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The Sixth Amendment and Criminal Sentencing

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THE SIXTH AMENDMENT AND CRIMINAL SENTENCING

Stephanos Bibas & Susan Klein***

ABSTRACT

This symposium essay explores the impact of Rita, Gall, and Kimbrough on state and federal sentencing and plea bargaining systems. The Court continues to try to explain how the Sixth Amendment jury trial right limits legislative and judicial control of criminal sentencing. Equally important, the opposing sides in this debate have begun to form a stable consensus. These decisions inject more uncertainty in the process and free trial judges to counterbalance prosecutors. Thus, we predict, these decisions will move the balance of plea bargaining power back toward criminal defendants.

INTRODUCTION

Though the earthquakes have subsided, the Supreme Court's sentencing tremors continue to reverberate through the Federal Sentencing Guidelines, and by extension to the states. *Rita v. United States* holds that appellate courts may (but need not) presume within-Guidelines sentences reasonable.¹ *Gall v. United States*, however, holds that appellate courts may not presume outside-Guidelines sentences unreasonable but must review all sentences individually and deferentially for abuse of discretion.² *Kimbrough v. United States* allows district courts to disagree with policy choices embedded in the Sentencing Guidelines. Though that case involved the crack/powder cocaine disparity, from which the Sentencing Commission itself had tried to retreat, the Court's reasoning allows individual district judges to

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¹ *Rita v. United States*, 127 S. Ct. 2456, 2462, 2464-65 (2007).

² *Gall v. United States*, 128 S. Ct. 586, 594-97 (2007).

disagree with any policy choice of the Commission.³

The Court's turn toward minimalism,⁴ and a consensus uniting some of the *Apprendi v. New Jersey* majority with the dissenters, has come at the price of clarity. Some of the Court's language sounds like it comes from Justice Breyer, praising the Sentencing Commission's expertise and rationality.⁵ Other sections sound like Justice Stevens' work, exalting district court discretion and individualized, deferential appellate review even for sentences that deviate from the Guidelines.⁶ These split lines of thought are in tension, if not contradictory. How can sentencing law simultaneously pursue centralized uniformity (to reduce disparity) and decentralized judicial discretion (to individualize sentences)? And how did the Sixth Amendment right to a criminal jury trial on some sentencing facts⁷ mutate into a quasi-due process right to sentencing judge discretion subject only to deferential appellate review?⁸

In this symposium Article, we try to make sense of these doctrinal loose ends and what they mean for state as well as federal sentencing. We also hazard some guesses about how these doctrinal changes are likely to shift the balance of power in plea bargaining. By injecting more uncertainty, and freeing district judges to counterbalance prosecutors, *Rita, Gall*, and *Kimbrough* probably move the balance of bargaining power back toward criminal defendants. The likely result will be lower sentences in the federal and state systems affected by *Blakely v. Washington*, unless and until these changes provoke Congress and state legislatures to respond.

Part I of this Article surveys the main doctrinal twists and turns that come out of *Rita, Gall*, and *Kimbrough*. The thorniest remaining issue is how much appellate common law can spell out reasonableness review without hardening into impermissibly mandatory sentencing

³ *Kimbrough v. United States*, 128 S. Ct. 558, 569-70, 574-75 (2007).

⁴ See generally CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

⁵ See, e.g., *Kimbrough*, 128 S. Ct. at 574 ("Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring))).

⁶ See, e.g., *id.* ("The sentencing judge, on the other hand, has 'greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.' He is therefore 'in a superior position to find facts and judge their import under § 3353(a)' in each particular case." (alteration in original) (citation omitted)).

⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁸ *Gall v. United States*, 128 S. Ct. 586, 605 (2007) (Alito, J., dissenting) ("It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing.").

rules. Part I also considers the unstable constitutional foundation on which the Court rests. While we would not follow Justice Scalia's Sixth Amendment extremism and purism, he is at least logically consistent. The majority never responds to him effectively by explaining how its holdings rest on the Sixth Amendment.

Part II then considers how these vagaries of federal law may translate to more flexible state sentencing systems. The majority of states will not be affected because they do not use mandatory guidelines or presumptive sentencing based upon judicial fact-finding.⁹ In those states affected, many pathologies of federal sentencing will be far less problematic because the state guidelines and appellate review under them are looser. In addition, state prosecutors have already learned how to circumvent jury sentencing by stacking criminal charges to raise maximum sentences without any additional factual findings.¹⁰

Part III turns to plea bargaining and considers how greater flexibility and uncertainty, and looser appellate scrutiny, are likely to change federal plea bargaining dynamics. Particularly in the federal system, where prosecutors were able to use exceedingly tight sentencing rules to bind judges and dictate outcomes, the pendulum swing back to discretion will help defendants. It weakens the credibility of prosecutors' threats of retaliation; it empowers district judges to counterbalance prosecutors; and it creates uncertainties that defendants can trade for lower sentences.

I. QUESTIONS ANSWERED AND UNANSWERED

A bare five-Justice majority in *Apprendi* required that juries, not judges, find beyond a reasonable doubt any facts that increase a defendant's statutory maximum sentence, except for recidivism.¹¹ *Blakely* extended *Apprendi*'s rule to facts that raise maximum sentences under a state presumptive-sentencing system.¹² The same five justices, in *Booker*'s merits-majority opinion, invalidated mandatory Federal Sentencing Guidelines, which had required judges to increase maximum

⁹ See Appendix B for the list of 29 states (plus the District of Columbia) unaffected by the *Blakely* decision.

¹⁰ In many of these jurisdictions, however, sentences cannot be stacked to increase the overall penalty without additional judicial factfinding regarding the connection between the multiple offenses or the separateness of their harms. Though most state courts allow it, there is a split as to whether *Apprendi* principles apply to consecutive sentences. See *infra* text accompanying notes 54-61. Compare *State v. Ice*, 170 P.3d 1049 (2007), *cert. granted*, 128 S. Ct. 1657 (2008) (No. 07-901), with *People v. Carney*, 752 N.E.2d 1137 (Ill. 2001). See generally Appendix C, Tbl. I & IV.

¹¹ *Apprendi*, 530 U.S. at 490.

¹² *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (holding that statutory maximum for *Apprendi*'s rule is the sentence the judge "may impose without any additional findings").

sentences based on their own findings of fact.¹³

Booker's remedial-majority opinion sang a very different tune. The four *Apprendi* and *Blakely* dissenters, led by Justice Breyer and picking up only Justice Ginsburg, not only recast the formerly-mandatory Guidelines as advisory, but determined that appellate courts would henceforth review sentences for "reasonableness" rather than conformity with the Guidelines.¹⁴ There is precious little doctrine or theory tying these now-voluntary guidelines to any kind of meaningful appellate review. If guidelines are truly voluntary, under what circumstances could appellate courts reverse a sentence that was free from procedural irregularities?

The *Booker* remedial opinion immediately gave rise to a series of circuit splits: (1) Could appellate courts presume that within-Guidelines sentences are reasonable, as seven of ten circuits did?¹⁵ (2) Could appellate courts require district judges to offer extraordinary justifications for outside-Guidelines sentences, as nine circuits did?¹⁶ (3) Could appellate courts automatically reverse deviations based on district judges' policy disagreements with the Guidelines, as seven of nine circuits did?¹⁷

Rita, *Gall*, and *Kimbrough* answer some important questions that *Booker* had left open, and often in surprising ways. *Rita* affirmed an appellate presumption that within-Guidelines sentences are reasonable.¹⁸ In *Gall* and *Kimbrough*, the Court continued to protect district court discretion by overturning two appellate reversals and reinstating each district judge's original sentence.¹⁹ Appellate courts may presume that within-Guidelines sentences are reasonable, but they do not have to do so.²⁰ Trial courts should not apply this presumption.²¹ And neither trial nor appellate courts may presume that outside-Guidelines sentences are unreasonable.²² The Guidelines reflect the empirical knowledge and expertise of the Sentencing Commission, and

¹³ *United States v. Booker*, 543 U.S. 220, 226-27 (2005) (merits-majority opinion authored by Stevens, J., joined by Scalia, Souter, Thomas, Ginsburg, JJ.).

¹⁴ *Id.* at 245 (Breyer, J., dissenting, joined by Rehnquist, C.J., O'Connor, Kennedy, and Ginsburg, JJ.) (excising 18 U.S.C. § 3553(b)(1) (the provision making judicial factfinding under the guidelines mandatory) and § 3742(e) (the provisions for appellate review of sentences for conformity with these mandatory guidelines)). Justice Scalia lamented in both his *Booker* and *Rita* dissents that "[t]he worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice." *Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part); *Rita v. United States*, 127 S. Ct. 2456, 2475 (2007) (Scalia, J., concurring in part and concurring in the judgment).

¹⁵ *See Rita*, 127 S. Ct. 2456 (2007).

¹⁶ *See Gall v. United States*, 128 S. Ct. 586 (2007); Brief for Petitioner at 13 n.3, *Gall v. United States*, 128 S. Ct. 586 (2007) (No. 06-7949).

¹⁷ *Kimrough v. United States*, 128 S. Ct. 558, 566 n.4 (2007).

¹⁸ *Rita*, 127 S. Ct. at 2459 (2007).

¹⁹ *Gall*, 128 S. Ct. at 598-602; *Kimrough*, 128 S. Ct. at 575-76.

²⁰ *See Rita*, 127 S. Ct. at 2462.

²¹ *Id.* at 2465.

²² *Id.* at 2467.

larger departures from the Guidelines require weightier explanations.²³ Nevertheless, appellate courts may not require extraordinary justifications or mathematical proportionality for variances from the Guidelines. On the contrary, they must review each sentence, whether within or outside the Guidelines, individually and deferentially for abuse of discretion.²⁴ The more searching *de novo* review, mandated by Congress in the PROTECT Act, is unconstitutional because it gives Guidelines too much binding force.²⁵

Sentencing judges merit deference in part because they see individual defendants up close and are best placed to weigh facts and credibility.²⁶ Surprisingly, sentencing judges also have leeway to follow their own policy preferences, even when they disagree with the Sentencing Commission.²⁷ The Guidelines used to impose uniformity on divergent policy preferences, but the Court now lets a thousand flowers bloom. District judges, who have long chafed at limits on their consideration of offenders' age and family circumstances, are likely to take up this invitation eagerly.

The interesting question here is how much law is too much. The Court claims to leave some room for appellate review to rein in outliers and ensure some consistency, but it insists on deference to the finder of fact. If district judges feel free to depart or vary, the Guidelines are truly guidelines and not binding laws that require jury fact-finding. But if they feel completely free, then what is the point of guidelines, except perhaps as a reminder or mental anchor? True, advisory guidelines may increase consistency and transparency modestly.²⁸ They provide mental anchors, starting points that influence how judges think about cases and

²³ *Gall*, 128 S. Ct. at 597 (“We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.”).

²⁴ *Id.*

²⁵ *United States v. Booker*, 543 U.S. 220, 259-60 (2005) (Breyer, J., remedial majority opinion).

²⁶ *Gall*, 128 S. Ct. at 597-98.

²⁷ *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007).

²⁸ John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 239-40 (2006) (results of empirical comparison between three voluntary guidelines states and five presumptive sentencing states found that the former, while not nearly as effective, were nonetheless relatively effective at curbing unwarranted sentencing disparity, as compared with the six non-guidelines states in the control group); Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT'G REP. 233 (2005). *But see* MODEL PENAL CODE: SENTENCING 37 (Discussion Draft Apr. 17, 2006) (explaining that voluntary guideline systems are a failure as compared to mandatory guidelines, though two states had marginal success, because such guidelines are ignored and thus do not eliminate unwarranted disparity; have failed to control prison populations; and because “[n]o state with an advisory sentencing-guidelines system has succeeded in generating a practice of meaningful appellate review of the substance of sentencing decisions.”); MICHAEL TONRY, SENTENCING MATTERS 27-28 (1996) (“Evaluations showed that voluntary guidelines typically had little or no demonstrable effect on sentences imposed . . .”).

where they wind up.²⁹ They create a shared vocabulary that structures sentencing discussions. They also provide benchmarks that allow outsiders to compare and critique decisions. But the main objective of sentencing guidelines is to increase consistency and uniformity by harmonizing disparate policy views and enforcing these rules through appellate review.³⁰ The Court greatly weakens policy uniformity by allowing district judges to inject their own policy views. And it greatly weakens appellate policing by mandating substantial appellate deference to the application of law to facts.

One might hope to achieve uniformity by letting appellate case law accumulate over time, gradually providing more guidance to district courts on the boundaries of their discretion. Does such a common-law process of accretion risk hardening into an impermissibly mandatory rule?³¹ The Court offers little guidance. At oral argument, the Justices agreed only that appellate courts could reverse as unreasonable plainly irrational sentences, such as those imposed in a fit of pique or after refusal to entertain a factual proffer.³² The Government, however, is wrong to claim that the Court's position will allow each district court to make whatever policy decisions it likes.³³ Rather, we suggest, the Court

²⁹ See *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005) (characterizing the Guidelines in post-*Booker* sentencing as "a benchmark or a point of reference"); Stephanos Bibas, *Rita v. United States Leaves More Open Than It Answers*, 20 FED. SENT'G REP. 28, 31 (2007) (noting that after *Rita*, district judges should still use the Guidelines calculations as "anchors and starting points for their analysis"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515-2519 (2004) (discussing the role that anchors and other factors play in influencing plea negotiations).

³⁰ See, e.g., *United States v. Booker*, 543 U.S. 220, 253 (2005) (Breyer, J., remedial majority opinion) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."); *United States v. Tejada*, 146 F.3d 84, 87 (2d Cir. 1998) (Sentencing Reform Act of 1984 was intended to "eliminat[e] disparity on a national level"); see also 28 U.S.C. § 994(f) (2006) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1) with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."); U.S. SENT'G COMM., U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2007) (discussing Congress' intention in passing the Sentencing Reform Act to reduce the "wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders"), available at <http://www.ussc.gov/2007guid/GL2007.pdf>.

³¹ See *infra* text accompanying notes 42-45.

³² Transcript of Oral Argument at 19-20, *Gall v. United States*, 128 S. Ct. 586 (2007) (No. 06-7949) (defense counsel pointed to *Poynter*, where the judge sentenced to the statutory maximum as a way to handle unwarranted disparity, and *Valdez*, where the court departed upwards because it was angry that the fraudulent check had been written to the district court); *id.* at 34 (government stated that "[w]e all agree that irrational sentences and procedurally defective sentences are to be set aside on reasonableness review."). Of course irrational government behavior, like Justice Stevens' example of sentencing the White Sox fans more harshly than Yankee fans in *Rita* is already prohibited by the Due Process Clauses of the Fifth and Fourteenth Amendments. See *Rita v. United States*, 127 S. Ct. 2456, 2473 (2007) (Stevens, J., concurring); *id.* at 2482-83 n.6 (Scalia, J., concurring in part and concurring in the judgment).

³³ Transcript of Oral Argument at 49, *Gall v. United States*, 128 S. Ct. 586 (2007) (No. 06-

will find some unspecified level of substantive appellate review consistent with the Sixth Amendment.

A cynic might read these cases as reactions against legislative interference. *Booker* restores the Court's own abuse-of-discretion standard by rejecting the hated PROTECT Act.³⁴ *Kimbrough* undermines the crack cocaine sentencing ratio kept in place by Congress over the Commission's repeated objection.³⁵ If so, the reaction is doctrinally quite strange, though practically effective. The *Apprendi* line of cases sounds in populism, defending representative, responsive juries against the interference of unelected sentencing judges. Now, however, the tables are turned, and the Court is rejecting democratic sentencing laws to preserve the independence and freedom of those very same unelected sentencing judges. The turnabout is ironic.

7949). See *infra* note 43 and accompanying text for explanation of why substantive reasonableness review, at least as defined by this Court, will not create a common law system of mandatory guidelines.

³⁴ *United States v. Booker*, 543 U.S. 220, 260-62 (2005) (merits majority opinion) (invalidating 18 U.S.C. § 3742(e), which required *de novo* appellate review of departures from the Guidelines); *Koon v. United States*, 518 U.S. 81, 113 (1996) (adopting abuse-of-discretion review of departure decisions and rejecting need for *de novo* review to police sentencing disparities); see also Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 695, 717-19 (2005) (describing *Booker*'s remedial opinion as the fifth time that Justice Breyer, the architect of the Federal Sentencing Guidelines, attempted to make the guidelines advisory rather than mandatory, and suggesting that the *Booker* remedial majority opinion was a coalition formed to strike down the Feeney Amendment to the PROTECT Act rather than to provide a coherent Sixth Amendment theory); *Bibas*, *supra* note 29, at 29 (noting that *Rita* was the fifth time that Justice Breyer had instructed appellate courts to defer to the Commission by affirming within-Guidelines sentences where possible, or otherwise defer to the sentencing judge who gives a reasoned opinion supporting a non-guideline sentence).

³⁵ *Kimrough v. United States*, 128 S. Ct. 558, 568-69, 575-66 (2007). Though the Sentencing Commission incorporated the 100-to-1 ratio that appeared in the mandatory minimum drug statute enacted at the time the guidelines were first being drafted in 1995, it soon proposed amendments to lower the ratio to 1-to-1. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25075-25077 (May 10, 1995). Congress, however, rejected those amendments. See Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, §1, 109 Stat. 334 (1995). In 1997, the Commission again recommended to Congress to change this ratio—this time proposing a 5-to-1 ratio. See U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (Apr. 1997), available at http://www.ussc.gov/r_congress/newcrack.pdf. In 2002, the Commission repeated its recommendation in a report suggesting Congress should lower the ratio to "at least" a 20-to-1 ratio. See U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf. Congress rejected both of these recommendations. In May 2007, the Commission repeated its recommendation to amend the crack cocaine sentencing ratio. It also adopted a change in the Guidelines, reducing the base offense level for each quantity of crack by two levels. See Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28571-28572 (2007). Congress allowed that change to take effect on Nov. 1, 2007. *Kimrough*, 128 S. Ct. at 568-69, 575-66. On Dec. 11, 2007, the day after *Kimrough* was rendered, the Sentencing Commission voted unanimously to make this amendment retroactive. *U.S. Sentencing Commission Makes Lighter Crack Penalties Retroactive*, 82 Crim. L. Rep. (BNA) 331 (Dec. 19, 2007).

The turnabout also raises deeper questions about the Court's shaky constitutional foundations. Justice Scalia argues unsuccessfully but with some force that the Sixth Amendment forbids any substantive appellate review of judicial sentencing guidelines.³⁶ Courts of appeals, he contends, may police district court adherence to procedures. If, however, they exercise any substantive review, then sentencing guidelines carry some substantive weight, so only juries may find facts that raise them.³⁷

Justice Scalia's position is extreme—too extreme for our tastes—but it is logically consistent. If any factor by law increases punishment, then it is an element of an offense reserved for a jury.³⁸ If a deviation is reversible on appeal, then it carries some weight by law. One would expect the majority to respond with its own theory as to why some appellate review is permissible but more is not. Unfortunately, the majority never engages the issue, other than leaving open the possibility of an as-applied Sixth Amendment challenge to a particular above-guideline sentence.³⁹ It suggests practical reasons why appellate deference makes sense, but it offers no constitutional justification for rewriting the statute this far but no further.

We can shed only a little more light. Justice Scalia has argued consistently that meaningful appellate review of sentences for disparity cannot coexist with judicial fact-finding under advisory guidelines. In theory, he is right that appellate review of sentences will over time harden into a common law of sentencing that will create jury trial rights for those facts needed to raise sentences. In practice, however, these developments are unlikely to raise real Sixth Amendment problems. Moreover, appellate review of federal criminal sentences will likely be somewhat more robust than the purely procedural review he favors.

We start with a hypothetical to explain why Justice Scalia is correct in theory. Suppose an appellate panel reverses a sentence that was above the suggested guideline range for the offense of conviction but within the statutory maximum for that offense as unreasonable because the defendant

³⁶ *Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring in part and concurring in the judgment); see also Klein, *supra* note 34, at 732-34 (collecting circuit court cases agreeing with this position, and suggesting that a judicially-created common law of sentencing could violate *Booker* in the same way as that of the Sentencing Commission, also located nominally in the judicial branch).

³⁷ *Rita*, 127 S. Ct. at 2476, 2482-84 (Scalia, J., concurring in part and concurring in the judgment).

³⁸ Moreover, Justice Scalia does not extend his theory to its logical conclusion. His theory should likewise require that juries find beyond a reasonable doubt all affirmative defenses and all facts that trigger mandatory minimum penalties. See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1481-82 (2001) (arguing that there is no logical baseline for determining when an additional fact increases rather than decreases a criminal penalty).

³⁹ *Rita*, 127 S. Ct. at 2473 (noting that Justice Scalia's "need to rely on *hypotheticals* to make his point" confirms that the majority's approach will not ordinarily raise Sixth Amendment issues).

was only 19 at the time of his misconduct.⁴⁰ The fact that the defendant must be at least 20 would then become part of “a sort of . . . common law of reasonableness developed through the public process.”⁴¹ A jury would have to make this finding before a judge could impose this higher sentence in the future. The result would be the same if Congress enacted a stand-alone statute providing that every defendant receive an additional consecutive 60 months imprisonment if he commits a crime while being over the age of 19. In theory, it should not matter that judges rather than legislatures or sentencing commissions develop these aggravators. After all, very early in our history judges determined both the nature of substantive criminal offenses and their penalties through the common law process. Yet, according to *Apprendi*’s reading of history, there was still a jury trial right on every essential element of the offense necessary to trigger a particular penalty.⁴²

Though Justice Scalia is thus correct that substantive review could in theory present a Sixth Amendment problem, we can rarely if ever identify these substantive violations in practice. The majority applies its forgiving abuse-of-discretion standard of review to “all sentencing decisions—whether inside or outside the Guidelines range.”⁴³ Appellate courts often cannot isolate a specific fact or judgment that is necessary to justify the imposition of a particularly high or low sentence. There are as many

⁴⁰ For another example, suppose a statute provided for a zero to 30-year sentence for trafficking in a detectable amount of cocaine, and the federal guideline range applicable to this statute was 65 to 120 months. If an appellate court eventually held that it was always unreasonable impose a sentence of more than 10 years for less than one kilogram, then the effective maximum sentence would be 120 months, not 360 months. If a judge could not sentence over 120 months unless at least one kilogram was involved, then a jury would have to find that fact.

Conversely, an appellate court could require a sentence of at least 10 years if the drug quantity were at least one kilogram. That mandatory minimum penalty would not be subject to the jury requirement, so long as the judge could sentence to 360 months based solely on the jury’s finding of a detectable quantity of cocaine. See *Harris v. United States*, 536 U.S. 545 (2002) (exempting, by 5-4 vote, mandatory minimum penalties from *Apprendi* rule). However, the *Kimbrough* and *Gall* Courts chose to apply the same abuse-of discretion standard to below-Guideline sentences as to above-Guideline ones, and therefore an appellate court could probably not reverse such a sentence.

⁴¹ Transcript of Oral Argument at 13, *Gall v. United States*, 128 S. Ct. 586 (2007) (No. 06-7949) (question by Justice Stevens).

⁴² *But see* Jonathan F. Mitchell, *Apprendi’s Domain*, 2006 SUP. CT. REV. 297, 298-99 (arguing that *Apprendi* overlooked historical practice of allowing judges to find facts that determined degrees of homicide and thus penalties).

⁴³ *Gall*, 128 S. Ct. at 596 (2007). The Court could have limited Sixth Amendment challenges to appellate review of sentences higher but not lower than the otherwise applicable guideline range. The Sixth Amendment, after all, demands that judges remain free at sentencing to increase a sentence up to that authorized by the naked jury verdict, but does not demand that judges remain free to decrease a sentence. The Court rejected a review that would have permitted the Sixth Amendment to act as a ratchet on judicial discretion, lest “you end up with a quite skewed system in which there is—there is vigorous hearty review of departures downward, but—but very, very slight review of departures upward.” Transcript of Oral Argument at 18, *Gall*, 128 S. Ct. 586 (2007) (No. 06-7949) (question by Justice Scalia).

different reasons for a particular sentence as there are particular defendants, ways to commit crimes, and sentencing policies. The abuse-of-discretion standard resembles the totality-of-the-circumstances test for determining Fourth Amendment reasonable suspicion for a stop or probable cause for a search. There are an almost infinite number of possibly relevant facts, policies, and judgments, so each case will be unique. Under a system that eschews binding rules in favor of contextual judgment, we can almost never pinpoint which facts were necessary for the sentence. Was it the quantity of drugs or dollars stolen? Was it the defendant's lack of remorse? Was it the perceived seriousness of mail thefts? The sentencing judge himself often will not be able to articulate it. Even if he can, he will be loath to flag a possible ground for appellate reversal by putting all his eggs in one basket.

Thus, an appellate court could not reverse a sentence as unreasonably high compared to other sentences nationwide because of a specific fact, as that would turn that fact into a jury issue. But it could reverse a sentence because under the totality of circumstances, no reasonable judge would impose this sentence. Appellate courts would reverse sentences without pinpointing exactly which facts and policies their reversals rested on. This vague approach would resemble the old but still constitutional model of unfettered sentencing discretion. Thus, there would be no Sixth Amendment violation.

It may seem strange to posit that we can have meaningful substantive review in part because we cannot isolate which particular reason motivated the judge. This same rationale, however, applies to judicial discretion to sentence within a guideline or indeterminate-sentencing range. Not even Justice Scalia believes that such discretion violates the Sixth Amendment, as indeterminate sentencing has a very long pedigree. Justice Scalia's argument proves too much. Taken to its logical extreme, Justice Scalia's argument would require either jury sentencing or strictly determinate sentencing, with no judicial discretion of any kind. At some point, the Court must draw a line, necessarily artificial and somewhat arbitrary, as to when judicial discretion crosses over into the jury's function. The majority's position is a fair compromise. Practicality and historical precedent trump theoretical purity.

Perhaps these practical considerations should lead us to go back and question Justice Scalia's theoretical premises in the first place. After all, it seems perverse to say that judges cannot do overtly what they can do opaquely. The majority's approach, by requiring sentencing judges to articulate the facts on which they rely and authorizing appellate review, encourages judicial candor, transparency, and predictability in exercising the discretion that inevitably remains.

II. APPLYING FEDERAL GUIDANCE TO THE STATES

Rita, Gall, and Kimbrough will most likely have little effect on state sentencing systems and state plea bargaining. This trio of cases may, in permitting weak appellate reasonableness review of sentences consistent with the Sixth Amendment jury trial right, slightly affect sentencing practice in those states that use voluntary guidelines, and may even slightly influence future legislative choice between sentencing systems. That will depend upon exactly how deferential appellate review of sentences must be to avoid hardening voluntary guidelines into mandatory rules. However, we predict that any effects on states will be quite weak compared with *Blakely* and *Booker*'s effect on the federal system.

A slight majority of states (twenty-nine states and the District of Columbia) were not immediately affected by the *Blakely* and *Booker* opinions. Seventeen of these states granted judges unfettered discretion to sentence within a range.⁴⁴ Eight jurisdictions had guideline systems in place that were sufficiently voluntary so that judicial fact-finding did not trigger any jury issues.⁴⁵ And five others used jury sentencing.⁴⁶ Even in those states, however, legislatures were indirectly affected: they knew after *Blakely* and *Booker* that their choices for sentencing reform had narrowed. The only way to ensure that a fact has a determinative effect on a defendant's sentence is to send that fact to a jury. Mandatory sentencing guidelines can no longer compel judges to find and give specified weight to particular facts.⁴⁷ Thus *Booker* and *Blakely* will influence the direction of any sentencing reform in those jurisdictions. Legislatures will have to choose between offering all relevant facts to juries and trusting judges to account for those facts through voluntary guidelines.

We have already begun to see this effect. Though eight

⁴⁴ Appendix B (noting that 17 states—Florida, Georgia, Idaho, Iowa, Louisiana, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, West Virginia, and Wyoming—used indeterminate judicial sentencing before *Blakely*).

⁴⁵ Appendix B (noting that a total of eight jurisdictions—Alabama, Delaware, Washington D.C., Maryland, Pennsylvania, Utah, Virginia, and Wisconsin—had voluntary guideline systems that used judicial fact-finding before *Blakely*).

⁴⁶ Appendix B (noting that five states—Arkansas, Kentucky, Missouri, Oklahoma, and Texas—had jury sentencing before *Blakely*). These jurisdictions continue to use jury sentencing today.

⁴⁷ However, a legislature could theoretically replicate mandatory guidelines and avoid the jury by raising the maximum penalty for each offense to life imprisonment and then insisting upon judicial fact-finding that triggered mandatory minimum penalties. Congress rejected this course of action. See Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong., 1st Sess. § 12 (2005) (proposing transformation of Federal Sentencing Guidelines into a complex series of mandatory minimum penalties).

jurisdictions had voluntary guidelines systems in place before *Blakely*, *Blakely* and *Booker* encouraged five additional states to transform their mandatory guideline systems into advisory ones.⁴⁸ A sixth state, Indiana, responded to *Blakely* by transforming its presumptive sentencing scheme to an indeterminate one.⁴⁹ States that, for whatever reasons, trust judges enough to adopt indeterminate sentencing or voluntary guidelines to begin with probably will not be swayed by *Rita*, *Kimbrough*, and *Gall*.⁵⁰ After all, those cases limited how binding guidelines could be but did nothing to cast doubt on discretionary sentencing.

Twenty-one state sentencing systems used judicial fact-finding to set presumptive or mandatory guidelines sentences and thus were constitutionally vulnerable. While *Blakely* and *Booker* influenced these systems significantly, *Rita*, *Gall*, and *Kimbrough* are likely to affect them only marginally. The most prevalent reaction to *Blakely* was to send facts formerly found by judges to juries. Thirteen states responded, at least initially, in this manner.⁵¹ The jurisdictions that chose this route rather than advisory guidelines or indeterminate sentencing should be unaffected by *Rita*, *Gall*, and *Kimbrough*. Former sentencing factors that became jury findings will be reviewed by the same standard as all other jury findings in criminal cases. If there is a general verdict of guilt (with those facts now included in the jury instructions), the court of appeals will affirm the conviction if a rational jury could have found for the government. If the trial is bifurcated, the court of appeals will affirm the jury's findings of sentencing facts if any rational jury, drawing all inferences in a light favorable to the government, could have found those facts. *Booker's* reasonableness standard of appellate review simply does not apply to the review of jury findings.

⁴⁸ Appendix A, tbl. III (noting that three state legislatures—California, Indiana, and Tennessee—enacted legislation changing their formerly mandatory guidelines into voluntary ones in the wake of *Blakely*, and that two states courts, New Jersey and Ohio, remedied *Blakely* violations by removing the mandatory nature of the guidelines, as did the Supreme Court in *Booker* itself).

⁴⁹ Appendix A, tbl. II (noting that the Indiana legislature responded to the State Supreme Court's conclusion that the appropriate *Blakely* remedy is to send aggravating facts to the jury by instead enhancing judicial discretion).

⁵⁰ Of course jurisdictions like Texas, with jury sentencing, will be as unaffected by *Gall* and *Kimbrough* as they were by *Blakely* and *Booker*.

⁵¹ See Appendix A, tbl. II (listing 13 states where the court responded to *Blakely* by sending facts to the jury (Alaska, Arizona, Colorado, Connecticut, Illinois, Indiana, Kansas, Maine, Minnesota, North Carolina, Oregon, Vermont, and Washington)); *id.* tbl. IV (listing nine states where the legislature responded by submitting aggravating facts to the jury (Alaska, Arizona, Kansas, Illinois, Minnesota, North Carolina, Oregon, Vermont, and Washington)). Note that some of these states are listed twice, as the court decision was later codified by the legislature. In a tenth state, Hawaii, legislation is pending to send to juries aggravating facts necessary to impose an extended term to the jury. H.B. No. 1152, 24th Leg. (Haw. 2007), available at http://capitol.hawaii.gov/session2008/bills/HB1152_HD1_.pdf.

In some of the states that turned to jury findings to comply with *Blakely*, prosecutors have discovered that they can frequently demand higher sentences than those authorized by the naked jury verdict by charging multiple offenses. In most jurisdictions, judges may or must stack criminal sentences under certain circumstances. In other words, the defendant must serve her multiple sentences consecutively rather than concurrently. Where judges have complete discretion to choose whether or not to stack, there is no Sixth Amendment concern.⁵² However, in many jurisdictions, judges are not authorized to stack sentences unless they first make certain findings, such as whether the total sentence was necessary to protect the public,⁵³ whether the crimes were both crimes of violence arising out of the same incident,⁵⁴ whether the defendant was on probation or release when he committed the crime,⁵⁵ whether the crime was committed in an especially cruel manner,⁵⁶ or whether the defendant had a particular relationship with the victim or physically or mentally damaged the victim.⁵⁷ A few states have determined that these factual findings must be made by a jury for the practice to comport with *Blakely*.⁵⁸ Most states, however, uphold judicial findings of these facts. They reason that *Apprendi*, *Blakely*, and *Cunningham* concerned a single sentence each and do not forbid judge-triggered aggregation of sentences. There is now a circuit split on this issue, and the Supreme Court has granted certiorari to resolve the issue.⁵⁹

We see both sides of this issue. On the one hand, there is not a lot of difference between stacking and the practices outlawed by *Apprendi* and *Booker*. In both instances, the judge is forbidden to increase a defendant's sentence without additional findings of fact. If a judge must impose concurrent sentences in the absence of an additional fact, in what sense is the combined sentence from multiple jury verdicts truly the statutory maximum under *Blakely*? On the other hand, the two situations are distinguishable. When a judge finds at sentencing that a

⁵² See Appendix C, tbl. II (listing five states where judges have complete discretion as to whether or not to stack sentences). Likewise, federal judges have discretion after *Booker* on the issue of stacking. See Appendix C, tbl. III.

⁵³ See, e.g., *Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005); *People v. Wagener*, 752 N.E.2d 430, 441–42 (Ill. 2001).

⁵⁴ See, e.g., *People v. Lehmkuhl*, 117 P.3d 98, 106–07 (Colo. Ct. App. 2005); *State v. Senske*, 692 N.W.2d 743, 746–48 (Minn. Ct. App. 2005).

⁵⁵ See, e.g., *State v. Keene*, 927 A.2d 398, 407–08 (Me. 2007).

⁵⁶ See, e.g., *State v. Abdullah*, 878 A.2d 746, 756–57 (N.J. 2005).

⁵⁷ See, e.g., *State v. Higgins*, No. E2006-01552, 2007 Tenn. Crim. App. LEXIS 763, at *42 (Sept. 27, 2007).

⁵⁸ Courts in Ohio, Oregon, and Washington have found that imposing consecutive sentences only where the court finds certain facts violates the principles of *Blakely*. See Appendix C, tbl. IV.

⁵⁹ *State v. Ice*, 170 P.3d 1049 (Ore. 2007), cert. granted, 128 S. Ct. 1657 (2007). As this article went to press, the Court decided 5–4 in *Oregon v. Ice* that judges rather than juries may find facts that trigger consecutive rather than concurrent sentences. *Oregon v. Ice*, 129 S. Ct. 711 (2009).

robber used a gun, *Apprendi* plausibly interprets this finding as a judicial conviction for armed robbery, a crime more serious than the jury's verdict of ordinary robbery. Armed robbery is indeed a distinct crime in many criminal codes, one that the jury could have found. The gun finding enhances both the defendant's loss of liberty and arguably the stigma that he suffers.⁶⁰ But when a judge runs two sentences consecutively, she brands the defendant with no additional stigma and in no sense convicts the defendant of an aggravated crime. The jury has already authorized the maximum punishment for each crime and has not demanded that they run concurrently. The judge simply determines how to carry out those authorized punishments.

Some of these state stacking factors, such as the vulnerability of the victim and the defendant's possession of a weapon or use of violence, are facts that a jury could resolve. Others, such as the need to protect the public or to prevent sentencing disparity, appear particularly ill-suited for jury determination. Should amenability to jury resolution make a difference? The Court thus far claims that the type of fact is irrelevant. With each new sentencing issue to arise, however, the argument that judicial discretion inherently includes certain findings grows stronger.⁶¹ A change on this issue would have quite an impact on state and federal sentencing.

III. THE IMPACT ON FEDERAL PLEA BARGAINING

Most sentences are not resolved through hotly contested sentencing hearings and appeals. Rather, the vast majority of defendants enter plea bargains,⁶² which often agree upon sentences in the hopes that judges will rubber-stamp them. Even though these sentence bargains do not involve sentencing hearings or appeals, the parties bargain at least in part in the shadow of the likely sentence.⁶³ When prosecutors hold all the aces at sentencing, they can drive hard bargains. Conversely, when their hands are weaker or less predictable, it is easier for defendants to

⁶⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 484, 495 (2000) (regulating sentence enhancements to protect defendants against increased loss of liberty and stigma of conviction).

⁶¹ *Cf.* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006) (advocating that *Blakely* apply to offense facts, such as use of a weapon or amount of injury or loss, but not to offender facts, such as criminal history or personal characteristics).

⁶² According to the United States Sentencing Commission, in 2007 95.8% of federal criminal defendants pleaded guilty. U.S. SENT'G COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C (2007), available at <http://www.ussc.gov/ANNRPT/2007/SBtoc07.htm>. Most of these pleas result from plea bargains, though there are no hard data to quantify the exact proportion.

⁶³ *But cf.* Bibas, *supra* note 29 (exploring structural and psychological forces that warp plea bargains and cause them to deviate from expected trial outcomes).

bluff about insisting on a sentencing hearing or call prosecutors' bluffs.

On their faces, *Booker*, *Rita*, *Gall*, and *Kimbrough* say nothing about raising or lowering sentences or about plea bargaining, short of reminding us that defendants can waive their sentencing rights.⁶⁴ These cases do, however, drastically increase district court discretion to depart or vary from the Federal Guidelines. Courthouse wisdom and occasional judicial outbursts indicate that most district judges think the Guidelines are too harsh and resent appellate pressure to conform to them.⁶⁵ The steady stream of judge-induced downward departures, compared with the trickle of upward departures, confirms that district judges like to reduce sentences.⁶⁶ And the frequent reversals of downward departures show that appellate courts constrain district courts' desires to move downward.⁶⁷

The Court's cases loosening sentencing oversight have two effects, we hypothesize, both of which are likely to help defendants. First, the cases give district judges much more latitude to follow their desires for lower sentences. Appellate courts must now review their decisions deferentially, for abuse of discretion, rather than *de novo* as the PROTECT Act required for downward departures.⁶⁸ The overwhelming

⁶⁴ *United States v. Booker*, 543 U.S. 220, 244 (2005) (merits majority opinion) ("Prosecutors and defense attorneys would still resolve the lion's share of criminal matters through plea bargaining, and plea bargaining takes place without a jury."). In *Booker*, Justice Breyer discussed plea-bargaining at some length in his remedial opinion. *Id.* at 255-57.

⁶⁵ See Jack B. Weinstein & Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumvention*, 9 FED. SENT'G REP. 298 (1997) (lamenting the frequent injustices that accompany the guidelines and describing how federal judges use various methods to circumvent the guidelines, as much as 35% of the time, quoting District Judge Thomas Hogan and Circuit Judges Edwards and Bright); MOLLY T. JOHNSON & SCOTT A. GILBERT, FED. JUD. CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 3-4 (1997) (73% and 69% of district and circuit judges respectively believe mandatory guidelines are unnecessary); Hon. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 530, 539 (2007) (describing how the initial "robust judicial opposition to the Guidelines" in 1986 slowly transformed to acceptance over the next two decades, and predicting that post-*Booker* judges will again "learn to critically evaluate the sentence the Guidelines suggest, to apply the teachings of social scientists, . . . and to temper the harsh effects of sentencing policy with . . . mercy").

⁶⁶ In 2007, only 1.5% sentences were above the Guideline range. Contrast that with 12% of sentences that fell *below* the Guideline range—not including the 25.6% of government-sponsored below-the-range sentences. SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 62, at tbl. N. It might appear contradictory to note both that district judges want to decrease sentences, and that the average federal sentence length has continued to increase very slightly from 56 months prior to the 2003 PROTECT Act to 57 months after PROTECT to 58 months post-*Booker*. However, this statistic is attributable, according to the Sentencing Commission, to the rise in the presumptive sentences under the Guidelines, an increase in prosecutions for more serious offenses, and a stiffening of penalties in federal statutes. U.S. SENT'G COMM., FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 69-76 (March 2006) [hereinafter *BOOKER REPORT*].

⁶⁷ See Stephanos Bibas, Max M. Schanzenbach, & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. (forthcoming 2009).

⁶⁸ *Booker*, 543 U.S. at 260-62; Prosecutorial Remedies and Tools Against the Exploitation of

majority of below-guideline (but not above-guideline) sentences after *Booker* were reversed as unreasonable under the extraordinary circumstances test employed by every circuit prior to *Gall*.⁶⁹ Now that courts of appeals are more likely to affirm those lower sentences, district judges should display an even greater willingness to sentence below the formerly mandatory guideline range.⁷⁰ And appellate courts may not presume that outside-Guideline sentences are unreasonable.⁷¹ Conversely, the safe harbor of remaining within the Guidelines is no longer quite as safe. Appellate courts are supposed to review within-Guidelines sentences substantively for their reasonableness instead of treating them as per se reasonable.⁷² Thus, district courts should feel significantly freer to lower sentences if that is their desire.

This is precisely what happened immediately after *Booker*. U.S. Sentencing Commission data on post-*Booker* cases show that after *Booker*, the percentage of outside—(almost exclusively below)—Guidelines sentences skyrocketed. The proportion of non-government sponsored, below-range sentences increased from 8.6% pre-PROTECT Act to 12.5% post-*Booker*.⁷³ The large increase is even more striking if we limit our post-*Booker* comparison to sentencing decisions after the PROTECT Act in 2003 (when district judges felt particularly constrained): the percentage almost doubled from 6.3% to 12.5%.⁷⁴ Judges departed downwards from the Guidelines during the period between *Booker* and *Gall* not just for substantial assistance, aberrant behavior, and the few other reasons recognized by the Commissioners. They departed for as many reasons as creative and motivated defense counsel were able to imagine.⁷⁵

If the past is any guide to the future, *Kimbrough* and *Gall* should make “[d]istrict [c]ourt judges feel almost as frisky as would a pay

Children Today Act of 2003 (Protect Act), Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁶⁹ Brief for the Petitioner, *Gall*, 2007 WL 2197584 (U.S. 2007) (No. 06-7949); see also BOOKER REPORT, *supra* note 66, at 30 exh. 2 (showing that 15 out of the 21 below-Guideline sentences imposed between *Booker* and March 2006 were reversed as unreasonable, while only 2 out of the 16 above-Guideline range cases were reversed on appeal as unreasonable. Of the scores of within-Guideline range sentences, only one was reversed as unreasonable.).

⁷⁰ Brief for the Petitioner at 10-11 n.2, *Gall*, 2007 WL 2197584 (U.S. 2007) (No. 06-7949) (listing circuit courts that adopted extraordinary circumstances test between *Booker* and *Gall*).

⁷¹ *Gall v. United States*, 128 S. Ct. 586, 594-95, 597 (2007) (embracing the government’s concession to that effect).

⁷² *Rita v. United States*, 127 S. Ct. 2456, 2474 (2007) (Stevens, J., concurring).

⁷³ BOOKER REPORT, *supra* note 66, at 77.

⁷⁴ *Id.*

⁷⁵ *Id.* at 81 tbl. 7 (listing *Booker* reasons provided by judges, including, *inter alia*, family ties, physical and mental condition, age, need to adequately deter criminal conduct, need to provide defendant with educational/vocational training, protecting public from further crimes, voluntary disclosure, rehabilitation, reflecting seriousness of crime, promoting respect for law, just punishment, reducing disparity, providing restitution to victim, and loss issues).

raise.”⁷⁶ In the few short months since these decisions were rendered, some prominent district judges are already hailing their new-found freedom publicly in scholarly writings.⁷⁷

Second, district courts are likely not only to be more lenient but also to vary more widely at sentencing, now that appellate oversight is relaxed.⁷⁸ Prosecutors and defense counsel will thus have a harder time predicting the likely result of a sentencing hearing and appeal. In theory, this uncertainty could cut in either direction. Prosecutors might be overconfident in their cases, leading them to insist on harder bargains. Because they are repeat players and can gamble on having a certain percentage of sentencing hearings, they might hang tough, counting on poorly paid defense counsel to twist their clients’ arms into pleading guilty at higher prices.⁷⁹

That story is plausible, but another one strikes us as more likely. Prosecutors too are overworked, and they are less invested personally in the outcomes of their cases than are defendants. Moreover, prosecutors care primarily about the certainty of a conviction and less about the severity of the sentence, as long as the defendant gets some prison time.⁸⁰ Defendants, however, care about severity quite a bit. Moreover, mandatory Guidelines set mental anchors and starting points for bargaining, so that the default sentence seems to be a high number

⁷⁶ Posting of Professor Craig Bradley to owner-crimprof@chicago.kent.law.edu (Jan. 31, 2008) (on file with the authors).

⁷⁷ See, e.g., Posting of Gerard E. Lynch to Ohio State Journal of Criminal Law Amici, *Letting Guidelines Be Guidelines (and Judges be Judges)*, <http://osjcl.blogspot.com> (Jan. 18, 2008) (cheering the fact that Federal Sentencing Guidelines are now truly advisory, but suggesting that district judges exercise some restraint); Posting of Richard G. Kopf to Ohio State Journal of Criminal Law Amici, *The Top Ten Things I Learned from Apprendi, Blakely, Booker, Rita, Kimbrough and Gall*, <http://osjcr.blogspot.com> (Jan. 18, 2008) (tongue-in-cheek critique of harshness of Guidelines and inexperience of appellate judges and Supreme Court justices).

⁷⁸ New numbers from the U.S. Sentencing Commission appear to confirm the observation in the text. Data from Fiscal Year 2007 show that the percentage of within-Guideline range sentences varied widely within the circuits. For example, within the Second Circuit, judges in the Eastern District of New York sentenced within the Guideline range only 41.5% of the time, while judges in the Western district followed the guidelines 58% of the time. Within the Fourth Circuit, judges in the Southern District of West Virginia stayed within the guidelines 87% of the time, while judges in Maryland sentenced within the guideline range only 51.5% of the time. Every circuit and district shows similar wide variations. SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 62, tbl. 26.

⁷⁹ For a discussion of how the overoptimism bias and underfunding of defense counsel warp plea bargaining, see Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 29, at 2476-82, 2498-502.

⁸⁰ See, e.g., MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 110-114 (2d ed. 1978) (explaining that reducing uncertainty and the risks of trial are important to prosecutors and lead to a desire to plea-bargain); G. NICHOLAS HERMAN, PLEA BARGAINING 5-10 (1997) (describing a variety of factors that affect a prosecutor’s interests and objectives); Joshua Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117 (2008) (citing literature supporting claim that prosecutors, especially state prosecutors bringing misdemeanor charges, are more interested in racking up convictions than increasing sentence length).

rather than zero. But when mandatory Guidelines become fuzzy rules-of-thumb, they may have less power as mental anchors. Defendants, particularly if they are free on bail, will treat liberty as their status quo and any imprisonment as a loss, which they are reluctant to accept. As stories circulate in jail about the defendant who convinced a judge to give him probation,⁸¹ defendants will indulge their overoptimism, each thinking that he too will get lucky with the judge. Thus, the fuzzier mental anchor, the framing of zero as the starting point, overoptimism, and aversion to losses will all combine to stiffen defendants' spines. Defendants are more likely to dig in their heels, demanding more generous concessions before they will plead guilty.⁸²

When the Guidelines seemed more or less automatic, a prosecutor could credibly claim that his hands were tied. All he could offer many defendants in exchange for pleading guilty was a 25% to 35% discount for acceptance of responsibility.⁸³ Now, prosecutors can no longer claim that Guidelines sentences are inexorable. A market that tried to create sticker-price shopping looks more like a Turkish bazaar, with more room for individualized dickering.⁸⁴ And if the prosecutor is obstinate, the defendant can more credibly threaten to go around him and put his case to the judge.⁸⁵

⁸¹ Newspapers were filled with such stories, most of them accurate, in the months following *Booker*. See Klein, *supra* note 34, at 726-30 & n.152-71 (collecting cases in which judges around the country sentenced well below the Guideline range, often to probation, based upon such factors as the defendant's physical or mental condition; family circumstances; rehabilitation efforts; ability to pay restitution; minimal role in the offense; and employment history; the judge's disagreement with the guidelines choice of amount of loss rather than personal culpability in white collar cases; the parsimony provision; the racial disparity stemming from the crack/powder ratio; and the government's refusal to bring a substantial assistance motion).

⁸² Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 29, at 2498-502, 2508-19. The Commission does not keep separate statistics indicating whether federal criminal sentences were after trial or guilty plea. Thus it would be extremely difficult to gather empirical support for the proposition that plea deals are improving post-*Booker* or post-*Gall*. We do note, however, that government-requested sentences below the Guideline range, a good indicator to us of a negotiated settlement, have increased from about 20% immediately after PROTECT to 23.7% in 2006 and 25.6% in 2007. See BOOKER REPORT, *supra* note 66, at vii & 55 fig.2; U.S. SENT'G COMM., PRELIMINARY QUARTERLY DATA REPORT: 2ND QUARTER RELEASE 1 tbl. 1 (2007), available at http://www.ussc.gov/sc_cases/Quarter_Report_2Qrt_07.pdf.

⁸³ Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 29, at 2488-89; U.S. SENT'G COMM., U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 nn.2-3 (2004) (authorizing two- or three-level downward adjustment for acceptance of responsibility, and explaining that the adjustment ordinarily does not apply to defendants who go to trial but that pleading guilty and truthfully admitting the crime "constitute significant evidence of acceptance of responsibility").

⁸⁴ *But see* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2130 (1998) (explaining that for many crimes in busy jurisdictions, prices are fixed by going rates rather than individually dickered, at least in ordinary cases).

⁸⁵ This threat will depend in large part upon what jurisdiction the defendant is in and which particular judge he draws. While rates of within-range sentences decreased for each of the twelve circuits from the post-PROTECT Act period to the post-*Booker* period, there is a marked difference between the low of 44.4% within-range sentence in the Ninth Circuit to the high of 71.8% within-range sentence for the Fifth Circuit. BOOKER REPORT, *supra* note 66, at 86. Even

Moreover, the analysis above assumes that prosecutors are trying to raise sentences. But in some areas, and for some individual cases, line prosecutors may think sentences are too severe. This is especially true in many United States Attorney's Offices, where most prosecutors are not political appointees and have varying views on the current Administration's sentencing policies. Though Main Justice in Washington, D.C., is nominally in charge, Assistant U.S. Attorneys spread across 94 U.S. Attorney's Offices prosecute the lion's share of federal criminal cases. In our experience, a fair number of these assistants chafe at the Department's insistence on draconian penalties and strict centralized oversight of charging and sentencing. Some prosecutors think this about white-collar sentences, which the Sarbanes-Oxley Act raised substantially.⁸⁶ Others think so about federal drug sentences⁸⁷ or other crimes. Though these prosecutors may want to ensure substantial sentences for these serious crimes, they may feel that recent sentence increases have gone too far.

Prosecutors who want to lower sentences, either openly or with a nod and a wink, can now agree to or acquiesce in defendants' motions for variances from the Guidelines. Doing so serves not only their sense of justice, but also their self-interest in disposing of their dockets quickly. These prosecutors form relationships with the local judges before whom they practice. When the choice is between pleasing Main Justice and pleasing the district judge who rules on all of their motions, the judge wins every time. Local practice varies, but in many districts, judges will refuse to accept a Rule 11(c)(1)(C) plea that binds them to a particular negotiated sentence. Likewise, many judges will reject a plea (ostensibly required by Main Justice) that requires a defendant to waive his *Booker* rights and agree to a Guideline sentence.⁸⁸ In these

more important than the circuit is the district where charges are brought and which judge a defendant draws within that district. "Differences among the culture and practices of district courts were found to contribute to regional variation in departure rates more than differences among the circuits." *Id.* at 85, 93 tbl. 11 (listing departure rates pre- and post-*Booker* for each of the 94 districts).

⁸⁶ Pub. L. No. 107-204, 116 Stat. 745 (2002); U.S. SENT'G COMM., U.S. SENTENCING GUIDELINES MANUAL (Supp. 2002); see Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279, 281-282 (2007), <http://thepocketpart.org/2007/02/21/podgor.html> ("The sentences given to white-collar offenders seem oddly imbalanced when compared to those given to international terrorists and violent criminals."); Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1519 (2007) ("Federal sentences are indeed draconian, and generally longer than state sentences for comparable conduct.").

⁸⁷ See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002).

⁸⁸ See *infra* note 90 (describing Comey memorandum); FED. R. CRIM. P. 11(c)(1) (describing three types of plea agreements, two permitting the judge sentencing discretion despite negotiated plea, and one binding the judge to the negotiated sentence once she agrees to accept the plea); Interview with Chief Assistant U.S. Attorney Anthony Brown, W. Dist. of Texas, in Austin, Tex.

jurisdictions, defense counsel always has the opportunity to argue for a lower sentence, giving the defendant hope and the judge discretion to make that hope a reality.

Line prosecutors' supervisors may try to police or rein in this leniency, but their monitoring and information are necessarily imperfect. Main Justice policies in effect since the Guidelines era purport to disallow leniency in charging and penalty decisions.⁸⁹ New policies in effect since *Booker* purport to disallow government stipulation to below-Guideline range sentences in negotiated pleas.⁹⁰ But Washington cannot easily oversee and enforce compliance. The policies contain loopholes; appealing low sentences risks creating bad circuit precedents, and distance and collegiality prevent micro-management from Washington.⁹¹ The Department's attempt to recreate a pre-*Booker* world through charging and pleading rules has failed, and conformity with the Federal Sentencing Guidelines continues to decrease. When both line prosecutors and judges want to collude to lower sentences and dispose of cases, it is hard to stop them.⁹²

Under the formerly mandatory Guidelines, one of the few ways to lower one's sentence was to cooperate with the Government by providing substantial assistance against other criminals. Defendants needed to persuade the Government that their assistance was substantial enough that the Government should file a motion on their behalf. If the

(June 29, 2007).

⁸⁹ See Memorandum from Richard Thornburgh, Attorney General, *reprinted in* 6 FED. SENT'G REP. 352 (1994) (requiring that prosecutors charge, and defendants plead to, the "most serious, readily provable offense"); Memorandum of John Ashcroft, Attorney General, *reprinted in* 6 FED. SENT'G REP. 347 (1994).

⁹⁰ See, e.g., Memorandum from Director Buchanan, Executive Office for U.S. Attorneys (Jan. 12, 2005) (providing that the government must argue that only sentences within the guideline range are reasonable); Memorandum of Deputy Attorney General James Comey (Jan. 26, 2005) (providing that all government attorneys must follow Attorney General Ashcroft's charging and pleading memorandum, that there be no government stipulations to sentences outside the guidelines range without prior Main Justice approval, that all below-guideline sentences be reported and appealed); Memorandum of Deputy Attorney General James Comey (July 2, 2004) (providing that all AUSAs must require defendants to waive *Blakely* rights as part of every plea deal).

⁹¹ There has always been wiggle room as to what charges are readily provable, and the Memorandum of Janet Reno, Attorney General, *reprinted in* 6 FED. SENTENCING REP. 352 (1994), added a longer list of exceptions to the Thornburgh memo. AUSAs never seek to appeal within-guideline sentences as unreasonable and very rarely request clearance to appeal below-guideline sentences. The Solicitor General's unofficial rule, according to our sources at various U.S. Attorney's Offices and in the Solicitor General's office, is that they generally will not approve appeals for sentences within 50% of a guideline range. It is difficult for a trial attorney at Main Justice, who is likely younger and less senior than her Assistant U.S. Attorney counterpart, to insist on a higher sentence in a particular case, particularly when the local prosecutor claims her hands are tied by the judge.

⁹² See generally GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (drawing this lesson from the history of the rise of plea bargaining during the nineteenth and twentieth centuries).

Government did so, the motion unlocked the Guidelines, allowing the sentencing judge to depart downward as much as he thought just.⁹³ Because the potential benefits were enormous, and there were almost no other ways around the stiff Guidelines, defendants faced enormous pressures to cooperate. And the Government had to consent and file the motion; the Government could tie the district court's hands by not doing so.⁹⁴ The Government held all the power.

Now, however, defendants request, and district judges grant, substantial assistance reductions without a government motion.⁹⁵ Thus far, the Second Circuit, the only one to address the issue directly, has upheld this practice.⁹⁶ Moreover, defendants have much more realistic hopes of leniency even if they refuse to cooperate with the Government. Cooperation is no longer the only way out of the Guidelines, and it carries plenty of risks of being branded a snitch and provoking one's criminal associates to retaliate. Thus, cooperation is comparatively less attractive than it once was, and defendants will be more reluctant to cooperate, unless perhaps prosecutors promise even greater sentence discounts. The only possible exception is where defendants are up against statutory mandatory minimum sentences. Judges remain powerless to unlock these on their own and depart downward, without Government motions, so defendants will still earn substantial benefits

⁹³ See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 83, § 5K1.1. A sentencing judge might still have to follow statutory mandatory-minimum sentences, but a Government motion can unlock those too. See 18 U.S.C. § 3553(e) (2006).

⁹⁴ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 83, § 5K1.1; see also *United States v. Wallace*, 22 F.3d 84 (4th Cir. 1994) (requiring the government to file a § 5K1.1 motion before a district court may grant a departure); *United States v. Kelley*, 956 F.2d 748, 757 (8th Cir. 1992) (“[T]he district court did not err in holding that it could not entertain a substantial assistance departure motion made by the defendant rather than the government.”); *United States v. Levy*, 904 F.2d 1026, 1035 (6th Cir. 1990) (stating that a district court is under no duty or responsibility to entertain a defendant's departure motion absent a government motion).

⁹⁵ During the year or so between the *Booker* decision in January 2005 and the U.S. Sentencing Commission's Report in March 2006, there were 258 cases in 61 districts in which a defendant's cooperation with authorities was given as a reason for a non-government-sponsored below range sentence. In 28 of these cases, substantial assistance was the only reason. BOOKER REPORT, *supra* note 66, at 110, 113, and 115 tbl. 14.

⁹⁶ See, e.g., *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (holding that a government motion for substantial-assistance departure is no longer a prerequisite to district court's reducing sentence below the guidelines range to reward the defendant for cooperating with authorities); Statement of Chairman of U.S. Sentencing Commission Judge Ricardo H. Hinojosa at hearing before a House judicial subcommittee (identifying issue of interaction between § 5K1.1 and district courts' authority to impose so-called “nonguidelines” or “variance” sentences as “one in need of clarifying legislation”), available at http://www.ussc.gov/booker_report/03_16_06Booker%20Testimony.pdf. But see *United States v. Germosen*, 473 F. Supp. 2d 221, 226 (D. Mass. 2007) (Gertner, J.) (relying on *United States v. Bermudez*, 407 F.3d 536 (1st Cir. 2005), to conclude that even after *Booker*, a judge may not depart under § 5K1.1 without the requisite government motion); *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (vacating a sentence for several reasons, including the district court's partial reliance on the defendant's assistance to the government to depart from the Guidelines, absent a § 5K1.1 motion from the government).

by cooperating that they cannot reap in any other way.

CONCLUSION

Forecasting is always a hazardous business, whether it involves weather, the stock market, or the Supreme Court's sentencing whims. But as far as we can tell, *Rita* and *Gall*'s reasonableness review lets appellate courts ensure moderate consistency, though obviously less than under the mandatory Guidelines. This approach is not theoretically consistent, in that it does allow district judges to find facts that overtly or covertly raise sentences. The result will be more sentencing variation, whether under advisory Guidelines in the federal system, voluntary guidelines in some states, and jury fact-finding in some others. On balance, this greater uncertainty and unpredictability gives judges leverage to counterbalance prosecutors. Prosecutors, enjoying less unilateral power and less certainty, will probably have to offer greater sentencing discounts to induce guilty pleas. Indeed, some line prosecutors welcome and will collude with this development, notwithstanding their superiors' efforts to constrain them. The pendulum, which had kept swinging toward prosecutors, is swinging back, at least until excessive leniency provokes legislatures to react with statutory mandatory sentences.

APPENDIX A

Table I: States That Have Been Affected by the Blakely Decision

Alaska – *State v. Moreno*, 151 P.3d 480, 483 (Alaska Ct. App. 2006) (holding that Alaska’s pre-2005 sentencing scheme was not consistent with *Blakely* because aggravating factors were not found by a jury).

Arizona – *State v. Brown*, 99 P.3d 15 (Ariz. 2004) (finding that Arizona’s presumptive non-capital sentencing scheme was inconsistent with *Blakely*).

California – *Cunningham v. California*, 127 S. Ct. 856, 871 (2007) (ruling that California’s determinate sentencing system violated the Court’s Sixth Amendment precedent from *Apprendi* to *Blakely*).

Colorado – *Lopez v. People*, 113 P.3d 713, 724 (Colo. 2005) (finding that Colorado’s sentencing scheme was subject to the requirements and protections of *Blakely* because a judge could sentence outside the presumptive range upon finding aggravating factors).

Connecticut – *State v. Bell*, 283 Conn. 748, 810-13 (Conn. 2007) (ruling that Connecticut’s persistent offender statute violated *Apprendi* and *Blakely* because it required the court to find that the defendant’s “history and character and the nature and circumstances of . . . [the defendant’s] criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest”). The Court found that the appropriate remedy was simply to excise the part of the statute that said, “the court is of the opinion that,” thereby removing the responsibility of the court to make a requisite finding. *Id.*

Hawaii – *State v. Mauoaotea*, 168 P.3d 562, 556-57 (Haw. 2007) (finding that Hawaii’s extended-term sentencing scheme violated the Sixth Amendment after *Blakely* and *Cunningham*). The court refused to fashion a remedy and awaits a legislative response.

Illinois – Illinois does not appear to have been seriously affected by *Blakely*, but its first-degree murder statute, which allowed for an extended sentence based on a judge’s finding, had problems stemming from *Apprendi*. See *People v. Swift*, 781 N.E.2d 292 (Ill. 2002); *People v. Nitz*, 848 N.E.2d 982 (Ill. 2006).

Indiana – *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005) (holding that Indiana’s sentencing scheme violated the Sixth Amendment as interpreted in *Blakely* because it “mandates both a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term”).

Kansas – Kansas changed its sentencing scheme after *Apprendi*, anticipating *Blakely*’s holding. See *State v. Gould*, 23 P.3d 801 (2001);

Blakely v. Washington, 542 U.S. 296, 305 (2004) (discussing with approval Kansas' sending aggravating facts to juries in response to *Apprendi*). Recently, the Kansas Supreme Court has ruled that a defendant's sentence, which was increased upon a judge's finding that he was a persistent sexual offender violated *Gould* and *Blakely* because it required the judge to find that his past sex crime was sexually motivated. See *State v. Allen*, 153 P.3d 488, 493 (Kan. 2007).

Maine – *State v. Schofield*, 895 A.2d 927 (Me. 2005) (holding that Maine's sentencing statute that allowed a judge to increase the sentence based on a finding of heinousness was not consistent with *Blakely*).

Michigan – Michigan maintains that its system is consistent with *Blakely*. After *Cunningham*, the Supreme Court remanded a case back to Michigan, but the Michigan Supreme Court reaffirmed its original decision, upholding the constitutionality of Michigan's sentencing scheme. See *Michigan v. McCuller*, 739 N.W.2d 563 (Mich. 2007). So, as of now, there is no official problem with Michigan's system.

Minnesota – *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005) (holding that Minnesota's sentencing scheme which allowed for an upward departure from the presumptive sentence under mandatory guidelines violated *Blakely*).

New Jersey – *State v. Natale*, 878 A.2d 724 (N.J. 2005) (holding that New Jersey's presumptive sentencing scheme violated the Sixth Amendment as interpreted in *Blakely*).

New Mexico – *State v. Frawley*, 172 P.3d 144, 152 (N.M. 2007) (holding that after *Cunningham*, New Mexico's sentencing scheme violated the Sixth Amendment). The court fashioned no remedy and awaits a legislative response.

New York – New York State upheld its persistent offender statute in *People v. Rivera*, 833 N.E.2d 194 (N.Y. 2005). However, a recent case in federal court on habeas has overruled *Rivera* and found that New York's persistent offender statute violate *Blakely* principles. See *Portatatin v. Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007) (holding that New York's persistent felony statute is unconstitutional). There is now a split within the Second Circuit on this issue. *Washington v. Poole*, 507 F. Supp. 2d 342 (S.D.N.Y. 2007) also found the statute unconstitutional. However, *Bailey v. Rivera*, 07 Civ. 2181, 2007 U.S. Dist. LEXIS 78753 (S.D.N.Y. Oct. 24, 2007) and *West v. Breslin*, 06 Civ. 4167, 2008 U.S. Dist. LEXIS 444 (S.D.N.Y. Jan. 3, 2008) have upheld the constitutionality of the statute. The cases are now consolidated and pending before the Second Circuit in *Phillips v. Artus*, 2006 U.S. Dist. LEXIS 45697 (2006) (upholding the constitutionality of the statute).

North Carolina – *State v. Allen*, 615 S.E.2d 256 (N.C. 2005) (holding that North Carolina's mandatory guideline system violated

Blakely).

Ohio – *State v. Foster*, 845 N.E.2d 470, 494 (Ohio 2006) (ruling that Ohio’s sentencing statutes “offend the constitutional principles announced in *Blakely*”).

Oregon – *State v. Dilts*, 103 P.3d 95 (Or. 2004) (holding that Oregon’s guidelines violated the Sixth Amendment after *Blakely*).

Tennessee – *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (concluding that Tennessee’s sentencing statute ran afoul of *Blakely* and *Cunningham*).

Vermont – *State v. Provost*, 896 A.2d 55 (2005) (holding that Vermont’s murder statute was inconsistent with *Apprendi* and *Blakely*—“We hold that 13 V.S.A. § 2303(a) violates the rule in *Apprendi* and *Blakely* because it requires the sentencing court to weigh specific aggravating and mitigating factors not found by a jury beyond a reasonable doubt before imposing a sentence of life without parole.”).

Washington – *Blakely v. Washington*, 542 U.S. 296 (2004).

Table II: States That Have Responded by Sending Facts to the Jury

Alaska – *State v. Moreno*, 151 P.3d 480, 483 (Alaska Ct. App. 2006) (holding that while the pre-2005 sentencing law was not consistent with *Blakely*, it could be remedied by sending aggravating factors to a jury).

Arizona – *State v. Martinez*, 115 P.3d 618, 624 (Ariz. 2005) (holding that “once a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment available . . .”).

Colorado – *Lopez v. People*, 113 P.3d 713, 726, 729 (Colo. 2005) (holding that the presumptive sentencing statute would comply with *Blakely* if aggravating factors were found by the jury).

Connecticut – *State v. Bell*, 283 Conn. 748, 811-12 (Conn. 2007) (removing the language in Connecticut’s statute that called for the court to make a determination, so that the responsibility would be left to the jury to make the requisite finding).

Illinois – *People v. Swift*, 781 N.E.2d 292, 300 (Ill. 2002) (holding that aggravating factors must be proved by a jury after *Apprendi*).

Indiana – *Smylie v. State*, 823 N.E.2d 679, 686 (Ill. 2005) (reaching the conclusion that the appropriate way to remedy the sentencing statute would be to send aggravating factors to the jury). Note, however, that within weeks the state legislature intervened and changed the law. The legislature did not follow the Indiana Supreme Court, and instead removed the *fixed* term part of the statute—giving the judge more discretion. See *Anglemeyer v. State*, 868 N.E.2d 482, 478

(Ill. 2007) for a discussion on the history in Indiana. The statute is cited in Part D.

Kansas – Legislature made this change; see below.

Maine – *State v. Schofield*, 895 A.2d 927, 937 (2005) (requiring that a jury find the “heinousness” element that was required to increase the sentence).

Minnesota – Legislature made this change; see below.

North Carolina – Legislature made this change; see below.

Oregon – Legislature made this change; see below.

Vermont – Legislature made this change; see below.

Washington – Legislature made this change; see below.

Table III: States That Have Responded by Interpreting Guidelines as Voluntary

California – After *Cunningham*, the legislature moved quickly to change the sentencing law (see below). However, in addressing those individuals caught in the middle (like *Cunningham*), the California Supreme Court adopted the same remedy as the legislature as for re-sentencing. Essentially, the presumptive sentence scheme is now discretionary: When the statute gives three possible sentences, “the choice of the appropriate term shall rest within the sound discretion of the court.” See *People v. Sandoval*, 161 P.3d 1146, 1157-64 (Cal. 2007) (holding that the appropriate remedy for re-sentencing should be the same as the remedy adopted by the legislature: namely, that the trial judge would have discretion to adopt any of the three possible sentences, without any presumption of adopting the middle sentence or any requirement of finding aggravating factors).

Indiana – This is what the Indiana legislature essentially did when it changed its law. See below.

New Jersey – The New Jersey Supreme Court, in *Natale*, held that New Jersey’s presumptive sentencing scheme was not consistent with *Blakely*. It held that the appropriate remedy would be to remove the presumptive aspect of the statute, giving judges discretion to sentence anywhere within the statutory minimum and maximum. *State v. Natale*, 878 A.2d 724, 737 (N.J. 2005).

Ohio – *State v. Foster*, 845 N.E.2d 470, 498 (Ohio 2006) (“Accordingly, we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.”).

Tennessee – Tennessee essentially did this when the legislature changed the law. See below.

Table IV: States Where the Legislature Has Responded

Alaska – Alaska changed its law to keep the basic presumptive sentencing structure, but now submits all aggravating factors to a jury. See ALASKA STAT. §§ 12.55.155(f), 12.55.125(c) (2008).

Arizona – Arizona now requires that aggravating factors that increase a sentence be found beyond a reasonable doubt by the trier of fact (the jury). See ARIZ. REV. STAT. § 13-702.01 (LexisNexis 2008).

California – After *Cunningham*, the California legislature quickly adopted SB 40, which removed the presumption of sentencing a defendant to the middle sentence (when the statute gave three possible sentences), and instead gave the court discretion to choose the sentence. See CAL. PENAL CODE § 1170(b) (West 2008).

Illinois – Illinois now requires aggravating factors to be proved by a jury (unless jury trial is waived) beyond a reasonable doubt. See 730 ILL. COMP. STAT. ANN. 5/5-8-1 (West 2008).

Indiana – Indiana removed the fixed-term part of their sentencing scheme, essentially giving the judge broad discretion within a range. See IND. CODE ANN. §§ 35-50-2-1.3(a), 35-38-1-7.1 (West 2008).

Kansas – Kansas changed its statute after a Kansas Supreme Court decision *before Blakely*. See above for more details. KAN. STAT. ANN. §§ 21-4716(b), 21-4718(b) (2008).

Minnesota – After *Shattuck*, the Minnesota legislature changed its sentencing scheme by sending aggravating factors to a jury. MINN. STAT. ANN. § 244.10, subdiv. 5 (West 2008).

North Carolina – The North Carolina legislature adopted changes in the state's sentencing system requiring all aggravating factors to be found by a jury. See N.C. GEN. STAT. ANN. § 15A-1340.16(a1) (West 2008).

Oregon – The Oregon legislature responded to *Dilts* by changing the law to send aggravating factors to the jury. See 2005 Or. Laws ch. 463, §§ 3(1), 4(1).

Tennessee – Tennessee changed its law in 2005 to comply with *Blakely*, and now gives judges discretion to sentence within the statutory range—effectively making their sentencing guidelines advisory. TENN. CODE ANN. § 40-35-210(c) (2008).

Vermont – Vermont changed its murder statute and now aggravating factors must be proved by a jury. See VT. STAT. ANN. tit. 13, § 2303 (2008).

Washington – Washington responded to *Blakely* by changing its statute; now aggravating factors must be found by the jury. See WASH. REV. CODE ANN. §§ 9.94A.535, 9.94A.537 (West 2008).

APPENDIX B: STATES UNAFFECTED BY THE *BLAKELY* DECISION

- Alabama** (voluntary guidelines).
Arkansas (jury sentencing).
Delaware – *Quandt v. State*, 933 A.2d 1250 (De. 2007) (holding that guidelines are voluntary and thus there is no *Blakely* problem).
District of Columbia (voluntary guidelines).
Florida (indeterminate judicial sentencing).
Georgia (indeterminate judicial sentencing).
Idaho – *Idaho v. Stover*, 104 P.3d 969 (Id. 2005) (finding no *Blakely* problem with Idaho’s sentencing scheme).
Iowa (indeterminate judicial sentencing).
Kentucky (jury sentencing).
Louisiana (indeterminate judicial sentencing).
Maryland – *Kang v. State*, 163 Md. App. 22 (2005) (holding that Maryland’s guidelines are purely voluntary).
Massachusetts (indeterminate judicial sentencing).
Mississippi (indeterminate judicial sentencing).
Missouri (jury sentencing).
Montana (indeterminate judicial sentencing).
Nebraska (indeterminate judicial sentencing).
Nevada (indeterminate judicial sentencing).
New Hampshire (indeterminate judicial sentencing).
North Dakota (indeterminate judicial sentencing).
Oklahoma (jury sentencing).
Pennsylvania – *Commonwealth v. Yuhasz*, 923 A.2d 1111 (Pa. 2007) (upholding Pennsylvania’s sentencing scheme after *Blakely*).
Rhode Island (indeterminate judicial sentencing).
South Carolina (indeterminate judicial sentencing).
South Dakota (indeterminate judicial sentencing).
Texas (jury sentencing).
Utah (voluntary guidelines).
Virginia (voluntary guidelines).
West Virginia (indeterminate judicial sentencing).
Wisconsin – *State v. Jones*, 2006 WI App. 101, 293 Wis.2d 363 (2006) (finding that Wisconsin’s sentencing guidelines are voluntary and thus pose no problem after *Blakely*).
Wyoming (indeterminate judicial sentencing).

APPENDIX C: STATES THAT HAVE ADDRESSED SENTENCE-STACKING
AFTER *BLAKELY**Table I: States That Allow Stacking*

Alaska – *Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005) (holding that the Alaska statute that gave a judge discretion to impose consecutive sentences posed no problems under *Apprendi* or *Blakely*).

Colorado – *People v. Lehmkuhl*, 117 P.3d 98, 106-07 (Colo. App. 2005) (ruling that a court may impose consecutive sentences as long as each sentence for each count is below the statutory maximum).

Hawaii – *State v. Kahapea*, 141 P.3d 440, 453 (Haw. 2006) (finding that consecutive sentences did not violate the defendant's Sixth Amendment rights as interpreted in *Apprendi* or *Blakely*).

Illinois – *People v. Wagener*, 752 N.E.2d 430, 441-42 (Ill. 2001) (upholding the use of consecutive sentencing after *Apprendi*); *see also* *People v. Carney*, 752 N.E.2d 1137 (Ill. 2001). Even though both cases predate *Blakely*, an Illinois intermediate appellate court has held that *Blakely* does not alter the analysis. *See People v. Tabb*, 870 N.E.2d 914, 929 (Ill. App. Ct. 2007), *appeal denied*, 225 Ill.2d 670 (2007).

Indiana – *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005) (finding no constitutional problem with consecutive sentencing because the statute did “not erect any target or presumption concerning concurrent or consecutive sentences”).

Maine – *State v. Keene*, 927 A.2d 398, 407-08 (Me. 2007) (ruling that *Apprendi* principles do not apply to consecutive sentences and upholding the sentencing court's decision to impose consecutive sentences).

Minnesota – *State v. Senske*, 692 N.W.2d 743, 746-48 (Minn. App. 2005) (ruling that consecutive sentences may be imposed and do not violate *Blakely* principles).

New Jersey – *State v. Abdullah*, 872 A.2d 746, 756-57 (N.J. 2005) (holding that the imposition of a consecutive sentence did not “exceed the statutory maximum for *Blakely* or *Apprendi* purposes”).

New York – *People v. Murray*, 785 N.Y.S.2d 675, 639 (Sup. Ct. 2004), *aff'd*, 829 N.Y.S.2d 106 (App. Div. 2007) (upholding the imposition of consecutive sentences where no single sentence exceeded the statutory maximum).

Tennessee – *State v. Higgins*, No. E2006-01552-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 763, at *42 (Sept. 27, 2007) (upholding the imposition of consecutive sentences even after a judge makes certain findings).

Table II: States That Allow Stacking But Do Not Require Factfinding

California – *People v. Black*, 161 P.3d 1130, 1144-46 (Cal. 2007) (concluding that the imposition of consecutive sentences was consistent with *Apprendi*, *Blakely*, and *Cunningham*).

Iowa – *State v. Jacobs*, 644 N.W.2d 695, 698-99 (Iowa 2001) (holding that the imposition of consecutive sentences does not violate *Apprendi* or Due Process).

Kansas – *State v. Bramlett*, 41 P.3d 796 (Kan. 2002) (upholding the imposition of consecutive sentences because a court has complete discretion whether to run multiple sentences concurrently or consecutively and each individual sentence was within the presumptive sentence range).

Texas – *Barrows v. State*, 207 S.W.3d 377 (Tex. Crim. App. 2006) (holding that there is no *Apprendi* violation when a judge orders that sentences run consecutively); *Alameda v. State*, 235 S.W.3d 218, 223-24 (Tex. Crim. 2007) (ruling that cumulative sentences did not violate *Apprendi* or its progeny).

Wyoming – *Gould v. State*, 151 P.3d 261, 267-68 (Wyo. 2006) (finding that consecutive sentences did not violate *Apprendi* or *Blakely*).

Table III: Federal Circuits

First – *United States v. Ziskind*, 471 F.3d 266, 271 (1st Cir. 2006) (affirming the imposition of consecutive sentences).

Second – *United States v. Brown*, 152 F. App'x 55, 58 (2d Cir. 2005) (holding that a district court judge had discretion under 18 U.S.C. § 3584(b) to impose consecutive sentences, but overturned the defendant's sentence because the trial court did not properly exercise discretion by considering the factors in 18 U.S.C. § 3553(a)); *see also United States v. Matera*, 489 F.3d 115, 124 (2d Cir. 2007) (upholding the imposition of consecutive sentences).

Third – *United States v. Guzman*, 207 F. App'x 219, 226-27 (3d Cir. 2006) (affirming the District Court's imposition of consecutive sentences).

Fifth – *United States v. Candia*, 454 F.3d 468 (5th Cir. 2006) (holding that after *Booker*, the imposition of a federal sentence that ran consecutive to a state sentence was within the district court's discretion and therefore acceptable).

Sixth – *United States v. Shannon*, 186 F. App'x 648 (6th Cir. 2006) (holding that the imposition of consecutive sentences did not violate *Apprendi* or *Booker* when the sentence for each count was below

the statutory maximum).

Eighth – *United States v. Zatarain*, 250 F. App'x 198 (8th Cir. 2007) (affirming the imposition of consecutive sentences).

Ninth – *United States v. Fifield*, 432 F.3d 1056, 1067 (9th Cir. 2005) (holding that “[b]ecause, under § 3584, a district court need not find any particular fact to impose consecutive sentences, the imposition of consecutive sentences does not violate the Sixth Amendment”).

Tenth – *United States v. Rodriguez-Quintanilla*, 442 F.3d 1254 (10th Cir. 2005) (upholding the imposition of consecutive sentences under 18 U.S.C. § 3584(a) after *Booker*); *see also United States v. Bly*, 142 F. App'x 339 (10th Cir. 2005) (affirming the trial court's decision to impose nine consecutive terms of twenty years).

Eleventh – *United States v. Mooney*, No. 07-12988, 2008 U.S. App. LEXIS 163, at *7 (11th Cir. Jan. 3, 2008) (explaining that the district court was within its discretion to impose consecutive sentences).

Table IV: States That Do Not Allow Stacking

Ohio – *Ohio v. Foster*, 845 N.E.2d 470, 490-91 (Ohio 2006) (holding that the imposition of consecutive sentences violated *Blakely* because it required a judicial finding).

Oregon – *State v. Ice*, 170 P.3d 1049, 1059 (Or. 2007) (ruling that consecutive sentences violated *Apprendi* and *Blakely* because Oregon's statute judicial fact-finding is required to impose consecutive sentences), *cert. granted* 128 S. Ct. 1657 (2008).

Washington – *In re VanDelft*, 147 P.3d 573, 578-79 (Wash. 2007) (holding that the imposition of consecutive sentences violated *Apprendi* and *Blakely* because the fact-finding required to impose consecutive sentences should be made by a jury). *But see State v. Cubias*, 120 P.3d 929 (Wash. 2005) (*upholding* the imposition of consecutive sentences under a different part of the statute).