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# Note: The Earthquake that Will Move Sentencing Discretion Back to the Judiciary? *Blakely v. Washington* and Sentencing Guidelines in Minnesota

Matthew R. Kuhn

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**NOTE: THE EARTHQUAKE THAT WILL MOVE  
SENTENCING DISCRETION BACK TO THE JUDICIARY?  
*BLAKELY V. WASHINGTON* AND SENTENCING  
GUIDELINES IN MINNESOTA**

Matthew R. Kuhn<sup>†</sup>

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## I. INTRODUCTION

In 1978, Minnesota became a pioneer in criminal sentencing reform by creating the first state sentencing guidelines commission.<sup>1</sup> Other states followed suit and gradually enacted sentencing reforms of their own.<sup>2</sup> The constitutionality of these reforms has come under increasing attack since 2000. Based on the Supreme Court's recent interpretation of defendants' rights under the Sixth and Fourteenth Amendments, several states' reformed procedures, including Minnesota's, need further reformation to comply with the Constitution's guarantees.

This Note begins by briefly laying out the evolution of criminal sentencing over the past century.<sup>3</sup> It then surveys judicial interpretation of defendants' Constitutional rights as they relate to sentencing procedure, focusing on the Court's recent invalidation of Washington state's sentencing guidelines in *Blakely v. Washington*.<sup>4</sup> The note will then examine possible reforms to

1. See Act of Apr. 15, 1978, ch. 723, 1978 Minn. Laws 761 (codified as amended at MINN. STAT. ch. 244 (2004)).

2. States that have enacted sentencing guidelines and/or commissions include Alaska, Arkansas, Delaware, Florida, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, and Virginia; Congress has also created a federal sentencing commission and guidelines. See ALASKA STAT. §§ 12.55.125(c)-(e), 12.55.155 (2004); ARK. CODE ANN. §§ 16-90-801 to -804 (2003); DEL. CODE ANN. tit. 11, §§ 6580-6581 (2004); FLA. STAT. ANN. ch. 921.001-.0016 (2001); KAN. STAT. ANN. §§ 21-4701 to -4719 (1995); MD. CODE ANN., Crim. Proc. §§ 6-201 to -216 (2001); MASS. GEN. LAWS ch. 211E, §§ 1-4 (2005); MICH. COMP. LAWS § 769.34(2000); N.C. GEN. STAT. §§ 15A-1340.13 to -1340.17 (2004); OHIO REV. CODE ANN. §§ 181.21-.25 (West 2002); OKLA. STAT. tit. 22, §§ 1501, 1508, 1512 (2003); OR. REV. STAT. §§ 137.654-.673 (2003); 42 PA. CONS. STAT. §§ 2151-2155, 9721 (2004); S.C. CODE ANN. §§ 24-26-10 to -20 (Law Co-op Supp. 2003); TENN. CODE ANN. §§ 40-35-101 to -114 (2003); UTAH CODE ANN. § 63-25a-301 to -304 (2004); VA. CODE ANN. § 19.2-298.01 (2004); 28 U.S.C. §§ 991, 994-995 (2004).

3. *Infra* Part II.

4. 124 S. Ct. 2531 (2004); *infra* Parts III-VI.

Minnesota's sentencing guidelines pursuant to the Court's decision.<sup>5</sup> It will conclude by advocating that, despite the recent spotlight on Kansas's sentencing guidelines, Minnesota's best response to *Blakely* is to return some sentencing discretion to the judiciary by implementing a system of voluntary guidelines.<sup>6</sup>

## II. THE EVOLUTION OF SENTENCING GUIDELINES

### A. *Pre-Guidelines Sentencing*

Prior to the 1980s, "indeterminate sentencing" was the modus operandi.<sup>7</sup> Under an indeterminate system, the legislature defines what acts constitute a crime and the maximum punishment that may be imposed upon a defendant convicted of that crime.<sup>8</sup> The judiciary, on the other hand, determines a defendant's guilt and, if guilt is established, the judge has the power and discretion to impose any sentence ranging from probation up to the maximum punishment established by the legislature for the respective crime.<sup>9</sup> After a criminal is imprisoned, parole boards have discretion to determine if the individual has been "rehabilitated" and is therefore eligible for release. Thus, parole boards have the ability to determine the portion of a sentence a convict actually serves.<sup>10</sup>

In the early 1970s, critics of indeterminate sentencing began to receive attention.<sup>11</sup> One criticism of indeterminate systems was that they did not provide sufficient overall deterrence and incapacitation of criminals because parole boards released criminals back into society far before the full duration of sentences.<sup>12</sup> Moreover, the broad discretion judges had in imposing sentences, in addition to the latitude parole boards had in determining what portion of a sentence was served, caused critics to charge that sentences were applied unfairly, based on factors such as race, sex, and economic class, which bear no

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5. *Infra* Part VIII.

6. *Infra* Part IX.

7. Richard Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 7 (1993) (citing 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1-4 (Alfred Blumenstein et al. eds., 1983)).

8. *See id.*

9. *See, e.g.*, WIS. STAT. § 973.013(1)(a) (1998).

10. Frase, *The Uncertain Future*, *supra* note 7, at 7.

11. *Id.* at 7-8.

12. *Id.* at 8.

relation to culpability or the harm caused by a given crime.<sup>13</sup>

*B. Minnesota's Sentencing Guidelines*

In response to such criticism, the Minnesota Legislature created the Minnesota Sentencing Guidelines Commission (MSGC).<sup>14</sup> The MSGC ultimately created a grid that establishes a presumptive sentence for convicted felons based on the seriousness of the offense (as determined by the MSGC) and a defendant's prior criminal record. The grid presently has eleven "severity levels" on the vertical axis and seven "criminal history scores" on the horizontal axis.<sup>15</sup> After determining the appropriate severity level and criminal history score, a defendant can ascertain the "presumed" sentence at the intersection of two scores on the grid.

The thick black line running across the middle of the grid represents the "disposition line." The numbers in the boxes below the line represent the presumptive length of a stayed sentence, in which a period of probation is presumed appropriate for the defendant. Stayed sentences are not served unless the defendant violates the terms of probation so that the stay is revoked.<sup>16</sup> The boxes above the disposition line represent presumed prison sentences. In addition to the presumed sentence, each box above the disposition includes a small range of numbers that represents a sentence the MSGC deems appropriate in most cases and is therefore "within" the Guidelines.<sup>17</sup>

The legislature labels the Guidelines as "advisory" and states

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13. *Id.*

14. MINN. STAT. § 244.09 (2004). The Commission's goal is to establish and maintain a system that: (1) promotes uniform, proportional sentences for convicted felons; (2) helps ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant; and (3) allocates the finite correctional resources to the most serious offenders. MINN. SENTENCING GUIDELINES § I (2002).

15. MINN. SENTENCING GUIDELINES § IV (2002). For example, the presumed sentence for a defendant convicted of first degree aggravated robbery (severity level = VIII) with no prior criminal history (criminal history score = 0) is forty-eight months, with a Guidelines range of forty-four to fifty-two months. *Id.* At the extreme, a defendant convicted of a crime with a severity level of XI and criminal history score of six or more faces a presumed sentence of 426 months, with a Guidelines range of 419 to 433 months. *Id.*

16. MINN. SENTENCING GUIDELINES § II, subd. D.

17. *See* MINN. SENTENCING GUIDELINES § IV (shaded boxes indicating presumptive stayed sentence). This Note will capitalize "Guidelines" when referring specifically to the Minnesota Sentencing Guidelines. All other references to guidelines will use the lowercase.

that sentencing within them is “not a right that accrues to a convicted felon.”<sup>18</sup> A judge may issue a sentence outside the Guidelines’ range when a case involves “substantial and compelling circumstances.”<sup>19</sup> In the event of such a departure, the judge must make written findings of facts explaining the reasons for the sentence.<sup>20</sup>

Despite its “advisory” nature, the sentence provided by the grid is presumed to be appropriate for every case<sup>21</sup> and judges are required to follow the Guidelines’ procedures.<sup>22</sup> Also, although the statutes are silent on the matter, the Minnesota Supreme Court has determined that not following the Guidelines’ procedures is cause for overturning a sentence.<sup>23</sup>

Finally, the Guidelines require “truth-in-sentencing,”<sup>24</sup> which is essential to achieving the Guidelines’ third goal of effective allocation of correctional resources. In Minnesota, this means that every “executed” sentence—in which a defendant spends time in prison either as initially sentenced or after revocation of a stayed sentence—“consists of two parts: (1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence.”<sup>25</sup> The supervised release period is similar to a parole term under an indeterminate

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18. MINN. STAT. § 244.09, subd. 5. The quoted language was added in 1997 in response to *State v. Givens*. See Act of May 6, 1997, ch. 96, 1997 Minn. Laws 694, 695 (codified as amended at MINN. STAT. ch. 244 (2004)); *State v. Givens*, 544 N.W.2d 774, 775 (Minn. 1996) (stating that a defendant has a right to be sentenced in accordance with the Guidelines, which may only be waived knowingly, voluntarily, and intelligently).

19. MINN. STAT. § 244.10, subd. 2. Factors that are not valid reasons for a departure include race, sex, or employment status. MINN. SENTENCING GUIDELINES § II, subd. D. Factors that may warrant an upward departure (“aggravating factors”) include, but are not limited to: selecting a victim that is “particularly vulnerable,” treating a victim with “particular cruelty,” committing a felony for hire, committing a crime as part of a group of three or more, or committing a “hate crime.” *Id.*

20. MINN. SENTENCING GUIDELINES § II, subd. D.

21. *Id.*

22. MINN. STAT. § 244.09, subd. 5.

23. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (noting that if a judge does not find facts justifying a sentencing departure and state the reasons for departure on the record at the time of sentencing, no departure is allowed) (citing *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985)).

24. See MINN. STAT. § 244.101, subd. 1 (mandating minimum term of imprisonment).

25. *Id.*

sentencing scheme.<sup>26</sup> However, the required minimum term of imprisonment has allowed state officials to more accurately project future prison populations because the discrepancy in length between criminals' sentences and the time actually spent in prison has been reduced and regulated. These projections then help state officials to effectively allocate finite resources and avoid problems associated with overcrowded prisons.<sup>27</sup>

### C. *Developments Pursuant to Minnesota's Guidelines*

The Guidelines' overall success in achieving the MSGC's stated goals is documented<sup>28</sup> and demonstrated by their longevity as well as the lack of any appreciable movement to replace them. The number of states that subsequently enacted sentencing guidelines<sup>29</sup> also indicates the MSGC's success and the important nature of the goals it seeks to achieve. While some states enacted sentencing guidelines clearly modeled after Minnesota's,<sup>30</sup> others enacted schemes with different salient features.<sup>31</sup> Of course, guideline systems can include some, but not all, features of Minnesota's scheme; for example, Virginia's guidelines are voluntary, but the state has implemented truth-in-sentencing for convicted felons.<sup>32</sup> Nonetheless, the Minnesota Sentencing Guidelines have proven to

26. Frase, *The Uncertain Future*, *supra* note 7, at 6.

27. *Id.* at 36–37.

28. See Richard Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279 (1993); MICHAEL TONRY, SENTENCING MATTERS 24–64 (1996).

29. See Frase, *The Uncertain Future*, *supra* note 7, at 2 n. 1 (listing fourteen states with commission-based sentencing guidelines as of 1993); see also *supra* note 2 (listing seventeen states other than Minnesota with commissions and/or guidelines in place).

30. *E.g.*, WASH. REV. CODE §§ 9.94A.010–.637 (2003); KAN. STAT. ANN. §§ 21-4701–29 (1995).

31. For example, rather than a grid, some states utilize a point system or a narrative format to establish a presumptive sentence or sentence range. See, *e.g.*, [www.vcsc.state.va.us/worksheets.htm](http://www.vcsc.state.va.us/worksheets.htm) (last visited Mar. 2, 2005); DEL. CODE ANN. tit. 11, § 4205 (2001). Further, in contrast to Minnesota, some states' systems are voluntary rather than presumptive; *i.e.*, judges are free to depart from the guidelines' suggested sentences in all cases and defendants have no recourse on appeal by virtue of a sentencing judge's departure from the guidelines. See, *e.g.*, VA. CODE ANN. § 19.2-298.01 (2004); MD. CODE ANN., CRIM. PROC. § 6-212 (2001); UTAH S. CT. R. pt. II app. D.

32. The Virginia Criminal Sentencing Commission produced a brochure advertising the salutary effects of its truth-in-sentencing, which is available from its web site, at [www.vcsc.state.va.us/ReptCdPDFfinal.pdf](http://www.vcsc.state.va.us/ReptCdPDFfinal.pdf).

be an overall success and have helped spawn various forms of guidelines that have served as tools in criminal sentencing across the nation.

### III. JUDICIAL INTERPRETATION OF CONSTITUTIONAL RIGHTS IN CRIMINAL SENTENCING

#### A. *Historical Background*—*Williams v. New York*

Any examination of criminal procedure requires a simultaneous exploration of constitutional law. *Williams v. New York* is a landmark case that embodies the intersection of the two topics.<sup>33</sup> A jury found Mr. Williams guilty of first-degree murder and recommended a sentence of life imprisonment.<sup>34</sup> The judge, however, sentenced him to death, citing the defendant's history of burglaries and morbid sexuality as reasons for disregarding the jury's recommendation.<sup>35</sup> The defendant had never been charged with, much less convicted of, the burglaries cited by the judge during sentencing.<sup>36</sup> The defendant also never received an opportunity to refute the assertion of his morbid sexuality.<sup>37</sup>

Nonetheless, the Supreme Court upheld the capital sentence against a due process challenge because, under New York's indeterminate sentencing scheme, the judge could have sentenced Mr. Williams to death providing no reason at all.<sup>38</sup> Therefore, the Court reasoned, the sentence should not become void merely because the sentencing judge considered the additional out-of-court information to assist him in the exercise of judicial discretion in imposing the death sentence.<sup>39</sup> Thus, the Supreme Court generally recognized the constitutionality of broad judicial discretion in sentencing.

#### B. *Welcome to "Apprendi-land"*

Almost forty years after *Williams*, the Court reexamined the permissible extent of judicial sentencing discretion in *Apprendi v.*

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33. 337 U.S. 241 (1949).

34. *Id.* at 242.

35. *Id.*

36. *Id.* at 244.

37. *Id.*

38. *Id.* at 251–52.

39. *Id.* at 252.



*New Jersey*.<sup>40</sup> In a plea agreement, Mr. Apprendi pled guilty to unlawful possession of a firearm arising from an incident in which he fired several bullets into the home of an African-American family.<sup>41</sup> The maximum sentence allowable by state statute for the firearm offense was between five and ten years.<sup>42</sup> However, a separate “hate crime” statute provided for an extended term of imprisonment if the judge found by a preponderance of the evidence that, in committing the crime, the defendant acted with a purpose to intimidate a group of people because of race.<sup>43</sup> The hate crime provision doubled the maximum sentence allowable for the firearms offense to a term between ten and twenty years.<sup>44</sup>

The trial judge found during sentencing that the shooting was motivated by racial bias and sentenced Mr. Apprendi to twelve years in prison for the firearms offense—two years longer than otherwise permissible by law.<sup>45</sup> The state appellate and supreme courts affirmed.<sup>46</sup> However, on certiorari, the Supreme Court, divided five-to-four, ruled that the Sixth and Fourteenth Amendments invalidated the extended sentence. The majority opinion announced that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum,” other than the fact of a prior conviction, “must be submitted to a jury and proven beyond a reasonable doubt.”<sup>47</sup> Because Mr. Apprendi’s extended sentence resulted from a finding of racial bias by the judge using the preponderance of the evidence standard, it did not stand.<sup>48</sup>

The Court further stated that, in analyzing whether the

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40. 530 U.S. 466 (2000).

41. *Id.* at 469–70. The defendant also pled guilty on two other counts, for which he received concurrent sentences that are irrelevant for purposes of the holding’s constitutional analysis. *See id.* at 474.

42. *Id.* at 468 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (1995)).

43. *Id.* at 468–69. The applicable statute provided:

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds . . . [t]he defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

N.J. STAT. ANN. § 2C:44-3(e) (1995).

44. *Apprendi*, 530 U.S. at 470 (citing N.J. STAT. ANN. § 2C:43-7(a)(3) (1995)).

45. *Id.* at 471.

46. *Id.* at 471–72.

47. *Id.* at 490.

48. *Id.* at 497.

protections of a jury and proof beyond a reasonable doubt apply, the relevant inquiry is “one not of form, but of effect;” that is, courts should ask if a required factual finding exposes the defendant to a punishment greater than that authorized by the jury’s guilty verdict.<sup>49</sup> If the answer is yes, the Constitution affords a defendant both protections.

### C. *Apprendi’s Progeny*

The scope of *Apprendi* was not immediately clear. In *Gould v. State*,<sup>50</sup> the Kansas Supreme Court examined *Apprendi* in light of the state’s sentencing guidelines, which were modeled after Minnesota’s. The jury convicted the defendant, Crystal Gould, on three counts of child abuse.<sup>51</sup> Given the statutorily classified severity of the crime and her criminal history, Ms. Gould’s presumptive guideline sentence was thirty-two months for each count, with a standard range of thirty-one to thirty-four months.<sup>52</sup> However, upon the state’s motion, the district court judge departed from the guidelines because the victims were particularly vulnerable, the defendant’s conduct was excessively brutal, and the defendant had a special relationship with the victims.<sup>53</sup> The court imposed an effective 136-month sentence on two counts, which was the maximum sentence the judge could impose under Kansas’s statutes.<sup>54</sup>

The Kansas Supreme Court invalidated the extended sentence

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49. *Id.* at 494.

50. 23 P.3d 801 (Kan. 2001).

51. *Id.* at 806.

52. *Id.*

53. *Id.* Kansas statutes provided:

The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines . . . unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

KAN. STAT. § 21-4716(a) (1995). The reasons cited by the sentencing judge for upward departure from the guidelines were specifically enunciated aggravating factors under section 21-4716(b)(2). The victims in the case were particularly vulnerable because they were all under two years of age at the time of the incidents. Further, because all the victims were Ms. Gould’s children, she had a special relationship with them. *Gould*, 23 P.3d at 806.

54. *Gould*, 23 P.3d at 806. Ms. Gould received a thirty-four month sentence on the third count, to run concurrent with the other two sentences, which is not relevant for purposes of the court’s *Apprendi* analysis.

on the ground that the statute providing for upward departures was unconstitutional pursuant to *Apprendi*.<sup>55</sup> The jury's verdict alone exposed the defendant to a sentence up to thirty-four months on each count.<sup>56</sup> The 136-month sentence resulted from the judge finding the existence of aggravating circumstances. Because the aggravating factors exposed the defendant to a sentence greater than that authorized by the jury's guilty verdict—that is, a sentence within the guidelines—the court reasoned that *Apprendi* requires the State to prove the aggravating factors to a jury beyond a reasonable doubt and not to the sentencing judge by a preponderance of the evidence.<sup>57</sup> Thus, for *Apprendi* purposes, the court deemed the “prescribed statutory maximum” under the Kansas guidelines to be the uppermost sentence within the range provided by the guidelines' grid.

Minnesota interpreted *Apprendi*'s scope differently. In *State v. Dean*, a jury convicted the defendant of first-degree attempted murder.<sup>58</sup> The judge granted the state's motion for an upward durational departure from the Guidelines, issuing a sentence of 240 months on that count.<sup>59</sup> The defendant asserted an *Apprendi* defense because a judge, not the jury, found the aggravating factors justifying the departure from the Guidelines. The court summarily dismissed this defense, stating that *Apprendi* applies only with respect to the statutory maximum—not the sentencing-grid maximum—for the applicable crime;<sup>60</sup> because the statutory maximum for attempted first-degree murder was twenty years,<sup>61</sup> the sentence did not exceed the “prescribed statutory maximum” and *Apprendi* did not apply.

Two years after *Apprendi*, the Supreme Court examined the case's rule as applied to Arizona's death penalty procedure.<sup>62</sup> In *Ring v. Arizona*, a jury convicted Timothy Ring of felony murder occurring in the course of armed robbery, but acquitted him on the alternative charge of premeditated murder because the

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55. *Id.* at 813.

56. *Id.* at 806.

57. *Id.* at 813. The court also refused to recognize the State's argument that the principles of harmless error should be applied because neither party disputed the aggravating factors cited by the judge. *Id.* at 814.

58. No. C4-02-1225, 2003 WL 21321425, at \*5 (Minn. Ct. App. June 10, 2003).

59. *Id.*

60. *Id.*

61. See MINN. STAT. § 609.17, subd. 4 (2004).

62. *Ring v. Arizona*, 536 U.S. 584 (2002).

evidence at trial failed to prove beyond a reasonable doubt that he actually participated in the murder of an armed truck guard that occurred during the robbery.<sup>63</sup>

The statutory maximum penalty for first-degree murder was death.<sup>64</sup> However, Mr. Ring was not eligible for the death penalty by virtue of the jury's conviction; rather, the sentencing judge, in a hearing before the court alone, could impose the death penalty only if the judge found the existence of at least one aggravating circumstance and no significant mitigating circumstances.<sup>65</sup> The judge sentenced Mr. Ring to death after concluding that Mr. Ring killed the guard and that two aggravating factors were present.<sup>66</sup>

The Court reversed the death sentence, focusing on the instruction in *Apprendi* that the relevant inquiry is one of form, not effect.<sup>67</sup> While the maximum statutory penalty for the first-degree murder charge was death, that punishment could *only* be imposed if an aggravating fact was found to be present. Therefore, the effect of the judge's finding of "aggravating" facts was to expose the defendant to a greater sentence than that authorized by the jury's verdict, which *Apprendi* does not allow.<sup>68</sup> The sentence could not stand unless Mr. Ring was afforded the procedural safeguards of having a jury find the existence of an aggravating fact beyond a reasonable doubt.

#### IV. *BLAKELY V. WASHINGTON*

##### A. *Facts and Procedure*

*Ring* set the stage for the Court's decision in *Blakely v. Washington*, which considered *Apprendi*'s effect on presumptive

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63. *Id.* at 591–92.

64. *Id.* at 592 (citing ARIZ. REV. STAT. § 13-1105(C) (2001)).

65. *Id.* at 592–93 (citing ARIZ. REV. STAT. § 13-703(F) (2001)).

66. *Id.* at 594–95. The judge found that Mr. Ring killed the guard to receive something of pecuniary value and acted in an especially cruel manner in doing so. *Id.* Both reasons are statutorily enumerated aggravating factors under Arizona's capital punishment statute. See ARIZ. REV. STAT. § 13-703(F) (2001).

67. *Ring*, 536 U.S. at 586, 602.

68. Writing for the majority, Justice Ginsburg chided Justice Breyer's dissenting opinion in *Ring*, characterized the holding in *Ring* as the logical result of *Apprendi*'s rule, and stated, "[c]oncisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to Apprendi-land." *Id.* at 613.

sentencing guidelines schemes.<sup>69</sup> The defendant, a paranoid schizophrenic, accosted his wife at knifepoint, bound her with duct tape, forced her into a wooden box, and abducted her.<sup>70</sup>

The State charged Mr. Blakely with first-degree kidnapping.<sup>71</sup> However, the parties reached an agreement under which he pled guilty to second-degree kidnapping (a class B felony), domestic violence, and firearms allegations.<sup>72</sup> Washington statutes stated that no person convicted of a class B felony could be sentenced to a prison term exceeding ten years.<sup>73</sup> The state's sentencing guidelines provided that Mr. Blakely faced a sentence with a standard range of forty-nine to fifty-three months.<sup>74</sup> Under Washington's guidelines, the judge could depart from the standard range for "substantial and compelling reasons," which had to be set forth in written findings of fact and conclusions of law.<sup>75</sup>

The State recommended a sentence within the standard range.<sup>76</sup> However, after hearing Mrs. Blakely's description of the incident, the judge departed from the guidelines and issued a sentence of ninety months, based on his finding that the defendant acted with deliberate cruelty.<sup>77</sup> The state appellate court affirmed the conviction<sup>78</sup> and the state supreme court denied review.<sup>79</sup>

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69. 124 S. Ct. 2531 (2004).

70. *Id.* at 2534.

71. *Id.*

72. *Id.* at 2534–35.

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

74. *Id.*

75. *Id.* See also WASH. REV. CODE § 9.94A.535 (2000).

76. *Blakely*, 124 S. Ct. at 2535.

77. *Id.* "Deliberate cruelty" in a domestic violence incident is a specifically enumerated aggravating circumstance justifying departure from the sentencing guidelines. WASH. REV. CODE § 9.94A.535(2)(h)(iii) (2000). Had Mr. Blakely been convicted of first-degree kidnapping, which is the offense the State originally charged, he would have faced a sentence with a standard range of seventy-five to ninety-five months (given his criminal history and a firearms enhancement). The irony of the situation is that second-degree kidnapping, when done with deliberate cruelty, is the logical equivalent of first-degree kidnapping. The fact that the aggravated sentence imposed falls within the standard range for first-degree kidnapping highlights this oddity. Mr. Blakely almost certainly pled guilty to the lesser offense with the hope of *avoiding* a sentence in the seventy-five to ninety-month range.

78. *State v. Blakely*, 47 P.3d 149 (Wash. Ct. App. 2002).

79. *State v. Blakely*, 62 P.3d 889 (Wash. 2003).

B. *The Supreme Court's Interpretation*

On certiorari, Justice Scalia, writing for the majority,<sup>80</sup> stated that *Ring* made clear that the “prescribed statutory maximum” for *Apprendi* purposes is *not* the uppermost penalty permitted by law for a given crime (ten years in Mr. Blakely’s case).<sup>81</sup> Rather, it is the maximum penalty a judge may impose *solely* on the basis of the facts reflected in the jury verdict or admitted by the defendant; in Blakely’s case, that meant fifty-three months, the uppermost end of the Washington guidelines’ “standard range.”<sup>82</sup> Because Mr. Blakely’s sentence exceeded the standard range based on the judge’s finding of deliberate cruelty (a fact neither admitted by Mr. Blakely nor found by the jury), the sentence ran afoul of *Apprendi* and its progeny.<sup>83</sup>

The majority’s justification for its holding represents a classic example of originalist Constitutional interpretation. Although the framers never conceived of a guidelines-like system for meting out criminal punishment,<sup>84</sup> they did guarantee, through the Sixth

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80. The Court in *Blakely* split 5-4 along the same lines it did in *Apprendi*. Justices Scalia, Thomas, Souter, Stevens, and Ginsburg formed the majority, while Justices Breyer, O’Connor, Kennedy, and Chief Justice Rehnquist dissented. The somewhat odd sides of the debate, in which normally conservative Justices Scalia and Thomas sided with three more liberal colleagues to form a majority, indicates that the *Apprendi* issue was focused more on the vision of the jury versus practical considerations, rather than simply political ideology. It should also be noted that the Court in *Ring* split 7-2. Justice Kennedy begrudgingly joined the five “*Apprendi*” justices, stating that, although *Apprendi* was wrongly decided, *Apprendi* represents the law of the land and Mr. Ring’s case presented a “clear” application of *Apprendi*’s rule. *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring). While still rejecting the holding in *Apprendi*, Justice Breyer concurred with the *Ring* majority’s judgment on the ground that the Eighth Amendment mandates jury sentencing in capital sentences. *Id.* at 613-14 (Breyer, J., concurring). In her dissent, Justice O’Connor, joined by Chief Justice Rehnquist, unequivocally stated she would overrule *Apprendi*, a holding she believed “was a serious mistake.” *Id.* at 619 (O’Connor, J., dissenting).

81. *Blakely*, 124 S. Ct. at 2538. Justice Scalia emphatically stated, “[t]he ‘maximum sentence’ is no more 10 years here [in *Blakely*] than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).” *Id.*

82. *Id.* at 2537. Throughout the remainder of this Note, the uppermost sentence provided by a presumptive sentencing guideline scheme will be referred to as the “prescribed statutory maximum.” The maximum sentence allowable by law for a given crime pursuant to an upward departure from a guidelines scheme will be referred to as the “statutory maximum.”

83. *Id.* at 2537-38.

84. Judicial sentencing discretion in early America was largely non-existent:

Amendment, the right to trial by a jury in criminal prosecutions. The Court's task was to determine the substance of that guarantee in light of Washington's presumptive guidelines.

The majority first offered, as historical support for its interpretation of the Sixth Amendment, quotations from Sir William Blackstone ("the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours'")<sup>85</sup> and Joel Prentiss Bishop ("an accusation which lacks any particular fact which the law makes essential to the punishment is

. . . no accusation within the requirements of the common law, and it is no accusation in reason").<sup>86</sup> The accusation that Mr. Blakely acted with deliberate cruelty was essential to his punishment because it was necessary to sustain an aggravated departure. Had Bishop lived long enough to witness the implementation of Washington's guidelines, seemingly he would have required that Mr. Blakely be apprised of that accusation prior to his sentencing hearing. Presumably, the majority quoted Sir Blackstone to lend legitimacy to its conclusion that the guarantee embodied in the Sixth Amendment was intended to require that the "accusation" of deliberate cruelty be proven to a jury beyond a reasonable doubt.

In addition to historical sources, the majority buttressed its rigid interpretation of *Apprendi* by presenting it as the only sensible understanding of the right embodied in the Sixth Amendment's language.<sup>87</sup> To demonstrate the holding's logic, Justice Scalia contrasted the majority's bright-line rule with two possible alternatives. First, the Court could require that a jury only need determine the facts the legislature chooses to designate as elements of a crime and leave all other facts to be "sentencing factors" that a judge could find.<sup>88</sup> Theoretically, this could allow a jury to find that a defendant, for example, made an illegal lane change, but allow

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"[S]tate legislatures commonly set a specific period of incarceration for each offense. As in England, the real sentencers continued to be the jurors by way of their verdicts." Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 964-65 (2003).

85. *Blakely*, 124 S. Ct. at 2536 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 343).

86. *Id.* (quoting 1 JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

87. *Id.* at 2538 (urging that the Court's "commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial").

88. *Id.* at 2539.

the judge to find as a “sentencing factor” that the infraction was made in fleeing the scene of a murder the driver just committed, meriting a hefty punishment from the court.<sup>89</sup> The obvious absurdity of such a result, the majority reasoned, demonstrates a (theoretically) possible emasculation of the Sixth Amendment. Alternatively, courts could defer to legislatures’ designation of elements of a crime—which must be found by a jury—and sentencing factors—which can be found by a judge—within a “logical” framework.<sup>90</sup> The problem with such a flexible approach is that its subjectivity could make it difficult to apply.<sup>91</sup> Ultimately, the majority determined that, for the Sixth Amendment’s text to have true, clear substance, its bright-line approach in *Blakely* was the best possible interpretation.<sup>92</sup>

Having defended the logic behind the Court’s extension of *Apprendi*, the majority next reconciled its holding with its earlier decision in *Williams*. In *Blakely*, the State attempted to have the extended sentence upheld by drawing an analogy between the broad discretion in sentencing permitted by the *Williams* court and the discretion exercised by Washington’s sentencing judge in finding deliberate cruelty.<sup>93</sup> Logically, the constitutionality of broad judicial fact-finding allowed in *Williams* (under an indeterminate scheme) should extend to allow a similar discretionary exercise in the context of sentencing guidelines.<sup>94</sup> That the two sentences were promulgated pursuant to two different systems—one indeterminate, the other determinate—is an obvious basis for distinction.

However, the Court engaged in a deeper analysis of the Sixth Amendment, explaining that the right to trial by jury is not categorically a limitation of judicial power; rather, it is a reservation of power to the jury.<sup>95</sup> The limitation on judicial power is merely a function of the jury’s province to find all facts *essential* to determining a defendant’s sentence.<sup>96</sup> Under an indeterminate

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2540.

93. Brief for the State of Washington at 10–12, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632).

94. See Jane A. Dall, Note, *A Question for Another Day: The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617, 1673 (2003).

95. *Blakely*, 124 S. Ct. at 2540.

96. *Id.*



sentencing scheme, once a jury establishes guilt, the defendant has no legal right to any sentence less than the statutory maximum for the given crime. Although the finding of additional facts beyond the statutorily prescribed elements of the crime *influence* a defendant's sentence, the additional facts are not *essential* to the sentence imposed. In contrast, under presumptive sentencing guidelines, a finding of deliberate cruelty is *essential* to the sentence imposed because an upward departure cannot be sustained without such a finding. According to the majority, the Sixth Amendment's language and the jury's historical role require juries to perform their traditional function of finding such an essential fact.

#### V. *BLAKELY'S* EFFECT ON THE MINNESOTA SENTENCING GUIDELINES

There is no shortage of rhetoric trumpeting *Blakely's* significance.<sup>97</sup> Without doubt, the Court's decision will attract the attention of legal scholars for years to come as its scope and application are clarified. *Blakely's* most significant ramification in Minnesota will be a restructuring of the state's procedure for imposing upward departures from the Guidelines' standard range. The similarities between Minnesota's Guidelines and the guidelines struck down in *Blakely* are great. Both schemes allow judges to determine the existence of "substantial and compelling"<sup>98</sup> aggravating circumstances justifying departure from the guidelines. Both require judges to set forth reasons for departure in "written findings of fact and conclusions of law."<sup>99</sup> Both direct sentencing judges to follow the guidelines,<sup>100</sup> and judges who disregard the guidelines face reversal of the aggravated sentence. While the Minnesota guideline ranges are administratively produced, a basis

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97. *E.g.*, Sandra Day O'Connor, Speech to annual conference of Ninth Circuit Court of Appeals (July 22, 2004) (analogizing *Blakely* to "a number 10 earthquake"); MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF *BLAKELY V. WASHINGTON* ON SENTENCING IN MINNESOTA: LONG TERM RECOMMENDATIONS 19 (2004) [hereinafter MSGC LONG TERM RECOMMENDATIONS] ("[*Blakely*] has created a level of confusion and uncertainty that has never previously been experienced in the area of criminal sentencing."), available at [http://www.msgc.state.mn.us/Data%20Reports/blakely\\_longterm.pdf](http://www.msgc.state.mn.us/Data%20Reports/blakely_longterm.pdf).

98. Compare WASH. REV. CODE ANN. § 9.94A.535 (West 2003) with MINN. SENTENCING GUIDELINES § II, subd. D (2002) (using substantially the same verbiage).

99. Compare WASH. REV. CODE ANN. § 9.94A.535 (West 2003) with MINN. STAT. § 244.10, subd. 2 (2004) (using substantially the same verbiage).

100. Compare WASH. REV. CODE ANN. § 9.94A.505(2)(a)(i) (West 2003) with MINN. STAT. § 244.09, subd. 5 (2004).

for distinction from Washington's codified guidelines, the practical similarities regarding judicial fact-finding make the administrative distinction constitutionally insignificant and cause Minnesota's Guidelines to violate defendants' Sixth Amendment rights recognized in *Blakely*.<sup>101</sup>

Despite the rhetoric surrounding *Blakely*, however, the aspects of criminal sentencing the decision does *not* cover are extensive. First, *Blakely* does not require any change to Minnesota's present procedure for downward departures. By its terms, the rule announced in *Apprendi* and extended by *Blakely* only pertains to facts that *increase* the penalty for a crime beyond the prescribed statutory maximum.<sup>102</sup> Further, voluntary sentencing guidelines are unaffected by *Blakely*. By virtue of their voluntary nature, judges—though discouraged from doing so—have always remained free to impose any punishment up to the statutory maximum regardless of guideline suggestions without finding any essential facts. In addition, *Blakely* does not affect the states using indeterminate sentencing. The majority specifically distinguished indeterminate sentencing from the guidelines at hand in *Blakely*<sup>103</sup> and indicated no inclination to overturn its decision in *Williams*. Finally, the Court expressly recognized that determinate sentencing schemes like Minnesota's are not per se unconstitutional; sentencing guidelines can continue to exist in the post-*Blakely* era.<sup>104</sup>

The majority opinion recognizes the value of the goals that led to the enactment of sentencing guidelines in Minnesota and other states. The Court intimated that the proper question to ask need not be, "What should replace sentencing guidelines?" Rather, the proper question may simply be, "How can Minnesota's Guidelines

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101. The MSGC quickly recognized the weakness of the administrative distinction and never attempted to have the Guidelines upheld on that basis. In a report for Governor Tim Pawlenty shortly after the *Blakely* decision, the MSGC unequivocally concludes that the decision affected the procedure pertaining to aggravated departures and a new procedure for such departures needs to be implemented. MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF *BLAKELY V. WASHINGTON* ON SENTENCING IN MINNESOTA: SHORT TERM RECOMMENDATIONS I (2004) [hereinafter MSGC SHORT TERM RECOMMENDATIONS], available at [http://www.msgc.state.mn.us/Data%20Reports/blakely\\_shortterm.pdf](http://www.msgc.state.mn.us/Data%20Reports/blakely_shortterm.pdf) (last visited Feb. 27, 2005). In the context of the Federal Sentencing Guidelines, the United States Supreme Court confirmed that the administrative distinction has no constitutional validity. *See* *United States v. Booker*, 125 S. Ct. 738, 752 (2005).

102. *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

103. *Id.* at 2538; *see infra* Part VI.A.

104. *Id.* at 2540.

be implemented in a manner that complies with the constitutional rights recognized in *Blakely*?<sup>105</sup>

## VI. SENTENCING AFTER *BLAKELY*

Achieving uniformity and proportionality in sentencing while effectively allocating prison resources—the goals set forth by the Legislature<sup>106</sup> and the MSGC<sup>107</sup>—remains an important task. The Guidelines' approximate twenty-five-year existence has effectively established these goals as a reflection of Minnesota's public policy in criminal sentencing. The present task is to determine how, in a post-*Blakely* environment, Minnesota can enact a constitutionally viable sentencing scheme that functions similarly to the current incarnation of the Guidelines and continues to effectively achieve the Guidelines' goals. In his dissent in *Blakely*, Justice Breyer identified several sentencing procedure options that states might adopt in *Blakely*'s wake.<sup>108</sup>

### A. Justice Breyer's Alternatives

#### 1. Return to Indeterminate Sentencing

First, as Justice Breyer suggests, Minnesota could entirely abandon its Guidelines and the MSGC, and simply return to indeterminate sentencing with a parole board.<sup>109</sup> Unfortunately, there is no logical reason to expect that the unpredictable, disparate, and idiosyncratic sentences that previously characterized the system would not accompany the scheme's return. A majority of states have retained indeterminate sentencing. Indeterminacy's persistence, however, seems to reflect states' reluctance to replace a long-entrenched system rather than to indicate any significant degree of success in doling out equitable punishments or rehabilitating criminals.<sup>110</sup> In light of Minnesota's goals, better

105. *Id.* "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Id.*

106. MINN. STAT. § 244.09, subd. 5 (2004).

107. MINN. SENTENCING GUIDELINES § I (2002).

108. *Blakely*, 124 S. Ct. at 2551–62 (Breyer, J., dissenting).

109. *Id.* at 2553–54.

110. Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices, in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 232 (Michael Tonry &

alternatives exist to ensure that the undesirable side effects of indeterminate sentencing do not return to the state.

### 2. *Adopt “Pure” Determinate Sentencing*

“Pure” determinate sentencing is another, equally unpalatable, option posited by Justice Breyer.<sup>111</sup> Such a system uses a handful of essential facts to define a crime; all defendants convicted of a crime receive the same sentence. For example, under a simple murder statute, the killer who captures and tortures his victim as part of a murder-for-hire plan is deemed to have committed the same crime—and receives the same penalty—as a person who plans and murders, say, a former abuser. Proportionality between the seriousness and culpability of one’s acts and the punishment imposed is clearly lost in such a system. While guidelines were aimed to reduce disparity in sentencing that occurs when similarly situated criminals receive different sentences, an equally unacceptable disparity occurs when differently situated criminals receive the same sentence. “Pure” determinate sentencing creates exactly that type of disparity by examining only a very limited number of facts. Therefore, like indeterminate sentencing, pure determinacy is also an unacceptable response to *Blakely*.

These first two options, indeterminate and pure determinate sentencing, focus on replacing, rather than altering, the present guideline system. Implementing these options would cause an intolerable possibility for disparate and disproportional sentencing. As the majority stated, sentencing guidelines need not be scrapped entirely, but could be altered to comply with a defendant’s constitutional rights. The question remains—what would such alterations entail?

### 3. *Adjust the Upper Ranges of the Guidelines*

Justice Breyer identified a third alternative that would, for Minnesota, involve changing the Guidelines’ ranges by greatly increasing the maximum end of each range, effectively making upward departures unnecessary. Meanwhile, the current Guideline minimums and the procedure for downward departures would remain unaffected by *Blakely*.<sup>112</sup> This option would be a large step

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Richard Frase eds., 2001).

111. *Blakely*, 124 S. Ct. at 2552–53 (Breyer, J., dissenting).

112. *Id.* at 2558. See *supra* note 102 and accompanying text.

in the direction of indeterminate sentencing: the arbitrariness of “tough” judges would no longer be checked by an effective upward limit in sentencing “typical” felons, but “softer” judges would still be constrained by the Guidelines. Although this alternative does not abandon the current determinate system, it reintroduces many of the problems of indeterminate sentencing because sentences “within” the Guidelines could be inexplicably and widely disparate due to the broad range of sentences that would be included in the grid’s revised standard ranges. Such a system would be an improvement on indeterminate sentencing only in proportion to the lack of “hard-on-crime” judges in the state. Overall, this approach is a blatant—but permissible—end-run around *Apprendi* and *Blakely* that would present a serious potential for numerous arbitrary and disproportionate sentences. Therefore, this alternative should not be adopted.

4. *Ask the Jury to Consider “Aggravating Factors”*

A fourth option Justice Breyer identified to make sentencing guidelines conform with *Apprendi*’s dictates is to maintain the present guideline system, but alter the guidelines to force prosecutors to charge “aggravating factors” to a jury and prove them beyond a reasonable doubt.<sup>113</sup> Justice Breyer cites two ways this option could be implemented.<sup>114</sup>

First, the legislature could amend its statutes to incorporate each fact previously considered an “aggravating sentencing factor” into the definition of a crime. For example, Minnesota’s present controlled substance statutes<sup>115</sup> could be amended to create further degrees (from the present five) based upon: (1) the number of transactions in which the defendant has sold drugs; (2) the defendant’s possession of a firearm during the sale; (3) the size of the geographic area in which the defendant has distributed drugs; and/or (4) the defendant’s position in the drug dealing hierarchy.<sup>116</sup> Each crime would be assigned its own severity level on the Guidelines grid with a presumptive sentence.

A potential problem with such a system, identified by Justice Breyer, is that some of the facts that are part of the newly defined

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113. *See id.* at 2554.

114. *Id.*

115. *See* MINN. STAT. §§ 152.021–025 (2004).

116. *See* MINN. SENTENCING GUIDELINES § II, subd. D.b(5)(a)–(g) (2002).

crime may not come to light until the time of trial, resulting in a charge that does not accurately reflect the crime actually committed.<sup>117</sup> In addition, implementing such highly calibrated criminal statutes could place defendants in prejudicial positions at trial if they choose to contest all of the facts in the charge, including the aggravating facts incorporated into the criminal statutes.<sup>118</sup> For example, a defendant who is charged under a revised controlled substance statute might contest that (s)he did not sell drugs; but, if (s)he did, it was only a few transactions, any/all of which occurred in the narrow confines of one neighborhood because (s)he was not a kingpin, but merely a local peddler. Defendants contesting all the facts in the complex charge could suffer a critical blow to credibility that would accompany assuming radically inconsistent positions at the same trial before the same jury. Nonetheless, defendants would want to contest each fact because all would be relevant to the punishment imposed.

A second way to allow aggravating factors to be proven to a jury beyond a reasonable doubt is to require two juries for each defendant whenever an aggravating factor is present.<sup>119</sup> One jury would determine guilt of the crime charged and a second jury would try the disputed facts constituting an aggravating factor.<sup>120</sup> The obvious issue with such a system is the increased costs in time, money, and resources that bifurcated trials incur.<sup>121</sup> Due to the cost, states have reserved such a procedure only for those cases in which the most severe penalty, death, is to be imposed.<sup>122</sup>

*B. Two Paths Through the Appendi-Woods (The “Kansas Solution” and Voluntary Guidelines)*

*1. Kansas—Making Sentencing Guidelines Work in Response to Appendi and Gould*

Subsequent to the Kansas Supreme Court’s decision in *State v. Gould*,<sup>123</sup> that state’s legislature had to amend its sentencing

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117. *Blakely*, 124 S. Ct. at 2555 (Breyer, J., dissenting). For example, the fact that the defendant sold drugs all over the state, rather than simply within a city’s limits, may not come to light until testimony at trial.

118. *Id.*

119. *Id.* at 2556.

120. *Id.*

121. *Id.*

122. *Id.*

123. 23 P.3d 801 (Kan. 2001).

guidelines to comply with *Blakely*. The legislature ultimately passed slight amendments to the state's statutes,<sup>124</sup> which maintain its guidelines, allow for departures, comply with defendant's constitutional rights to a jury trial, and avoid, to a certain extent, several problems associated with a *Blakely*-compliant scheme as identified by Justice Breyer.

First, the Kansas legislature created an exception to the previous sentencing procedure, which mandated that judges impose the presumptive sentence unless the judge found substantial and compelling reasons and stated the reasons on the record.<sup>125</sup> The exception applied only in respect of "fact[s] that would increase the penalty for a crime beyond the [sentencing guidelines' prescribed] statutory maximum, other than a prior conviction."<sup>126</sup> Such facts have to be proven to a jury beyond a reasonable doubt in accordance with the amended procedure set forth in section 21-4718.<sup>127</sup> The procedure for downward departures remained unchanged.

In amending section 21-4718, the legislature mandated that, in order to obtain an upward departure, a prosecutor must file a motion with the court to seek an upward departure thirty days prior to trial.<sup>128</sup> If the trial is to take place in less than thirty days, the motion is to be filed within five days from the date of arraignment.<sup>129</sup> Aggravating facts that do not come to light before trial cannot be introduced to the jury at any time or serve as a basis for departure.<sup>130</sup>

The procedure for allowing a jury to find aggravating facts can then take one of two forms. First, the prosecutor can present evidence of the aggravating fact at trial and have the jury unanimously find the existence of the alleged fact beyond a reasonable doubt in a manner similar to a special verdict form.<sup>131</sup> Alternatively, if the court determines that "justice so requires," a separate sentencing departure proceeding may be conducted as soon as practicable after the phase of trial establishing guilt.<sup>132</sup> Any

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124. See 2002 Kan. Sess. Laws 170.

125. See *id.*

126. KAN. STAT. ANN. § 21-4716(b) (1995 & West Supp. 2002).

127. *Id.*; see also *id.* § 21-4718(b)(2).

128. See *id.* § 21-4718(b)(1).

129. *Id.*

130. *Id.* § 21-4718(b)(5).

131. *Id.* § 21-4718(b)(4).

132. *Id.* § 21-4718(b)(2)-(4).

person who served on the jury during the guilt-phase of the trial, but is unable to serve for a departure hearing, is replaced by an alternate juror originally impaneled for the guilt-phase of the trial.<sup>133</sup> If such alternates have been exhausted, the departure sentence can proceed so long as the jury is comprised of at least six jurors.<sup>134</sup> The right to have a jury determine aggravating facts can be waived; and if the right to have a jury determine innocence or guilt is waived, the statute provides that a defendant has also waived the right to have a jury determine the presence or absence of aggravating facts.<sup>135</sup>

In addition to retaining the discretion to decide whether to conduct a separate departure proceeding or have the aggravating facts determined along with guilt, judges are able to determine whether a specified fact warrants an upward departure in the event a factor is not included in the non-exclusive statutory list of aggravating factors.<sup>136</sup> Discretion in these two areas is important. By not *requiring* a bifurcated trial in all departure cases, Kansas has attempted to create a system that minimizes the costs of complying with defendant's *Apprendi* rights. Judges, relying on their training, are entrusted with the power to disallow a single trial with a special verdict form when doing so would cause Justice Breyer's fear of prejudicial trials to be realized. Furthermore, judges are able to tap their experience to determine whether a given fact—if proven—makes a violation more severe than the average crime in the rare but inevitable situation where the legislature has not specifically incorporated a factor into the guidelines.

Thus, Kansas has developed a system that allows juries to determine beyond a reasonable doubt all facts that subject defendants to greater penalties, in compliance with *Blakely*. The state's sentencing guidelines are saved, as is the ability to depart

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133. *Id.* § 21-4718(b)(4).

134. *Id.* The six-juror-minimum requirement is based on the Supreme Court's interpretation of the Sixth Amendment right to trial by a "jury." The Court has held that the right to a twelve-person jury is not embodied in the Sixth Amendment, and a six-person jury is sufficient to comply with the defendant's constitutional rights. *Williams v. Florida*, 399 U.S. 78, 99–103 (1970). *Cf. Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a five-person jury does not comply with a defendant's Sixth and Fourteenth Amendment rights.)

135. KAN. STAT. ANN. § 21-4718(b)(2)–(4).

136. *Id.*; *see also* *State v. Martin*, 87 P.3d 337, 340 (Kan. Ct. App. 2004) (determining that a defendant's role as the mastermind of the crime is a valid reason for upward departure, even though the reason for departure was articulated by the judge and not the legislature).



from them in those cases where aggravating factors are known prior to trial, which provides flexibility that makes salvaging the guidelines a worthwhile endeavor.<sup>137</sup>

## 2. Voluntary “Sentencing Guidelines”

Because voluntary sentencing guidelines survive *Blakely*, their provisions and limitations are also worth examining. Like Minnesota, the Virginia legislature created a sentencing guidelines commission (the Virginia Criminal Sentencing Commission, or VCSC)<sup>138</sup> for the purpose of “assist[ing] the judiciary” in the imposition of sentences that are “appropriate and just” and make the most efficient use of correctional resources.<sup>139</sup> Because the guidelines are voluntary, Virginia’s judges are not required to give the VCSC’s guidelines and efforts any practical effect.

The VCSC developed a series of worksheets for “serious” crimes.<sup>140</sup> Each crime is assigned a score.<sup>141</sup> The VCSC also assigned scores to various facts relating to the commission of a crime.<sup>142</sup> Findings relating to whether a defendant possessed a weapon at the time of the offense, has a prior criminal record, and/or committed the offense while on parole or probation all have specified point values.<sup>143</sup> The sum of the points for the given crime plus the value of any additional facts found comprises the defendant’s total score.<sup>144</sup> Each total score has a corresponding recommended sentence and the VCSC deems a sentence “in compliance” with the guidelines if it is within five percent of the presumptive sentence.<sup>145</sup> In all felony cases other than class one

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137. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 861 (1992) (“Departures are . . . essential to the proper functioning of [a] [g]uidelines system [because] [t]hey permit differentiation that could otherwise be achieved only through unstructured discretion [and] [t]hey [also] permit relatively consistent treatment of atypical situations and the development of coherent principles for deciding unusual cases.”).

138. 1998 Va. Acts ch. 872.

139. VA. CODE ANN. § 17.1-801 (Michie 2003).

140. See [www.vcsc.state.va.us/worksheets.htm](http://www.vcsc.state.va.us/worksheets.htm) (last visited Feb. 25, 2005).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. VA. CRIM. SENTENCING COMM’N, ANNUAL REPORT 2003 23 (2003), at [www.vcsc.state.va.us/2003Annualreport\\_pdf.pdf](http://www.vcsc.state.va.us/2003Annualreport_pdf.pdf) (last visited Feb. 25, 2005) [hereinafter 2003 VCSC ANNUAL REPORT].

felonies, sentencing judges are instructed by statute to file a written explanation of any departure from the record of a case.<sup>146</sup>

While the structure and goals of Virginia's guidelines appear similar to Minnesota's, their implementation has notable differences. First, a judge's failure to file a written explanation of a departure, or to follow *all* provisions of the state's guidelines, affords a defendant no right to review on appeal or any other form of post-conviction relief.<sup>147</sup> Sentencing judges<sup>148</sup> are free to impose a punishment outside the guidelines, but within the statutory maximum, for any reason—or no reason. For example, a judge may depart upward simply because, in the judge's opinion, the presumptive sentence for a given crime is "too low," and such blatant disregard for the guidelines will stand so long as the sentence falls below the statutory maximum.<sup>149</sup> Moreover, appellate courts will not revise sentences reached by incorrect application of the guidelines—so long as the sentence remains below the statutory maximum—even if the misapplication increases the defendant's punishment beyond the "proper" guideline sentence.<sup>150</sup>

In practice, Virginia's guidelines are entirely advisory and do not bind a court. Because of the truly voluntary nature of Virginia's guidelines, sentencing is analogous to indeterminate sentencing because no facts—beyond those establishing guilt—are *essential* to the imposition of a given punishment. This is the precise reason that voluntary guidelines survive *Blakely*.<sup>151</sup> Judges are free to depart from the guidelines because they do not respect them, because they cannot competently apply them, or for no ostensible reason whatsoever, and a defendant has no grounds for

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146. VA. CODE ANN. § 19.2-298.01(B) (2004).

147. *Id.* See also *Runyon v. Commonwealth*, 513 S.E.2d 872 (Va. Ct. App. 1999). Cf. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (holding that if a judge does not find facts justifying a sentencing departure and state the reasons for departure on the record at the time of sentencing, no departure is allowed).

148. Virginia allows for jury-imposed criminal sentences; the state's sentencing guidelines are only utilized by judges in imposing sentences.

149. *Burpo v. Commonwealth*, No. 2831-02-2, 2004 WL 555438 at \*1-2 (Va. Ct. App. March 23, 2004).

150. See *Lutrell v. Commonwealth*, 592 S.E.2d 752 (Va. Ct. App. 2004) (applying harsher sentencing guidelines in effect at the time of sentencing, rather than at the time of the offense, is not a basis to overturn a sentence below the statutory maximum).

151. In striking down the mandatory United State Sentencing Guidelines pursuant to *Blakely*, the Supreme Court remedially altered the guidelines to effectively make them voluntary and thus preserve, in part, the existing guidelines system. *United States v. Booker*, 125 S. Ct. 738, 767 (2005).

appeal based on the guidelines' implementation. While the VCSC specifies factors that are relevant or irrelevant to punishment and gauges a crime's seriousness in light of the state's resources, ultimately the VCSC's work only provides judges with a frame of reference to help establish a sentence that is fair and reasonable in light the VCSC's goals and studies.

## VII. THE EXPERIENCES OF KANSAS AND VIRGINIA

### A. *Kansas: A Short Track Record of Success*

Evaluating which scheme to implement in response to the *Blakely* decision necessarily requires a close examination of the success each state has had in achieving uniformity, proportionality, and effective allocation of correction resources. Kansas's present statutory scheme for upward departures only became effective in June of 2002. Consequently, there is no appreciable amount of literature or data regarding its costs or overall effects. The most significant problem the state experienced in revising its guidelines seems to have been finding a way to deal with aggravated sentence departures that were not final at the time of *Gould*, but prior to the time the statutory amendments took effect.<sup>152</sup>

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152. In one case during that timeframe, a defendant pled guilty to the aggravated battery charge *and* admitted as part of his plea bargain that—had the matter been to a jury trial—the jury would have found beyond a reasonable doubt that he had manifested excessive brutality (an aggravating fact) in committing the offense. *State v. Santos-Garzo*, 72 P.3d 560, 560–61 (Kan. 2003). Given the defendant's admission, the district court issued a sentence five months longer than the guidelines' uppermost range. *Id.* at 561. Nonetheless, on appeal, the Kansas Supreme Court vacated the sentence because the upward durational departure was issued pursuant to unamended section 21-4716, which the court had found unconstitutional on its face. *Id.* at 564. Because no constitutionally compliant procedure was in place to impose an upward durational departure, the majority ruled that no court had the ability to issue an aggravated sentence, even with the defendant's admission in the case; aggravated sentences could only be imposed after the legislature had responded with a constitutional procedural scheme. Therefore, the case was remanded for sentencing within the guidelines. *Id.*

The MSGC, in its initial report to the governor discussing *Blakely*'s impact in Minnesota, recommended:

[T]he state [should] move cautiously and thoughtfully as it explores potential changes to the current sentencing system," and that "it may be more prudent for the judiciary, prosecutors and defense attorneys to develop temporary interim policies and procedures that are advisory in nature for conducting bifurcated jury trials . . . and sentencing procedures that impact the areas or sentencing . . . affected by [*Blakely*].

However, once the transition to the new departure procedure was made, the literature and data available indicate that Kansas's experience has not been a failure. The guidelines, and ability to depart from them, have been preserved. The costs of preserving the guidelines, although largely unknown, appear not to have been prohibitive. In the two years the amended aggravated departure procedure has been in effect, no reports indicate that the state has experienced an explosion in bifurcated jury trials or an unmanageable load of trials straining judicial resources. Further, no significant movement is underway to implement an alternative system. The manageable costs of the state's new procedure are possibly a result of several factors.

The first and most important fact is that the majority of criminals nationwide plead guilty to the crimes charged. Given that over ninety percent of criminal cases are settled by plea bargains, the practical effect of forcing additional facts to be found by juries is minimal when juries are not implicated in the vast majority of cases in the first instance.<sup>153</sup> Because there are relatively few criminal cases that actually involve a jury trial, only a limited number potentially involve substantial and compelling circumstances that might cause prosecutors to seek an aggravated departure.<sup>154</sup> From the small subset of cases that involve a jury trial and aggravating circumstances, presumably a number of those cases can have all facts fairly decided by a single jury using a special verdict, as Kansas's guidelines provide.<sup>155</sup> For example, fairness

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MSGC SHORT TERM RECOMMENDATIONS, *supra* note 101, at 13. If Minnesota courts adopt the view of the *Santos-Garzo* court, any such temporary interim policies and procedures could be deemed ineffective for allowing aggravated sentencing departures until the MSGC or the legislature makes a formal response to *Blakely*, which, as the MSGC's report indicates, is not likely to occur in the near future.

153. See, e.g., Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 254 n.2 (1999) (noting that approximately ninety-two percent of cases in the federal judicial system are resolved by plea bargains, and state figures run up to ninety-seven percent, in the case of Colorado).

154. The MSGC estimates that only seventy-nine criminal cases in 2002 involved a jury trial *and* an aggravated durational departure. MSGC SHORT TERM RECOMMENDATIONS, *supra* note 101, at 6. Overall, 358 Minnesota cases in 2003 involved contested dispositional or durational departures. MSGC LONG TERM RECOMMENDATIONS, *supra* note 97, at 9.

155. By allowing judges to decide if justice demands a bifurcated trial, Kansas's system mitigates the possible realization of Justice Breyer's concern regarding defendants being placed in untenable positions disputing an array of facts regarding whether, where, how and in what capacity one committed a crime. For such complex situations, the bifurcated process can be utilized. However, because the bifurcated process is only used in such complex situations, the overall number

likely will not require a separate trial to determine whether a victim is particularly vulnerable, a leading cause of aggravated departures in Minnesota,<sup>156</sup> because the fact is normally clear (due to the victim's age or mental state) and undisputed. The seemingly manageable expense of Kansas's sentencing procedure is not surprising given the very small number of cases that are likely to involve the costly bifurcated jury trial that the *Blakely* dissenters fear will cause many to shy away from a similar system.

Judicial interpretation of defendants' *Apprendi*-rights has also limited the costs associated with implementing Kansas's scheme. As in Minnesota, Kansas's grid includes several boxes that contain presumed stayed sentences of varying durations.<sup>157</sup> The Kansas Supreme Court has pronounced that facts that may compel a court to turn a presumed stayed sentence into an executed prison sentence of the same length (a "dispositional departure") need not be found by a jury beyond a reasonable doubt.<sup>158</sup> While the decision's logic can certainly be challenged<sup>159</sup>—arguably, a prison sentence is a greater punishment than a period of supervised release—the rule in *State v. Carr* prevents some defendants from being able to demand a bifurcated jury trial to determine all facts relevant to the punishment.<sup>160</sup> Whether states that adopt the

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of bifurcated trials—and the costs associated therewith—are minimized to some extent while still allowing for departures and respecting defendants' constitutional rights.

156. Of the 274 aggravated durational departures in 2002, twelve percent (thirty-four cases) were justified on the grounds that the victim of the crime was particularly vulnerable. MINN. SENTENCING GUIDELINE COMM'N, 2002 SENTENCING DEPARTURE DATA REPORT 18 (2004), at [www.msgc.state.mn.us/Data%20Reports/dep2002.pdf](http://www.msgc.state.mn.us/Data%20Reports/dep2002.pdf) (last visited Feb. 26, 2005).

157. See *supra* Part II.B.

158. *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002). The court reasoned that a dispositional departure does not expose a defendant to a greater punishment than that authorized by a jury conviction, but merely determines where an individual's sentence is supervised, and thus *Apprendi* applies only to upward *durational* departures. *Id.* at 850.

159. See Steven J. Crossland, Comment, *Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court's Uneasy Passage Through Apprendi-Land* [*State v. Carr*, 53 P.3d 843 (Kan. 2002)], 42 WASHBURN L.J. 687, 723 (2003) ("[T]here is no rational basis for the court to apply due process guarantees solely to durational departures . . . [and *Carr*] is at odds with the spirit, if not the letter, of the *Apprendi* decision."). The MSGC has assumed that *Carr* was wrongly decided and the protections of a jury and burden of proof beyond a reasonable doubt also apply to strictly dispositional departures. MSGC LONG TERM RECOMMENDATIONS, *supra* note 97, at 10.

160. In Minnesota, for example, the latest sentencing data indicates that approximately twenty cases involved contested upward dispositional departures.

Kansas solution in *Blakely*'s wake agree with *Carr*'s logic remains to be seen. In any case, the rule in *Carr* is another factor that has minimized the potential number and cost of bifurcated trials in Kansas.

Nonetheless, the newfound ability to challenge an aggravating factor before a jury, and thereby subject it to a greater evidentiary standard, would logically make some defendants more willing to contest aggravating factors and cause *some* increase in the number of cases taken to trial. Kansas's experience thus far provides one reason to believe no explosion in the number of jury trials will ensue from implementation of a presumptive guideline scheme pursuant to *Blakely*. The logical explanation behind this result could lie in the fact that an aggravating factor simply represents *one* additional fact a prosecutor must prove, or plea bargain with, in a criminal case.<sup>161</sup> Adding one additional fact to the equation will not necessarily produce a major increase in the number of defendants demanding jury trials such that complying with their constitutional rights would be impossible. More likely, prosecutors will be more reluctant to charge aggravating factors than at present and—knowing the additional resources that would be required to obtain the result sought through trial—will only do so if the aggravating

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MINN. SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDER SENTENCED IN 2002 39–40 (2004).

161. It is interesting to note that *Blakely*'s interpretation of Washington's guidelines system requires that only a single aggravating fact be proven to a jury beyond a reasonable doubt for a sentencing departure of any duration—up to the statutory maximum—to be constitutionally compliant. This is noteworthy because once an aggravating fact—*any* aggravating fact—is proven to the jury, a judge's departure is allowed and no *additional* facts are *essential* to the sentence imposed. Therefore, any additional aggravating facts a sentencing judge may consider in sentencing cannot be used to challenge the punishment imposed because such facts would only *influence* the judge's decision. For example, under Kansas's present sentencing procedure, the prosecutor in *State v. Gould*, would have only needed to prove to a jury that the victims were particularly vulnerable to have allowed the extended sentence in the case to stand. This would have been easy because the children's ages were undisputed and could have been proven with ease. Beyond proving that lone aggravating fact to the jury, the judge would have been free to consider and find additional aggravating facts, such as whether or not the defendant acted with "particular cruelty" (a fact that is much more difficult to prove), when deciding how much to increase the defendant's sentence. *Blakely*'s result, which seems to allow judges to find *additional* aggravating factors under presumptive guideline systems, appears to be illogical and to undermine the protections *Blakely* superficially affords defendants. However, this oddity further demonstrates that *Blakely*'s bright-line rule is simply a formal interpretation of the Sixth Amendment's text rather than an attempt to afford criminal defendants any measure of practical insulation from judicial fact-finding or discretion.

fact is clearly supported by strong evidence.<sup>162</sup> In such cases, defendants would likely be willing to plead guilty to the aggravating fact, say, to have other, less-supported charges dismissed or to attempt to minimize the perceived increase in sentence the aggravating fact warrants.<sup>163</sup> Regardless of the plausible explanations, the overall result in Kansas to date appears to have been a relatively controlled increase in monetary costs associated with charging aggravating facts to a jury. The short track record, scant data, and unclear logic underlying this result, however, make tenuous any conclusions that the experience is a necessary result of the respective procedure.

*B. Voluntary Guidelines: A Long, but Abysmal, Track Record*

While the principal concern with Kansas's system is cost, states that have voluntary guidelines are primarily concerned with the practical effect those guidelines have to eliminate disparity and to achieve a greater degree of proportionality in sentencing. To date, the overall results are unimpressive. In Maryland, for example, the state's Commission on Criminal Sentencing Policy (MSCCSP) states the overall departure has historically been "high," at around forty-five percent over a ten-year period.<sup>164</sup> The high departure rate is in

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162. Such a practice could certainly be an effective way to limit the cost in judicial resources that implementing a Kansas-like system could have. However, to a certain extent, it will also lessen the degree to which the punishment fits a criminal's actual conduct if aggravating factors are only charged in a few clear cases and at the prosecutor's sole discretion.

163. In fact, theoretically, there could be a strong incentive for a defendant charged with an aggravating factor to plead guilty to a *greater* crime in exchange for having the aggravating factor dropped from the charge. Defendants would do this to ensure that they receive sentence of defined duration within the guidelines and eliminate the risk of contesting an aggravating fact, and losing, which creates the potential for a significantly greater sentence all the way up to the statutory maximum for the crime charged. Regardless of how *Blakely* was decided, the extensive use of plea bargaining in criminal sentencing was not likely to change. Given this fact, the social costs of having criminal sentences determined by advocates in a plea bargain setting, rather than through an adversarial fact-determination process, is an interesting topic that is outside the scope of this Note. Nonetheless, the theoretical incentive above, demonstrates the extent to which aggravating factors are a "big-stick" in plea negotiations under presumptive guidelines.

164. MD. STATE COMM'N ON CRIM. SENTENCING POL'Y, 2003 ANNUAL REPORT 5 (2003), at [www.msccsp.org/publications/ar2003.html](http://www.msccsp.org/publications/ar2003.html) (last visited Mar. 15, 2005) [hereinafter MSCCSP 2003 ANNUAL REPORT]. The MSCCSP emphasizes that compliance with the guidelines has improved over time. For example, the overall departure rate declined from 58% in 1999, to 51% in 2000, to 49% in 2001. MD.

spite of the facts that (1) the state's sentencing grid has a wide sentencing range;<sup>165</sup> (2) the state includes a probationary sentence of any length as "within" the guidelines so long as probation is the disposition in the appropriate grid box; and (3) since 2001, any sentence agreed upon in a plea bargain is considered "within" the guidelines, regardless of where the sentence falls on the state's grid.<sup>166</sup> In contrast, in 2002, Minnesota's presumptive guidelines yielded a seventy-three percent non-departure rate despite having much narrower sentencing ranges, presumptive lengths for stayed sentences and including plea bargain sentences as departures if outside the standard range or dispositionally non-compliant.<sup>167</sup>

Virginia's voluntary guidelines seemingly have had greater influence than Maryland's. Defining compliance as any sentence within five percent of the presumptive sentence,<sup>168</sup> Virginia reports

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STATE COMM'N ON CRIM. SENTENCING POL'Y, 2002 ANNUAL REPORT 7 (2002), at [www.msccsp.org/publications/ar2002.html](http://www.msccsp.org/publications/ar2002.html) (last visited Mar. 15, 2005). These recent compliance rates remain, however, well above the MSCCP's goal of a 33% departure rate. *Id.* at II.

165. For example, the range of a sentencing near the middle of the state's grid (involving an offense score of "eight" and an offender score of "four") provides for a sentence anywhere from eight to fifteen years. As such, even sentences "within" the state's guidelines can be widely disparate with no clear explanation justifying differences in sentences. The state's sentencing matrix is available at [www.msccsp.org/guidelines/matrices.html](http://www.msccsp.org/guidelines/matrices.html) (last visited Mar. 15, 2005).

166. MD. STATE COMM'N ON CRIM. SENTENCING POL'Y, 2002 ANNUAL REPORT 14 (2002), at [www.msccsp.org/publications/ar2002.html](http://www.msccsp.org/publications/ar2002.html) (last visited Mar. 15, 2005).

167. Almost ninety percent of aggravated dispositional departures are issued at the request of defendants but nonetheless are categorized as departures by the MSGC. MINN. SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2002 28 (2004).

168. 2003 VCSC ANNUAL REPORT, *supra* note 145, at 23. At this Note's print deadline, Minnesota's grid provided approximately a five percent range in most boxes. For example, a defendant situated near the middle of the grid with a criminal history score of three and an offense severity level of six faced a standard range of thirty-seven to forty-one months (a 5.1% variance around the thirty-nine month presumed sentence). Only in the most severe cases did Minnesota's grid provide for a standard range that is significantly less than five percent around the presumed sentence; for example, the most severe box on the grid provides a range of 419 to 433 months around a presumed sentence of 426 months (a 1.6% variance above or below the presumed sentence).

In *Blakely's* wake, however, the MSGC has proposed expanding the range of presumptive sentences, likely to minimize the number of instances in which prosecutors deem it necessary to pursue a complex and costly departure process because a sentence within the presumptive range would not provide an "appropriate" punishment. For example, a defendant with a criminal history score of three and an offense severity level of six would face a standard range of thirty-four to forty months on the proposed grid. The most severe box on the proposed grid provides a range of 363 to 480 months. MINN. SENTENCING



an almost eighty-percent compliance rate in 2003 for sentences imposed by judges.<sup>169</sup> Thus, the VCSC's efforts seem to have influenced sentencing practices in the state. However, despite the relatively high compliance rate, the VCSC also reports that in over one-quarter of the cases involving departures, the sentencing judge provided no explanation of the departure<sup>170</sup> despite a statutory requirement to so do.<sup>171</sup> Similarly, in Maryland between July and December 2001, almost thirty percent of cases involving departures contained no explanation of the reasons for the variant sentence.<sup>172</sup> Contrasting these figures with Minnesota's present Guidelines, which, pursuant to *State v. Geller*, require every departure to include a written explanation of the reasons for the extraordinary sentence, the transparency in sentencing under a voluntary system seems low.<sup>173</sup>

What do the figures from Maryland and Virginia indicate? Among other things, they demonstrate that the effect voluntary guidelines actually have on sentencing practice can vary greatly from state-to-state. However, the overall consensus is that voluntary guidelines are not very effective at reducing disparity or influencing judicial discretion in determining sentence lengths.<sup>174</sup> In addition, the common absence of reasons justifying departure-sentences undermines the goal of achieving proportionality in sentencing; if the reasons why a particular crime was more or less serious than the "typical" crime remain unknown and unannounced, the guidelines perceived ability to achieve a sentence proportional to the crime suffers a serious credibility problem. Voluntary sentencing guidelines are likely not being considered as a possible response to *Blakely* due in large part to their suspect historical ability to

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GUIDELINES COMM'N, NOTICE OF PUBLIC HEARING TO CONSIDER MODIFICATIONS TO THE SENTENCING GUIDELINES ADDITIONAL MODIFICATIONS TO BE CONSIDERED—PROPOSED SEX OFFENDER GRID 7-9 (Dec. 2004), at [www.msgc.state.mn.us/Forms/pubheardec2004.pdf](http://www.msgc.state.mn.us/Forms/pubheardec2004.pdf) (last visited Feb. 27, 2005).

169. 2003 VCSC ANNUAL REPORT 2003, *supra* note 145, at 24 (2003). Jury sentences within the guidelines are much lower, likely due to society's present "tough-on-crime" stance.

170. *Id.* at 10.

171. VA. CODE ANN. § 19.2-298.01 (2004).

172. Steven Adler & Michael Connelly, *Reasons for Judicial Departure in Maryland Circuit Courts, July 2001-December 2001*, SENTENCING FAX, December 6, 2002, [www.msccsp.org/publications/fax/fax111.pdf](http://www.msccsp.org/publications/fax/fax111.pdf) 1 (last visited Feb. 27, 2005).

173. *See supra* notes 153-56 and accompanying text.

174. Michael Tonry, *Sentencing Commissions and Their Guidelines*, in 17 CRIME & JUSTICE: A REVIEW OF RESEARCH 137, 140 (Michael Tonry, ed. 1993).

effectively achieve policy goals of uniformity, proportionality, and effective resource allocation.

### VIII. THE CASE FOR MINNESOTA'S EXCEPTIONALISM

#### A. *Why Voluntary Guidelines are Likely to Work in Minnesota*

There are several logical reasons, however, to believe that Minnesota is uniquely situated to make voluntary guidelines work effectively. The Guidelines' longevity in the state offers two crucial advantages that would aid successful implementation of a voluntary scheme. First, Minnesota's judges have a deep familiarity with the Guidelines, arising from their experience dealing with the guidelines as a presumptive tool.<sup>175</sup> Maryland points to a lack of knowledge regarding the guidelines as a principal reason for judges' common disregard for the guidelines in sentencing;<sup>176</sup> and both Maryland and Virginia<sup>177</sup> identify ignorance as a main cause of the judiciary's laxity in providing justifications for departures. Neither state has ever effected presumptive guidelines that have forced judges to acquire knowledge of the respective guidelines. However, that is not the case in Minnesota. Minnesota judges' present familiarity with the Guidelines' ranges and procedure likely cause them to consult and implement voluntary guidelines as intended by the legislature and MSGC, which is the first step necessary to achieving the goals set forth by the MSGC.

Another reason Minnesota's experience with its Guidelines would help make a voluntary system work well is that the state's twenty-five year experience with them has been a success.<sup>178</sup> The MSGC has conducted extensive research in evaluating the seriousness of various crimes, the correctional resources available, reasons that logically justify departure sentences and the overall

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175. While conceding that the judiciary's overall familiarity with the Guidelines may diminish over time as seats on the bench turn over, an appreciable amount of turnover will inevitably require a significant period of time. By the time any appreciable turnover actually occurs, *if* voluntary guidelines prove ineffective with newer judges, the state will nonetheless have afforded itself enough time to perform a more comprehensive evaluation of the costs and benefits of alternative responses to *Blakely*. This ability to perform a better analysis of alternatives further demonstrates the prudence of enacting voluntary guidelines as an immediate response to *Blakely*. See *infra* Part IX.

176. MSSCP 2003 ANNUAL REPORT, *supra* note 164, at 17.

177. VCSC 2003 ANNUAL REPORT, *supra* note 145, at 9–11.

178. See *supra* note 28 and accompanying text.

theory of punishment for the state. Recognizing the MSGC's dedication to providing a coherent sentencing policy and procedure, Minnesota's judges are especially likely to respect the purpose the Guidelines serve, whether they are voluntary or not. Further, in light of the overall respect generated from the state's positive experience with the Guidelines to date, judges would presumably give guideline sentencing ranges serious consideration to continue the positive trend in punishment that has emerged in this state.

The final reason to believe that voluntary guidelines could work in Minnesota is that, in contrast to the federal judiciary, the electorate can monitor judges' sentencing practices through elections to ensure that the public's policy for punishment is being implemented through the judiciary.<sup>179</sup> Careful monitoring of sentencing practices under a voluntary scheme—through the MSGC and/or private groups—could detect any appreciable return of unjustifiably disparate, harsh, lenient, or disproportional sentencing by members of the judiciary. Assuming the Guidelines remain a valid expression of the state's public policy to eliminate such practices, judges who disregard a voluntary form of the Guidelines would not likely pervade the judiciary because the populace could replace judges who disregard voluntary guidelines with individuals who express a respect for, and intent to follow, the Guidelines system in place.<sup>180</sup> Combined with the benefits that flow from judges' experience with—and respect for—the Guidelines, the opportunity to monitor sentencing practices justifies a degree of optimism for voluntary guidelines.

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179. See MINN. CONST. art. VI, § 7.

180. George W. Soule, Chairman of the Minnesota Commission on Judicial Selection, has observed, "Typically, a judge has trouble in winning election only if he or she has drawn some public notoriety during the term." Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-five Years of Radical Change*, 26 HAMLINE L. REV. 219, 281 (2003). Publicity of blatant disregard for the guidelines and the negative consequences that accompany such disregard—either in the form of increased costs to the state caused by inexplicable upward departures, or the notoriously "soft on crime" label that accompanies unjustifiable downward departures—could create the notoriety necessary to allow a qualified candidate advocating adherence to the Guidelines to mount a legitimate challenge. One role for the MSGC in the context of a voluntary guidelines setting could be to track and disseminate information relating to unexplained departures. Such a check would allow judicial elections to perform their task, as described by Coase, of providing a "mechanism to remove judges from office who are not performing well." *Id.*

*B. Why Adopting Voluntary Guidelines Is Prudent Now*

Criminal sentencing procedure is at a crossroads because of *Blakely*. The Minnesota legislature certainly intended to limit judicial discretion through its initial creation of the MSGC and implementation of a guidelines scheme. *Blakely* now forces the legislature to modify the established guidelines system and either further restrict judicial authority by removing consideration of aggravating factors from the bench's purview, or return a degree of judicial discretion that could be channeled by the efforts of a commission specifically dedicated to analyzing criminal punishment.

Superficially, a system modeled after Kansas's seems to be the next logical step in the path of criminal sentencing, in which judicial sentencing discretion has been steadily curtailed through legislation and judicial interpretation over the past two decades.<sup>181</sup> Such a measure can be seen as the best way to preserve the positive effects the Minnesota Sentencing Guidelines have had in this state. Certainly, a Kansas-based approach is a legitimate response to *Blakely*.

However, limiting judicial sentencing discretion is not a goal in and of itself. Rather, it is properly viewed as a means to an end, which is the accomplishment of the goals established by the MSGC. Overall, a voluntary guidelines system is superior to a Kansas-styled scheme because a voluntary system is likely to be equally effective while involving less cost and risk than the Kansas alternative. Moreover, a voluntary scheme would more closely follow the legislature's express policy underlying the Guidelines.<sup>182</sup>

Modifying Minnesota's Guidelines to permit greater judicial discretion through voluntary guidelines would likely function in

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181. Justice Scalia's opinion indicates his belief that Kansas-modeled systems will be the most logical and popular response to *Blakely* in states that have implemented presumptive guidelines. *Blakely v. Washington*, 124 S. Ct. 2531, 2541 (2004). See also *United States v. Booker*, Nos. 04-104, 04-105, 2005 WL 50108, at \*47-48 (U.S. S. Ct. Jan. 12, 2005) (Scalia, J., dissenting) (criticizing majority approach in *Booker* allowing United State Sentencing Guidelines to stand in voluntary form as judicial disregard for Congress's intent in passing Guidelines). The MSGC has recommended that Governor Pawlenty effect a system roughly based on Kansas's model for aggravated departures. MSGC LONG TERM RECOMMENDATIONS, *supra* note 97, at 16.

182. It also needs to be noted that truth-in-sentencing can be implemented regardless of the presumptive or voluntary nature of sentencing guidelines, and the benefit in the area of correctional resource allocation can be reaped regardless of the path a state chooses to follow.

the same practical manner and achieve success similar to that which the state has experienced with prescriptive guidelines over the past twenty years.<sup>183</sup> In addition to being effective, maintaining the present Guidelines' procedures in voluntary form has the distinct advantage of being less costly on several fronts than the Kansas alternative.

First, such an approach would allow the familiar sentencing procedure at the trial level to continue essentially unchanged, thus avoiding many of the efforts necessary to enact a new scheme, educate the judiciary on the new procedure, gain the experience needed to efficiently implement it, and expend the energy that would necessarily accompany clarifying its application. The challenges to clarify *Apprendi's* application to dispositional departures, the sufficiency of process in potentially having aggravating factors found by smaller-sized juries,<sup>184</sup> and any number of other issues that inevitably accompany a new procedure are all costs that could also be avoided by simply transforming the present presumptive scheme into a voluntary one.<sup>185</sup>

Further, and most directly related to monetary costs, following Kansas's system amounts to writing a blank check to cover an unknown amount of additional judicial expenses that will accompany a presumably greater amount of jury trials of greater length and complexity. Although one can point to the fact that Kansas's system has not imploded, a single example with such a short track record should hardly inspire overwhelming confidence

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183. See discussion *supra*, Part VIII.A.

184. The continuing validity of *Williams v. Florida* could be questioned in light of the present Court's strong desire to maximize the role of the jury in criminal cases.

185. One especially troubling issue in implementing a revised procedure for aggravated departures in Minnesota would be adopting the MSGC's proposal to allow judges, *sua sponte*, to seek such a departure. See MSGC LONG TERM RECOMMENDATIONS, *supra* note 97, at 14. The recommendation to give judges such power is likely a response to criticisms that Kansas's system gives prosecutors too much discretion in ultimately determining defendants' sentences by virtue of the ability to charge, not charge, or drop aggravating factors; thus, punishments can be seen as being determined by prosecutorial discretion rather than the severity of the crime committed. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1168-70 (2001). However, the MSGC recognizes the potential for challenges to such a provision as a violation of separation of powers; the *sua sponte* option would provide the judicial branch with limited influence in the prosecution of crimes, a function reserved for the executive. In addition, it is difficult to imagine an efficient, effective, and practical means to prosecute an aggravating factor at the court's demand after the prosecutor has refused to do the same.

in the long-term viability of the system. Justice O'Connor refers to the majority's decision as imposing a constitutional tax on guidelines systems.<sup>186</sup> There is no reason Minnesota should rush to pay a "constitutional tax" of an indefinite amount by implementing a bifurcated-trial guidelines system when a "non-taxable" voluntary guidelines system is likely to achieve the same desired results.

Finally, in examining how the state's response to *Blakely* can best follow the spirit of the present Guidelines, it is important to note that Minnesota's laws, at present, clearly provide that sentencing pursuant to the Guidelines is not a right that accrues to a convicted felon. Rather, the Guidelines are a procedure based on the public policy of achieving the MSGC's goals.<sup>187</sup> Kansas's system directly contradicts the legislature's express vision of the Guidelines by making a sentence within the Guidelines a felon's right, which could only be taken away by knowing and voluntary waiver or proof to a jury beyond a reasonable doubt of some aggravating fact. Voluntary guidelines, in contrast, create no such right. A voluntary system would recognize that Minnesota has a clear public policy for sentencing, but that guidelines are truly a tool to use in the sentencing process, not an expansion of felons' rights.

In light of the present justification for the Guidelines' existence, a voluntary system would more closely comport with the legislature's apparent philosophy for having guidelines than a Kansas-style system would. A voluntary system, therefore, is the most logical successor to the present system and should be implemented to allow the Guidelines to continue to successfully function as they have in the past.

#### IX. CONCLUSION

Surely other states' legislatures, and possibly the United States Congress, will follow the yellow brick road to a Kansas-modeled guidelines system. In cases such as the federal system, in which sentencing guidelines are presently reviled, such a path is likely the best approach to ensure a tool is in place to minimize disparate or disproportional sentencing. However, not all jurisdictions are similarly situated and therefore there is no universal "best" or "most logical" response to *Blakely*. In light of Minnesota's unique

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186. *Blakely v. Washington*, 124 S. Ct. 2531, 2546 (2004) (O'Connor, J., dissenting).

187. See MINN. STAT. § 244.09, subd. 5 (2004).

experience with its Guidelines, the time is ripe for a swing in the pendulum back toward greater judicial discretion in sentencing, aided and directed by the efforts of the MSGC and supplemented by continuing the state's implementation of truth-in-sentencing. By gauging the experience other jurisdictions have with such a system, and monitoring the resources such a system requires over an appreciable time, Minnesota would be in a position down the road to intelligently perform a cost-benefit analysis of this system when its effects are better known. Presently, however, maintaining the guideline procedures in voluntary form is the legislature's best available option when reconstructing part of the sentencing system *Blakely* tore down.