumptive sentencing range if “there exists 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 that should result in a sentence different from that described.”); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2004) (discussing departure standard); MINN. SENTENCING GUIDELINES AND COMMENTARY, *supra* note 80, § II.D, at 24–25 (“When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances, and which demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence.”); PA. SENTENCING GUIDELINE MANUAL § 303.13(a), Description, at 227 (“Although the standard range applies in most instances, an aggravated sentence should be imposed when the court determines that there are aggravating factors which are sufficiently important to warrant a sentence above the standard range recommendation.”); *id.* § 303.13(b), Description, at 233 (“Although the standard range applies in most instances, a mitigated sentence should be imposed when the court determines that there are mitigating factors which are sufficiently important to warrant a sentence below the standard range recommendation.”).

<sup>289</sup> See, e.g., PA. SENTENCING GUIDELINE MANUAL § 303.13(a) (discussing aggravated range sentence); *id.* § 303.13(b) (discussing mitigated range sentence).

<sup>290</sup> See, e.g., *id.* § 303.13; *Walls*, 846 A.2d at 158 (discussing standard range as a “norm” that “strongly implies that deviation from the norm should be correlated with facts about the crime that also deviate from the norm for the offense, or facts relating to the offender’s character or criminal history that deviates from the norm and must be regarded as not within the guidelines contemplation”). Judges may not double-count by using criteria considered in the guidelines to justify an aggravated or mitigated sentence. See, e.g., PA. SENTENCING GUIDELINE MANUAL § 303.13(a), Commentary, at 228 (“Any of the criteria not specifically considered in the guidelines may continue to be used as reasons for imposing an aggravated or mitigated sentence.”).

compelling as for a departure sentence, the rationale for imposing an aggravated or mitigated range sentence must be objectively defensible.<sup>291</sup>

The benefit of aggravated and mitigated ranges is that they guide the extent to which sentences for more or less serious cases diverge from the presumptive standard range.<sup>292</sup> It is an example of bounded flexibility. In fact, by providing three sentencing ranges—mitigated, presumptive standard, and aggravated—the ISS approach further channels judges' discretion without extinguishing it.

Third, as discussed above, it is important to guide a judge's decision to impose sentences concurrently or consecutively. Providing such guidance can reduce what might otherwise be hidden disparity.<sup>293</sup> Roughly similar defendants convicted of roughly similar offenses may receive wildly disparate sentences simply by the unguided, discretionary application of the power to sentence concurrently or consecutively.<sup>294</sup> In the absence of any direction

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<sup>291</sup> For example, the Pennsylvania Superior Court has described the justification to sentence in the aggravated or mitigated ranges as follows:

[W]hen a case is not of the norm the sentencing judge may deviate from the standard sentencing range. However, when sentencing in these [aggravated or mitigated] sentencing ranges, the court is required to provide reasons on the record for so doing. Implicit in this methodology is the premise that the court must have valid reasons for sentencing in these ranges, otherwise the recitation of the reasons on the record would serve no real purpose.

*Gause*, 659 A.2d at 1017.

<sup>292</sup> The extent of departure sentences is an often overlooked area of sentencing law. Cf. Andrew D. Goldstein, Note, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L.J. 1955, 1970 (2004) (observing that the federal "sentencing statute places few restrictions (and provides little guidance) as to the extent of departures"). Although the focus has frequently been on the decision whether to depart at all, the extent of the departure is vitally important. Cf. Linda Drazga Maxfield & John H. Kramer, *Two Sentencing Commission Staff Reports on Substantial Assistance*, 11 FED. SENT. REP. 6, 14 (1998) (discussing that "legally irrelevant factors also appeared to have played an influential role in the degree of a § 5K1.1 departure" for substantial assistance). Furthermore, a small, but questionably justified departure may be viewed as less offensive than an overly large departure in a case that warrants some deviation from the presumptive range.

<sup>293</sup> Sadly, Pennsylvania's guidelines, which reflect some of the attributes of the ideal ISS scheme, exert no control over this crucial decision. They offer judges no assistance concerning when to impose concurrent versus consecutive sentences. The Pennsylvania Superior Court has recently stated that the "imposition of consecutive as opposed to concurrent sentences is solely within the discretion of the trial court, and does not in and of itself even rise to the level of a substantial question" justifying appellate review. *Commonwealth v. Boyer*, 856 A.2d 149, 153 (Pa. Super. Ct. 2004) (citation omitted). *But cf.* *Commonwealth v. Dodge*, 859 A.2d 771, 779 (Pa. Super. Ct. 2004) ("We do not, and indeed cannot, rubber stamp all consecutively-run sentences . . ."); *id.* at 782 n.13 ("We do not read *Boyer* as announcing a per se rule that we never examine the consecutive nature of a standard range sentence.").

<sup>294</sup> As now-Justice Breyer once noted, giving the trial judge vast discretion concerning the decision of whether to run sentences concurrently or consecutively is problematic. "A moment's thought suggests . . . that

from the Commission, sentencing judges may thus functionally evade the dictates of the guidelines. Furthermore, even the possible *perception* that judges arbitrarily make decisions to run sentences concurrently or consecutively is an unnecessary cloud over the criminal justice system. Thus, guidance as to that decision would bring greater accountability, rationality and perhaps legitimacy to the sentencing system.

As with the guidelines ranges themselves, judges should be free to depart from the Commission's guidance regarding concurrent or consecutive sentences as long as they provide sufficient, contemporaneous justifications for their decision. Deviations from presumptively concurrent or presumptively consecutive sentences would be departure sentences.

Fourth, sentencing guidelines under ISS offer a fully developed departure power. As noted above, the power to depart is crucial in a system of presumptive sentencing guidelines. It reflects the fact that no set of rules can anticipate every circumstance and that different cases deserve different treatment. The departure power helps to ensure that the minimum sentence imposed reflects the seriousness (or lack thereof) of the offense and the culpability and circumstances of the offender while respecting the goals of reasonable uniformity embodied by presumptive sentencing guidelines. The judge could depart—based on judicial factfinding<sup>295</sup> as well as jury factfinding and defendant admissions—when there are compelling aggravating or mitigating circumstances.<sup>296</sup> As with the sentences in the mitigated or aggravated ranges, the sentencing judge would have to justify the departure sentence contemporaneously on the record.

Finally, meaningful review by appellate courts is crucial to enforce the sentencing rules established by the Super Commission.<sup>297</sup> Although there are

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this [discretionary] approach leaves the prosecutor and the judge free to construct almost any sentence whatsoever." Breyer, *supra* note 239, at 26.

<sup>295</sup> See *supra* notes 263, 265.

<sup>296</sup> See, e.g., *Commonwealth v. Walls*, 846 A.2d 152, 159 (Pa. Super. Ct. 2004) ("[I]f a sentencing court were able to easily sentence outside of the guideline ranges, the goals of treating like offenders in like fashion would be frustrated and we would be, *de facto*, in a sentencing environment that existed prior to the passage of the guidelines."); cf. 18 U.S.C. § 3553(b)(1) (West Supp. 2003).

<sup>297</sup> See, e.g., *Commonwealth v. Smart*, 564 A.2d 512, 514 (Pa. 1989) ("Appellate review of sentencing matters would become a mockery and a sham if all sentences were routinely affirmed under the guise of discretion of the trial court."); MODEL PENAL CODE: SENTENCING § 7.ZZ, at 216 (Preliminary Draft No. 3, 2004) (describing suggested standard of appellate review as a "middle course that avoids the total absence of enforcement and precedential decisionmaking. It sets in place a meaningful yet deferential standard for the appellate review of sentences.").

several acceptable ways to organize such appellate review, it would be logical for the intensity of the review to vary depending on the action taken by the sentencing judge.<sup>298</sup> For example, a sentence within the standard presumptive range would be subject to the lowest level of review. A judge's decision to sentence within the mitigated or aggravated range would warrant heightened review. Departure sentences would trigger the most searching review by the courts of appeals.<sup>299</sup> Even then, however, de novo review is not necessarily required in light of the trial court's superior ability to assess and understand the case before it.<sup>300</sup>

This ISS approach to presumptive sentencing guidelines provides for bounded discretion within a responsive system. The guidelines allow a judge to judge but are sufficiently muscular to reduce unwarranted disparity and maintain at least a medium high level of relative proportionality. For example, the Pennsylvania Sentencing Guidelines reflect some, though certainly not all, of the desired features discussed above. They are more flexible than some other presumptive sentencing guidelines, most notably the Federal Sentencing Guidelines. Yet researchers have found that they reduce the unwarranted disparity prevalent in the previous, unguided sentencing system.<sup>301</sup>

Thus, the ideal ISS sentencing system presents a workable balance between uniformity and individualization, as reflected below:

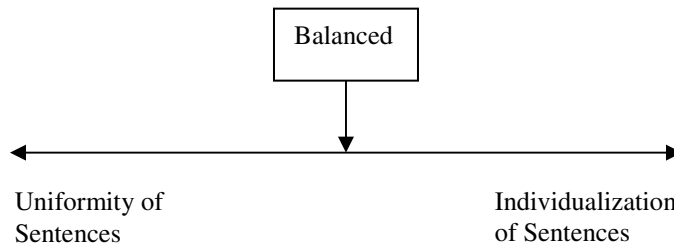
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<sup>298</sup> See, e.g., MODEL PENAL CODE: SENTENCING § 7.ZZ(6), at 214–15 (describing different levels of review for different trial court actions); *id.* § 7.ZZ, at 220 (“Consistent with the statutory law and caselaw in most guideline jurisdictions, subsection (6) lays out a multi-tiered standard for appellate sentence review that attaches with differing levels of intensity depending on the nature of the issue raised on appeal.”); Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 5 (1997) (arguing in favor of “a sliding scale of deference approach in which differing degrees of deference (highly deferential, substantially deferential, moderately deferential, and non-deferential) are applied depending upon the specific inquiry involved”). The American Law Institute proposal would also authorize “subconstitutional proportionality review that reaches miscarriages of penalty that are not ‘reasonably proportionate’ to deserved outcomes [in] individual cases.” MODEL PENAL CODE: SENTENCING § 7.ZZ, at 220 (emphasis omitted).

<sup>299</sup> Cf. *Commonwealth v. Vega*, 850 A.2d 1277, 1281 (Pa. Super. Ct. 2004) (“Sentences that fall outside the guidelines are afforded greater circumspection . . .”).

<sup>300</sup> Cf. TONRY, *supra* note 37, at 18 (“[M]ost peoples’ judgments of others’ blameworthiness depend on knowledge of their circumstances.”).

<sup>301</sup> See, e.g., Joe Gorton & John L. Boies, *Sentencing Guidelines and Racial Disparity Across Time: Pennsylvania Prison Sentences in 1977, 1983, 1992, and 1993*, 80 SOC. SCI. Q. 37 (1999) (“[O]ur analysis demonstrates that Pennsylvania’s sentencing guidelines significantly reduced, if not eliminated, racial disparity in the prison sentences received by felony defendants.”).



Given the interrelationship between the Super Commission, the sentencing judge, and the appellate court, this sentencing system should rate at least a medium high score on the proportionality confidence index.

The ideal ISS system incorporates some of the best features of presumptive sentencing guidelines. Unfortunately, *Blakely v. Washington* injured or destroyed many of these regimes. One of the most attractive parts of the ISS method is that it allows presumptive sentencing guidelines to flourish despite *Blakely*. These sentencing guidelines escape *Blakely*'s grasp because of ISS's indeterminate nature. It is thus necessary to address the resulting parole release authority.

#### B. ISS Parole Release Guidelines

The ISS approach involves the joint presence of traditional presumptive sentencing guidelines in an indeterminate system with coordinated, guided, discretionary parole release authority. ISS offers many of the benefits of a pre-*Blakely* presumptive sentencing guidelines approach in a *Blakely*-compliant fashion. The parole release power that results from this indeterminate system is a significant and complicating limitation of the ISS model. Nevertheless, it is possible to lessen this difficulty through a modest conception of the role of parole release authority and comprehensive parole release guidelines.<sup>302</sup>

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<sup>302</sup> In the world before *Blakely*, I advocated for abolition of parole release authority in jurisdictions with sentencing guidelines. Chanenson, *supra* note 43 ("Given such an approach, I do not believe that the sentencing commission should co-exist with a separate entity that has parole release authority."). In light of *Blakely*, that position is now politically untenable. Furthermore, it would result in a less desirable sentencing system up-front because such a system could not take advantage of the flexibility of the pre-*Blakely* sentencing guidelines approach. The ISS system I now advocate assumes a reformed discretionary parole release authority as sketched out in this Article.

The Super Commission would recognize that because the sentencing judge typically has superior information about the offense, the judge's retributive judgment—channeled by the sentencing guidelines and expressed through the sentence imposed—is entitled to substantial weight in the parole release process. Accordingly, ISS parole release guidelines generally encourage the parole board to exercise its discretion<sup>303</sup> to grant parole release at or near<sup>304</sup> the expiration of the typical defendant's judicially imposed minimum sentence. In other words, the parole release guidelines generally encourage the parole board to mitigate the inmate's sentence served down from the judicially imposed maximum to the judicially imposed minimum. Yet, the guidelines do provide for circumstances when a release after the expiration of the minimum sentence is presumptively appropriate. Examples might include an inmate's violation of certain prison rules or a clear conclusion that the inmate would present an unusually high risk if released. The amount of time served after the expiration of the minimum sentence must be within principled limits based on the offense and the offender, and reflect a modest view of the role of parole release authority. The ISS parole release guidelines, like the ISS sentencing guidelines, allow for departures when appropriate, and provide for some form of appellate review, although this need not be judicial.

The Super Commission's parole release guidelines will not offend *Blakely*. The parole release process is outside of both *Blakely*'s reasoning and its Sixth Amendment constitutional foundation. Parole release guidelines channel discretion concerning *mitigation*, not aggravation. The Supreme Court has made clear that the Sixth Amendment is not at all concerned about structuring the judicial power to mitigate sentences.<sup>305</sup> There should be even less concern

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<sup>303</sup> See, e.g., *Rogers v. Pa. Bd. of Prob. & Parole*, 724 A.2d 319, 321 (Pa. 1999) ("A prisoner has no absolute right to be released from prison on parole upon the expiration of the prisoner's minimum term.") (citation omitted); *id.* at 323 (finding no protected liberty interest in parole release); *Commonwealth ex rel. Sparks v. Russell*, 169 A.2d 884 (Pa. 1961) (concluding that parole is a matter of legislative grace vested in the discretion of the parole board); *Commonwealth v. Reefer*, 816 A.2d 1136, 1139 n.2 (Pa. Super. Ct. 2003) (same).

The ISS scheme would survive even if the courts were to conclude that inmates had a due process protectable expectation of parole release at the expiration of their minimum sentence. Presumably, the most that would then be required would be the need for an opportunity to be heard and to be informed why parole release was denied. Cf. *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 16 (1979). This should not be problematic because, as noted elsewhere, I envision a transparent system in which the parole board (like sentencing judges) explains its actions and is subject to some appellate review—perhaps administrative in character—of the application of those parole release guidelines.

<sup>304</sup> Such things as temporary difficulties in obtaining an approved release residence may unavoidably prevent some inmates from being released right at the expiration of their minimum sentence.

<sup>305</sup> In *Apprendi v. New Jersey*, the Court stated that juries need not find mitigating facts:



about the Super Commission structuring the parole board's power to mitigate sentences through the parole release authority. Pursuant to the ISS system, the judge sets the maximum sentence (within the bounds set by the legislature for the offense of conviction and authorized by the guilty verdict) long before the parole board gets involved. Far from undercutting the jury's role of authorizing the greatest permissible punishment, the parole board is simply deciding whether to mitigate the judicially imposed maximum sentence by granting parole at some point after the expiration of the minimum sentence. Just as *Blakely*-compliant sentencing guidelines can structure a judge's power to mitigate the length of the sentence imposed, parole release guidelines can structure a parole board's power to mitigate the length of the sentence served.

More fundamentally, structured parole release—as opposed to structured sentencing—is outside the ambit of the Sixth Amendment. The very language of the Sixth Amendment, as well as judicial interpretations concerning the parole release process, amply supports this conclusion. It is important not to conflate trial processes and parole release procedures. The criminal prosecution concludes long before the parole board determines, under a different procedure, whether to grant an inmate discretionary parole release. The relevant text of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”<sup>306</sup> Thus, the Sixth Amendment applies solely to “criminal prosecutions” and provides rights only to “the accused.”<sup>307</sup> No such event and no such person are involved in the parole release process. The criminal prosecution is over. The accused is now a convicted prisoner.

Following this understanding and the express language of the Sixth Amendment, various courts have properly refused to analyze parole release proceedings through the lens of the Sixth Amendment. For example, speaking through then-Judge John Paul Stevens, the Seventh Circuit—consistent with

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If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

530 U.S. 466, 490 n.16 (2000). The parole board's power to release is an act of sentence mitigation.

<sup>306</sup> U.S. CONST. amend. VI.

<sup>307</sup> *Id.*

analogous Supreme Court decisions—held that a “parole release hearing is not part of the criminal prosecution; the Sixth Amendment is inapplicable.”<sup>308</sup> Judge Paul Cassell, in a post-*Blakely* opinion, stated that “parole decisions have always been viewed as constitutionally distinct from sentencing decisions.”<sup>309</sup> Indeed, he wrote that “the full panoply of constitutional protections (such as the Sixth Amendment’s right to a jury trial) do not apply to parole decisions.”<sup>310</sup> Guided, discretionary parole release authority does not offend *Blakely*.

Effective presumptive sentencing guidelines can survive *Blakely* because of the indeterminate nature of the ISS approach. But the ISS system comes with the difficulty of parole release authority.<sup>311</sup> Parole release authority is problematic for at least three reasons. First, it has a wretched history of discretionary abuses. Second, it may be difficult to square with prevailing theories of punishment. Third, it may presume a predictive power society

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<sup>308</sup> *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir. 1973) (Stevens, J.). The *Ganz* court quoted from a Supreme Court case which concluded that parole revocation proceedings were not part of the criminal prosecution. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972) (“Parole arises after the end of the criminal prosecution, including imposition of sentence.”); *cf.* *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) (refusing to extend exclusionary rule “beyond the criminal trial context” to parole revocations); *id.* at 369 (“We have long been averse to imposing federal requirements upon the parole systems of the States.”); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284 (1998) (observing that “[c]lemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings.”) (plurality opinion); *id.* at 289 (O’Connor, J., concurring in part and concurring in the judgment) (“I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings.”) (emphasis in original).

<sup>309</sup> *United States v. Croxford*, 324 F. Supp. 2d 1255, 1264 (D. Utah 2004).

<sup>310</sup> *Id.*

<sup>311</sup> The drawbacks of discretionary parole release authority are not inconsequential. In an ideal world, I would not advocate such a move. Before *Blakely*, I argued that parole release authority and sentencing guidelines do not and should not mix. Chanenson, *supra* note 43; *see also supra* note 302. Contending that we need to make the tough decisions at the front end, I argued that presumptive sentencing guidelines as part of a determinate sentencing scheme, with a fully developed departure power, would more reliably lead to just results. I also asserted that the Super Commission approach, while palatable, was second-best. *Blakely* changed all that. For the reasons discussed above, a *Blakely*-ized presumptive guidelines system as part of a determinate sentencing scheme is inadequate. Following the Kansas model, a jurisdiction may achieve appropriately severe sentences by driving the discretion back underground (or perhaps just keeping it there) through the opaque and unregulated use of concurrent and consecutive sentences. If a jurisdiction follows Minnesota’s expected path, there will likely be pressure to increase sentences across the board in order to allow judges to punish unusually serious permutations of an offense sufficiently. Neither of these determinate sentencing options is desirable. Despite the complications of discretionary parole release, the ISS approach is the most attractive post-*Blakely* option.

simply does not possess. Although these concerns are substantial, ISS parole release guidelines can resolve or at least mitigate each of them.

First, a significant objection to parole release authority is that it has historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict fully discretionary judicial sentencing. Frequently, parole release decisions were hard to predict and even harder to explain.<sup>312</sup> Although parole release guidelines were the forerunner of sentencing guidelines, the move away from indeterminate sentencing and parole release has stunted their development. Both historically and today, some of the most powerful attacks on parole release revolve around the problem of runaway discretion and the resulting disparities in time served by inmates.<sup>313</sup> This is where the power of the Super Commission is crucial.

The Super Commission is responsible for both sentencing policy and parole release policy.<sup>314</sup> Its parole release guidelines channel the parole board's discretion much in the same way as the sentencing guidelines channel the sentencing judge's discretion.<sup>315</sup> The Super Commission not only brings order, reason and transparency to the parole release process, but it coordinates both

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<sup>312</sup> As Professor Bottomley noted:

At times, parole authorities appeared to take pride in the indecipherability of their work. Even when parole authorities did have explicit criteria and principles, this did not necessarily resolve the problem, as they never really have clarified the process by which decisions to grant or deny parole were made or indicated what precise weighting was given to each factor.

A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s*, in 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH, *supra* note 253, at 319, 338.

<sup>313</sup> See, e.g., HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 219 (8th ed. 2003); Berman, *supra* note 57, at 26; Bottomley, *supra* note 312, at 338.

<sup>314</sup> Parole release authority has recently been a problem in Pennsylvania, which employs a less-than-ideal variation on the ISS approach. Part of the reason for the problem is that the Pennsylvania Commission on Sentencing has no influence over the parole release function. As I plan to explore in a forthcoming work, the problems of uncoordinated sentencing guidelines and discretionary parole release authority are substantial. The Utah Sentencing Commission, in contrast to Pennsylvania, provides guidance on the sentencing and release of offenders. See Utah Sentencing Commission, Frequently Asked Questions, available at <http://www.sentencing.utah.gov/FAQ.htm> (last visited Jan. 28, 2005). Unfortunately, Utah uses fully voluntary, descriptive guidelines for both sentencing and release. See *id.*

<sup>315</sup> Cf. United States v. Addonizio, 442 U.S. 178, 182-83 (1979) (discussing federal parole release guidelines); Commonwealth v. Stark, 698 A.2d 1327, 1333 (Pa. Super. Ct. 1997) (describing grant of power to parole board); Petersilia, *supra* note 253, at 372 ("Parole guidelines, which are used in many states, can establish uniformity in parole decisions and objectively weigh factors known to be associated with recidivism.").

sentencing and release practices. At the policy level, the entire punishment system—from entry to exit—speaks with one voice.<sup>316</sup>

Second, some people contend that parole release authority is not justified under prevailing theories of punishment. Parole release authority fell out of favor with the fall of the rehabilitative ideal of punishment.<sup>317</sup> In its place, the goal of “just deserts” gained prominence.<sup>318</sup> A dominant variant of that view is the limiting retributivism theory largely attributed to Norval Morris.<sup>319</sup> Professor Morris famously argued that desert is “an essential link between crime and punishment. Punishment in excess of what is seen by that society at that time as a deserved punishment is tyranny.”<sup>320</sup>

The limiting retributivism theory reminds us that our retributive judgments are imprecise, resulting in a *range* of acceptable punishments supported by our retributive beliefs. This “theory requires decision makers to select sentences inside the boundaries of penalties that are clearly excessive and those that are clearly too lenient, always staying within the plausible retributive range.”<sup>321</sup> In other words, the punishment must be deserved, or, in Morris’s term, it must be within the range of potential punishments that are not *undeserved*.<sup>322</sup> “At the perimeters of the range, some punishments will appear clearly excessive to do justice, and some will appear clearly too lenient—but there will nearly always be a gray area between the two extremes.”<sup>323</sup>

Parole release authority, like sentencing authority, can operate within that gray area. The parole board—its discretion channeled by guidelines promulgated by the Super Commission—can act in such a way as to honor the goals of the limiting retributivism theory. As Professor Kevin Reitz noted,

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<sup>316</sup> Cf. Bottomley, *supra* note 312, at 345 (objecting to having both a sentencing commission and a parole board “both exercising decision-making responsibility over the time to be served in prison, based on a similar set of factors that were known at the time of sentence—a sure recipe for conflict, inefficiency, or both”); Chanenson, *supra* note 43.

<sup>317</sup> See Bottomley, *supra* note 312, at 337 (“[W]hen the whole notion of the rehabilitative ideal began to be challenged, parole and indeterminate sentencing were inevitable targets.”).

<sup>318</sup> See, e.g., JEREMY TRAVIS & SARAH LAWRENCE, *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 2* (2002).

<sup>319</sup> See, e.g., MODEL PENAL CODE: SENTENCING § 1.02(2), at 4 (Preliminary Draft No. 3, 2004); MORRIS, *supra* note 21, at 76.

<sup>320</sup> MORRIS, *supra* note 21, at 76.

<sup>321</sup> Reitz, *supra* note 259, at 203.

<sup>322</sup> To further determine an appropriate sentence, Morris suggested following the concept of parsimony, which requires that the “least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed.” MORRIS, *supra* note 21, at 59.

<sup>323</sup> MODEL PENAL CODE: SENTENCING § 102.2(2) cmt. b, at 8.

“we could choose to design a sentencing system that asks parole boards to apply [limiting retributivism] reasoning to their cases.”<sup>324</sup> Thus, parole boards may exercise their discretionary parole release authority in a way that is both guided and theoretically palatable.

In fact, consistent with limiting retributivism, parole release authority in the ISS system can take the place of the sentence-adjusting aspects of nonflat, determinate sentencing. Although the parole release process should not simply be an opportunity to reweigh the seriousness of the offense or the offender’s criminal history,<sup>325</sup> it can be used to evaluate the defendant’s postsentencing behavior to the extent that influences the defendant’s just punishment.<sup>326</sup> As Professor Reitz stated: “If it is true that parole and corrections officials instinctively believe that the moral desert of prisoners during confinement should have some bearing on their length of stay, we should think carefully before attempting to legislate in the opposite direction.”<sup>327</sup>

The proposed ISS scheme requires defendants to serve their entire judicially imposed minimum sentence. There is no good time reduction in the minimum sentence. Yet, some correctional experts argue that improvements in institutional behavior and order result if the inmate believes he has something

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<sup>324</sup> Cf. Reitz, *supra* note 259, at 203.

<sup>325</sup> This is a departure from the role many parole boards have played in the past. See, e.g., DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 23 (1978) (describing parole guidelines model in which parole board sets severity ratings for offenses). This may have been a logical approach when judges were sentencing as part of an unguided indeterminate model. See *id.* at 70 (“[T]he length of the maximum sentence cannot be relied upon as a good indicant of the offense severity owing to the considerable variations (disparity) in sentencing among judges.”). However, in a guided, indeterminate model with presumptive sentencing guidelines such as the ISS approach, the judge is in the best position to make the appropriate determinations about the seriousness of the offense or the offender’s criminal history. Cf. Bottomley, *supra* note 312, at 344 (noting that the success of parole release guidelines “raises the fundamental question whether the parole board is the most appropriate authority for determining the time to be served”) (citation omitted). Before the judge (as opposed to the parole board) both the government and the defendant are represented by counsel and the relevant evidence of the offense and any aggravating or mitigating circumstances is fresh in everyone’s mind. Cf. GOTTFREDSON ET AL., *supra*, at 70 (discussing how at parole release stage it “is often difficult or impossible to obtain an accurate picture of the actual behavior involved in the offense”). Finally, a parole-based system of reweighing offense severity raises the potentially problematic issue of how to deal with changing views of offense severity long after the offense has been committed. Cf. *id.* at 80.

<sup>326</sup> Reitz, *supra* note 259, at 203–04. “If there is any place for desert-based adjustments of dates of release, they should be narrowly tailored to post-sentencing behaviors and events.” *Id.* at 206.

<sup>327</sup> *Id.* at 205; see also *id.* at 208 (opposing parole release authority but noting that “where the prospects for an offender’s rehabilitation are believed to be slim or none, the policy of incapacitation predominates and pushes toward the longest period of confinement morally allowable”).

to lose by violating prison rules.<sup>328</sup> Even Professor Reitz, a skeptic of parole release authority generally, is willing to accept that good time, in the neighborhood of 20–25% of an inmate’s sentence, “is a desirable feature of a prison system.”<sup>329</sup> Professor Reitz noted that a “modest amount of play in confinement terms can assist prison administrators in maintaining discipline and can be used as an incentive to encourage inmates to participate in prison programming, but the device should be routinized and should carry basic protections on prisoners’ behalf.”<sup>330</sup> Parole release authority in an ISS system can satisfy that goal by functioning as a mechanism for what can be called “bad time.” In other words, all of the things that could warrant the forfeiture of good time in a nonflat, determinate system could, pursuant to transparent parole release guidelines, justify an equally long reduction in the amount of sentence mitigation granted by the parole board.<sup>331</sup>

There is a third argument against parole release authority. Professor Morris and Professor Reitz, both writing before *Blakely*, argued that even properly administered parole release is unwise because it offers few, if any, advantages over a determinate system in which the judge sets the imprisonment term at sentencing. After *Blakely*, the ability of the ISS approach to capitalize on the benefits of presumptive sentencing guidelines with a fully developed departure authority changes that calculation.

Nevertheless, there remains a strong concern that parole release authority calls on the parole board to make impossible predictions about inmates’ future criminal behavior and does not assist in—and in fact may discourage—prisoner rehabilitation efforts.<sup>332</sup> These concerns should encourage the Super Commission to take a modest view of the role of parole release authority and adopt a general philosophy of presumptive release at or near the expiration of the minimum sentence. However, there is enough debate in this area to remain open to experimentation, which can only occur within a framework that allows discretionary parole release.

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<sup>328</sup> See, e.g., *id.* at 200. But see James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221, 258 (1982).

<sup>329</sup> Reitz, *supra* note 259, at 200.

<sup>330</sup> *Id.*

<sup>331</sup> Cf. MORRIS, *supra* note 21, at 39 (indicating that institutional infractions and unwillingness to develop, with governmental assistance, a pre-release plan could defer a parole release date); *id.* at 33 (distinguishing “loss of good time for disciplinary offenses in prison” from a powerful critique against various aspects of parole release decisionmaking).

<sup>332</sup> See, e.g., *id.* at 31–45.

Professor Morris steadfastly argued that parole release predicated on inmate rehabilitation efforts encouraged prisoners to pretend to participate in such programs and effectively turned prisons into acting schools.<sup>333</sup> In part because of the unguided and, at times, irrational discretion wielded by parole boards, Morris believed that inmates did not trust the parole board and, in the words of Professor Reitz, “long argued that the coercive edge of the parole board’s release discretion actually destroys the best chances for obtaining inmates’ genuine involvement in prison programming.”<sup>334</sup>

Professor Joan Petersilia is probably the current leading academic advocate for parole release authority.<sup>335</sup> She focuses in large part on the value that parole release authority can bring to the prisoner reintegration process.<sup>336</sup> She asserts that “[i]nmates should be given incentives to participate in prison programs, since research shows that regardless of their initial incentive to become involved, some positive effects will accrue for some people.”<sup>337</sup> While there is a vigorous debate as to the wisdom and efficacy of her suggestions,<sup>338</sup> Professor Petersilia contends:

Parole boards are in a position to demand participation in drug treatment, and research shows that coerced drug treatment is as successful in achieving abstinence as is voluntary participation. Parole boards can also require an adequate plan for a job and residence in the community—and that has the added benefit of refocusing prison staff and corrections budgets on transition planning.<sup>339</sup>

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<sup>333</sup> *Id.*

<sup>334</sup> See Reitz, *supra* note 259, at 212.

<sup>335</sup> See PETERSILIA, *supra* note 63, at 74 (“Common sense and empirical evidence call for reinstating discretionary parole release for inmates.”). *But see* Reitz, *supra* note 259, at 209 (disagreeing with Professor Petersilia’s conclusion and recommendation but noting that she “is a respected voice in the criminal justice research community”).

<sup>336</sup> Petersilia, *supra* note 253, at 361–62 (noting that under determinate sentencing defendants are released automatically which sets up many for likely failure and reincarceration); *see also* PETERSILIA, *supra* note 63, at 187–88 (“Eliminating discretionary release reduces the incentives for inmates to try to rehabilitate themselves while incarcerated.”). Of course, certain re-entry programs can and should be introduced while the inmate is incarcerated regardless of whether he is subject to a determinate or indeterminate sentence.

<sup>337</sup> PETERSILIA, *supra* note 63, at 74; *see also id.* at 188 (“Some inmates may recognize the intrinsic value of improving themselves, but more inmates will participate if they believe it will reduce their prison stay.”); *id.* at 75 (“No one is more dangerous than a criminal who has no incentive to straighten himself out while in prison and who returns to society without a supervised transition plan.”).

<sup>338</sup> *See, e.g.,* Reitz, *supra* note 259, at 199.

<sup>339</sup> Petersilia, *supra* note 253, at 371; *see also id.* at 372 (“Parole officers say it is impossible to ensure cooperation of offenders when offenders know they will be released, regardless of their willingness to comply with certain conditions (e.g., get a job).”).

Finally, and controversially,<sup>340</sup> Professor Petersilia reports that our ability to predict recidivism has improved in recent years, although “the ability to predict recidivism is rather limited.”<sup>341</sup>

Contrary to Professor Petersilia, Professor Reitz is highly dubious of the connections between parole release authority and predictions of beneficial inmate changes.<sup>342</sup> A full exploration of (let alone a judgment on) this debate is beyond the scope of this Article. However, it is relevant to note that even Professor Reitz believed that “we should be open to future research and should take steps to encourage it.”<sup>343</sup> The most effective way to examine these issues, particularly the ability of parole release authority to encourage serious participation in rehabilitative programs, is to have some form of parole release authority.<sup>344</sup> Coupled with the post-*Blakely* sentencing benefits of an indeterminate system, a guided, reconceptualized, and humble approach to parole release as part of the ISS method seems worthwhile.

Based on these ideas, an embryonic ISS parole release strategy emerges. The Super Commission synchronizes the sentencing and parole release policies. This is a critical component of ISS, and an approach that differs even from many earlier efforts to rationalize parole release practices through parole release guidelines. At least some previous attempts to create parole release guidelines were largely disconnected from the then usually unguided, front-end sentencing policies.<sup>345</sup> As part of the ISS model, however, the Super

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<sup>340</sup> See, e.g., Reitz, *supra* note 259, at 199.

<sup>341</sup> PETERSILIA, *supra* note 63, at 190.

<sup>342</sup> See, e.g., Reitz, *supra* note 259, at 208 (describing the Canadian research on which Professor Petersilia relies as “preliminary and only suggestive”).

<sup>343</sup> *Id.* at 210; see also *id.* at 215–16 (“As I said earlier when the topic was prediction, this does not mean that a hypothesized connection between release mechanisms and future behavior does not merit future study. It does, and we may some day discover that for some categories of offenders, in some circumstances, there is indeed a link.”); *id.* at 229 (“It may also be the better part of wisdom to encourage ongoing experimentation with treatment and reentry programs fueled in part by early release incentives, provided reasonable evaluations are performed along the way.”).

<sup>344</sup> Parole release predicated on rehabilitative predictions can be consistent with the limiting retributivism model. “This prospect requires a friendly amendment to Morris’s approach, borrowing from his [limiting retributivism] framework, to posit that the exact term of confinement may be adjusted up or down *within the permissible retributive range* if there is good reason to suppose that the offender’s rehabilitation will be facilitated by a longer or shorter stay.” *Id.* at 211. Again, Professor Reitz does not believe that the “case has yet been made” for a parole board’s possessing predictive power superior to that of the trial judge at sentencing, but he notes that this “might usefully be explored in future research and in pilot programs for specific kinds of offenders.” *Id.* at 212.

<sup>345</sup> Cf. GOTTFREDSON ET AL., *supra* note 325, at 70 (discussing need for parole board guidelines to set offense severity levels in part because “the length of the [judicially imposed] maximum sentence cannot be



Commission provides centralized control of the sentencing guidelines and the parole release guidelines, both of which are subject to some form of appellate review.

The sentencing judge's guided discretion and retributive judgment reflected in the minimum sentence significantly inform the parole board in the exercise of its release authority.<sup>346</sup> This is only logical given the sentencing judge's typically superior information about the offense and the offender's previous history.<sup>347</sup> Accordingly, the Super Commission's parole release guidelines by and large advise the parole board to exercise its discretion to fully mitigate the sentence down from the imposed maximum and grant parole release at or near the expiration of the typical defendant's judicially imposed, minimum sentence.<sup>348</sup> Under the ISS parole release guidelines, not all offenders are released at or near the expiration of their minimum sentence, but the overwhelming majority of them will be. Nevertheless, the ISS parole release guidelines do identify various situations that presumptively call for a later release. As discussed above, parole release guidelines can address violations of prison rules by reducing the extent of presumptive sentence mitigation (thus extending the parole release date beyond the expiration of the minimum sentence) in a principled, transparent, and predictable fashion. Furthermore, compelling predictions of future risk, although viewed with a jaundiced eye, may also motivate the parole board to exercise its discretion—guided by the Super Commission's parole release guidelines—not to mitigate down to the minimum sentence.<sup>349</sup> In this way, the ISS approach reduces the potential

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relied upon as a good indicant of the offense severity owing to the considerable variations (disparity) in sentencing among judges").

<sup>346</sup> *Cf. id.* at 77 (observing that even after that adoption of more traditional parole release guidelines, "[i]t is likely that the perceived seriousness of the offense behavior for which an offender has been committed will continue to be one of the major factors considered in parole selection decision making").

<sup>347</sup> *Cf. id.* at 70 (discussing how at parole release stage it "is often difficult or impossible to obtain an accurate picture of the actual behavior involved in the offense").

<sup>348</sup> This will also make the process more predictable and allow the sentencing judge to have a reasonably accurate understanding of the likely consequences of her minimum sentence. I plan to address some of the sentencing problems that can flow from a dramatic lack of such parole release predictability in a forthcoming article.

<sup>349</sup> *Cf. Reitz, supra* note 259, at 208 (opposing parole release authority but noting that "where the prospects for an offender's rehabilitation are believed to be slim or none, the policy of incapacitation predominates and pushes toward the longest period of confinement morally allowable"). There would also likely be grounds for concern and a longer period of incarceration when an inmate willfully refuses to participate in the development of a release plan. *Cf. MORRIS, supra* note 21, at 39 (indicating that institutional infractions and unwillingness to develop, with governmental assistance, a prerelease plan could defer a parole release date). As noted, there are limits to the consequences of these behaviors and the resulting risk predictions.

negative aspects of discretionary parole release authority,<sup>350</sup> and the parole release process remains compatible with the limiting retributivism model.

Like their sentencing counterparts, ISS parole release guidelines offer a fully developed departure power. This ability to depart is vital, as it acknowledges the fact that no set of rules can anticipate every situation and that material differences in the offense or the offender may warrant different treatment. The departure power helps to ensure a sensible amount of individualization in the parole release process. It does so while simultaneously honoring the goal of reasonable uniformity and acknowledging a modest vision of the role and power of discretionary parole release authority. The parole board may depart—effectively delaying parole release or advancing parole release (up to the expiration of the minimum sentence)—when justified by aggravating or mitigating circumstances. As with the judges and front-end sentences, the parole board must justify the parole release departure contemporaneously on the record.

Finally, some form of appellate review is vital to effective implementation of the Super Commission's parole release guidelines.<sup>351</sup> Although the Super Commission can monitor compliance and modify the guidelines accordingly, there does need to be a case-specific enforcement mechanism. Consistent with the historically flexible and informal procedures surrounding parole, this review can be administrative instead of judicial.<sup>352</sup> Although administrative appellate review is a sensible choice, traditional judicial review is also attractive and may offer enhanced perceptions of legitimacy. Appellate judicial review is also likely to be logistically achievable given that the parole board will release the majority of offenders at or near their minimum sentence,

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Virginia presents a different, interesting, and at times arguably troubling, example of predictions at sentencing. See, e.g., Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT. REP. 165 (2004).

<sup>350</sup> Cf. Petersilia, *supra* note 253, at 372 (“No one would argue for a return to the unfettered discretion that parole boards exercised in the 1960s. That led to unwarranted disparities. Parole release decisions must be principled and incorporate explicit standards and due process protections.”).

<sup>351</sup> Cf. *Commonwealth v. Smart*, 564 A.2d 512, 514 (Pa. 1989) (“Appellate review of sentencing matters would become a mockery and a sham if all sentences were routinely affirmed under the guise of discretion of the trial court.”).

<sup>352</sup> In the context of parole revocations (which implicate the arguably more serious issue of deprivation of conditional liberty), the Supreme Court has recognized a strong governmental interest in informal administrative procedures. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *id.* at 486 (“This independent officer need not be a judicial officer.”).

which limits the volume of cases for review.<sup>353</sup> Again, like appeals concerning the ISS sentencing guidelines, it is logical for the level of review to fluctuate depending on the action taken by the parole board. Release decisions departing from the Super Commission's release guidelines are subject to more intense review.<sup>354</sup>

By combining and coordinating presumptive sentencing guidelines and presumptive parole release guidelines, the ISS's Super Commission obtains strategic control over the entire sentencing and punishment system. That power allows rationally ordered, yet responsive, sentencing practices on the front-end, and modest, yet meaningful, parole release practices on the back-end.

### CONCLUSION

*Blakely* may be, as Justice O'Connor has said, "a No. 10 earthquake,"<sup>355</sup> but it need not be the end of the world. Rather, it may be the beginning of something better. It can herald the dawn of the next era of sentencing reform.

When choosing among the various ways in which to deal with *Blakely*, legislatures and sentencing commissions will have to decide what kind of accommodation they want to reach between uniformity and individualization and how much relative proportionality they desire. *Blakely*-compliant options abound. Many of these options are undesirable because they would produce sentencing schemes that are out of kilter. Yet, a just and balanced ISS system, compatible with *Blakely*, is achievable.

ISS holds great promise for the world after *Blakely*. There may be political impediments to adopting this kind of a system, but the post-*Blakely* benefits it brings can provide the needed push to make it possible. The ideal version of an ISS system attempts to strike an acceptable balance between reasonable uniformity and reasonable individualization. It endeavors to do so while maintaining a good likelihood of reaching a proportionate result, at least in

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<sup>353</sup> Although the number of appeals will likely increase (even assuming a pre-existing ability to challenge unguided discretionary parole release practices), this proposal need not be an unbearable burden on the courts. Offenders will not appeal their release at (or likely even near) the expiration of the minimum sentence. Although the government may appeal such release orders, it is unlikely to do so frequently given the general thrust of the ISS parole release guidelines.

<sup>354</sup> As such, the appellate process will also be able to police the release dates in an effort to ensure rough compliance with the limiting retributivism concept.

<sup>355</sup> Ann Gearan, *Justices To Again Tackle Sentencing*, DESERET MORNING NEWS, Aug. 3, 2004, at A2.

relative terms. Any such system will always be striving to reach this ideal balance, even with all the structural pieces in place. Professor Michael Tonry put it well when he observed:

Like all calls for just the right amount of anything, not too much and not too little, a proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection. Nonetheless, that is probably what most people would want to see in a just system of sentencing . . . .<sup>356</sup>

The ISS approach allows for a meaningful post-*Blakely* pursuit of that “unattainable perfection.”

There are many potential explanations for why the Supreme Court decided *Blakely*. Regardless of the reasons for its birth, *Blakely* has the potential to grow into either a destructive monster or a gentle giant. The way in which the various jurisdictions react to *Blakely* and its progeny will determine how history will view these cases. Several state sentencing systems across the country are at least partially invalid now. The Supreme Court will soon tell us whether the Federal Sentencing Guidelines survive *Blakely*. With what will these systems be replaced? Legislatures need not and should not return to classic, unguided, indeterminate—or, worse, unguided, determinate—sentencing. Further, they need not and should not move toward a tariff system in which every crime results in a specific, unchangeable penalty. Neither end of the uniformity versus individualization continuum is acceptable.

Rather, legislatures, and the citizens they represent should view *Blakely* as an opportunity to reassess their sentencing systems. They should seek a balance between the extremes. Judicial “[d]iscretion should neither be effectively absent or effectively absolute.”<sup>357</sup> An ISS scheme offers a productive and constitutional path. Like all sentencing systems, ISS has its weaknesses. Yet, it avoids the lawlessness of classic, unguided, indeterminate sentencing without becoming little more than a collection of mandatory sentences. It honors judicial discretion without becoming its slave. It presents a total package that offers reasonable uniformity with room for bounded individualization and enough flexibility to provide reasonable proportionality. ISS represents a real hope for the next era of sentencing reform.

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<sup>356</sup> TONRY, *supra* note 37, at 185–86.

<sup>357</sup> Chanenson, *supra* note 43.

## POSTSCRIPT

As this Article was being prepared for press, the Supreme Court decided *United States v. Booker and United States v. Fanfan*.<sup>358</sup> The Court produced a fractured decision with six opinions, including two, almost dueling 5-4 majorities.<sup>359</sup> As an (over)simplified summary, the merits majority held that *Blakely* applies to the Federal Sentencing Guidelines<sup>360</sup> while the remedial majority held that the proper remedy would be to sever the allegedly mandatory parts of the underlying legislation.<sup>361</sup> The resulting nonmandatory federal sentencing system still provides for appeals, but it does so under a “reasonableness” standard of review, the contours of which are unclear.<sup>362</sup> While courts and scholars will appropriately spill much ink over this decision and how the new Court-imposed federal system might operate if Congress allows it to survive,<sup>363</sup> this decision casts no doubt on the viability of the ISS approach. Indeed, as predicted, “[r]egardless of what the Supreme Court decide[d] in *Booker and Fanfan*, *Blakely* presents legislatures, courts, and sentencing commissions with an opportunity to re-examine and improve their sentencing systems.”<sup>364</sup> *Booker and Fanfan* simply guarantee that Congress will join the many state legislatures that must decide how to reinvent their sentencing systems. ISS continues to offer an attractive, balanced approach to sentencing that satisfies *Blakely*—and now *Booker and Fanfan* as well—while simultaneously being sensible, just, and grounded in sentencing history, theory, and practice.

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<sup>358</sup> 125 S. Ct. 738 (2005).

<sup>359</sup> Compare *id.* at 742 (Stevens, J.) (addressing the merits), with *id.* at 756 (Breyer, J.) (addressing the remedy).

<sup>360</sup> *Id.* at 749.

<sup>361</sup> *Id.* at 765–66.

<sup>362</sup> *Id.* at 766.

<sup>363</sup> *Id.* at 768 (“Ours, of course, is not the last word: The ball now lies in Congress’ court.”).

<sup>364</sup> *Supra* p. 379.