2005

Why Minnesota Will Weather Blakely's Blast

Dale G. Parent

Richard Frase
University of Minnesota Law School, frase001@umn.edu

Why Minnesota Will Weather *Blakely*'s Blast

DALE G. PARENT AND RICHARD S. FRASE

Dale Parent is Senior Associate, Abt Associates, Inc., Cambridge Massachusetts. He served as the Executive Director of the Minnesota Sentencing Guidelines Commission from its inception, in September 1978, until May 1982. The Commission's Guidelines went into effect in May 1980.

Richard Frase is the Benjamin N. Berger Professor of Criminal Law, University of Minnesota.

On June 24, 2004, the United States Supreme Court held in *Blakely v. Washington*[1] that Blakely's Sixth Amendment right to trial by jury had been violated because the facts the sentencing judge relied upon to impose an exceptional sentence of ninety months (an upward departure from the presumptive sentence range of forty-nine to fifty-three months under Washington's sentencing guidelines) had neither been admitted by Blakely nor found by a jury. The decision cast doubt on the constitutionality of the United States sentencing guidelines and led to an expedited hearing by the Supreme Court and its decision in *Booker and Fanfan*,[2] confirming that the federal guidelines are indeed subject to the *Blakely* ruling. The reasoning of Justice Stevens' and Breyer's "majority" opinions in *Booker* also strongly implied that the legally binding guidelines adopted in Minnesota and several other states are likewise covered by *Blakely*, and Minnesota courts had so ruled even before *Booker*.[3]

Blakely has been likened to a legal earthquake or tsunami, and some observers predicted that the decision would have huge impacts on existing state sentencing guidelines systems. In her dissent, Justice O'Connor identified nine states whose sentencing regimes were cast into doubt under *Blakely* and commented that "over 20 years of sentencing reform are all but lost."[4] The Vera Institute of Justice identified nineteen states with sentencing guidelines or other presumptive-sentencing laws that seemed to be affected by *Blakely*, and thirteen states—including Minnesota—whose guidelines systems would be fundamentally affected.[5] However, the Vera report argued that Blakely's effects would vary by state and would generally be less than some first expected, because "unlike the federal system, [state] judicial fact-finding is used in only a small fraction of cases." [6]

In September 2004 the Minnesota Sentencing Guidelines Commission issued a report on *Blakely*'s impact on Minnesota sentencing.[7] The Commission concluded that *Blakely* would apply only to upward departures and estimated that of the 14,492 cases sentenced in 2003, only 358 (2.4 percent) involved upward departures in which the defendant did not plead guilty.[8] The Commission concluded that Blakely's modest impact would be manageable, although it noted that courts already were overburdened, and any increase in trials would only add to their overload. The Commission also recommended a number of procedural changes to clarify and streamline *Blakely*'s application to Minnesota cases, adopting an approach similar to the one used in Kansas to make that state's guidelines compliant with constitutional requirements.[9] In May 2005 the Minnesota Legislature adopted the Commission's proposals in slightly modified form.[10]

In retrospect, *Blakley*'s modest impact in Minnesota resulted from both the context within which the Commission developed its guidelines and key policy decisions it made in 1978 and 1979. As discussed more fully below, the context included strong bipartisan Legislative support in favor of determinate sentencing and equally strong opposition to sentencing policies that would cause prison crowding. The Commission's policy choices—in particular, its decision to approach guideline development as a policy-making process rather than an effort to codify past sentencing practices, and its rejection of "real-offense" sentencing—resulted in proposed guidelines that lacked several features that made the federal guidelines highly vulnerable to *Blakely* attack.

The Legislature had considered sentencing reform bills for three sessions before enacting legislation to create the Commission in 1978.[11] Leaders built coalitions that represented both major political parties, as well as diverse interest groups—law enforcement, prosecutors, defenders, crime victims, and corrections. In 1975 the Legislature approved $33 million to build a new 400-bed high-security prison to provide a level of security that could not be attained within Minnesota's aging correctional institutions. The new facility was not intended to increase total prison capacity—in fact, the original plan called for closure of 400 beds in older prisons when the new facility opened. Overruns pushed final costs well over $40 million and occurred at a time when the state faced severe revenue shortfalls. In 1978 liberal and conservative legislators were determined not to allocate more scarce public resources to add prison bed space, and they directed the Commission to produce a sentencing reform that would work within the limits of existing prison capacity.[12]

Federal Sentencing Reporter, Vol. 18, No. 1, pp. 12–18, ISSN 1053-9867 electronic ISSN 1533-8363

The Commission's Key Decisions

The Commission's decisions on four key issues during guideline development blunted *Blakely*'s impact on Minnesota many years later. Those decisions were (1) to view guideline development as a policy-making process, (2) to use conviction offenses rather than "real" offenses to determine presumptive sentences, (3) to define a narrow range of departure criteria, and (4) to promote a low judicial departure rate from the guidelines.

Guideline Development as a Policy-Making Process

The Commission adopted the position that it was making sentencing policy, not discovering and codifying past sentencing practice. The Commission was acting under a clear delegation of authority from the Legislature (which itself could have created sentencing guidelines and enacted them in statutes) to develop presumptive guidelines. Commission members were appointed by the governor and chief justice to represent a broad array of criminal justice interests—trial and appellate judges, prosecutors, defenders, law enforcement, parole, and corrections—as well as the public. The Commission's chairperson was highly skilled in building coalitions and mediating situations in which groups held divergent positions. In its early deliberations the Commission distinguished its work from earlier judicially developed descriptive and voluntary guidelines, wherein judges viewed their task as identifying past judicial sentencing patterns and building guidelines to reflect those practices. In short, the Commission chose to develop "prescriptive" rather than "descriptive" guidelines. Several of the Commission's prescriptive policy choices, described below, resulted in guidelines provisions that are less vulnerable to Blakely attack.

Conviction versus Real-Offense Sentencing

Important issues were at stake in the Commission's decision about how to determine the presumptive sentence. Under past practice, judges were free to consider offenders' underlying criminal conduct, not just the nominal offense for which an offender was convicted or to which they had pleaded guilty. Proponents of real-offense sentencing maintained that under presumptive guidelines, conviction-offense sentencing would give prosecutors much greater power to determine sentences by adjusting their charging and bargaining discretion, effectively shifting sentencing authority from the judge to the prosecutor. They argued that judges needed real-offense sentencing to prevent this expansion of prosecutorial sentencing power and to avoid disparity in the treatment of cases where the underlying conduct was quite similar but the conviction offenses differed substantially.

Proponents of conviction-offense sentencing argued that real-offense sentencing allows prosecutors to offer charge reductions to obtain guilty pleas and then retract those bargains by arguing for sentencing based on actual conduct that was inconsistent with the conviction offense. These critics also argued that real-offense sentencing negates the law of evidence, because it allows judges to consider facts at sentencing that would be inadmissible at trial, either because the evidence was illegally obtained or because it is not relevant to the conviction offense. Real-offense sentencing also lowers the standard of proof on such facts, because they are not subject to proof beyond a reasonable doubt and other trial-procedure safeguards.[13]

During its early deliberations, the Commission considered whether the presumptive sentences should be based on conviction or real offenses. However, they deferred a decision on the matter while they worked to resolve other issues in guideline construction, including how to rank the severity of criminal offenses. As it turned out, the Commission's deliberations and choices on offense severity rankings helped them to resolve the conviction vs. real offense issue.

After a failed attempt by staff to lead the entire Commission in an offense severity ranking exercise,[14] the Commission delegated the task to a work group of members co-chaired by the prosecutor and public defender. This work group developed a ranking process that was grounded in experience rather than in theory and that divided deliberations so that workload was more manageable.

The work group began by excluding archaic or rarely prosecuted felonies from the ranking exercise. Then they divided remaining felonies into six broad categories—violent, arson, sex offenses, drugs, property crimes, and miscellaneous. All but the property category contained twenty or fewer crimes. The work group split property crimes into three subcategories: forgery, forgery-related, and theft-related.

The work group decided to fine-tune the statutory offense definitions by adopting dollar-loss modifiers for a few crimes in the forgery, forgery-related, and theft-related categories. These modifiers were identical to dollar-loss criteria that the Legislature had included as sentencing factors in the theft statute.[15] Hence, on a pragmatic level the work group found that statutory offense definitions were a satisfactory and workable basis for the Commission's ranking of offense severity.[16]

The work group returned to the Commission with its new groupings of crimes to resume the ranking exercise. This involved several steps. First, the Commission reached agreement on severity rankings within each category. Second, they reached agreement on a severity ranking that spanned all categories. Finally, they divided the overall ranking into ten coherent severity levels, which formed the vertical axis of the sentencing guidelines grid. In these subsequent steps, members' arguments were based on a combination of their experience (gained from different perspectives within the justice system) and their values. When debate suggested wide variation in rankings, members holding extreme positions were called upon to explain the basis of their positions to the Commission and to attempt to sway other members to their position.[17] The

Commission did not find it necessary to consider additional information about crimes, not included within statutory definitions of crimes, to complete its ranking exercise.

During its earlier considerations several Commission members expressed reservations about the fairness of real-offense sentencing. Because it now had a workable offense severity index based on statutory offense definitions, the Commission quickly reached a decision to use conviction offenses to determine presumptive sentences. The Commission devoted little additional debate to the philosophical or operational issues at stake before it reached this decision. The decision to base presumptive sentences on conviction offense elements avoided the disadvantages of real-offense sentencing and made the guidelines relatively simple to apply. By avoiding the use of frequent case-specific adjustments to calculate sentence severity, the Commission also limited the number of judicial sentencing findings that are now subject to *Blakely* attack.

Narrow Departure Criteria

Later in its deliberations the Commission set policy governing judicial departures from individual convicted offenders' presumptive sentences. This was a contentious matter because it directly affected core values and authorities of judges, prosecutors, and defenders. While the Commission took several weeks to finalize all aspects of its departure policy, during their deliberations Commission members agreed that departures should not be permitted for reasons that were inconsistent with the statutory definition of the conviction offense. While this point was never explicitly stated in the guidelines, one Commission member, a highly respected judge,[18] observed that this position was essential if the Commission was to preserve the integrity of its prior policy choice of basing presumptive sentences on conviction offenses. This judge later became chief justice of the Minnesota Supreme Court and heavily influenced case law interpreting application of the guidelines.

Low Departure Rates

The Commission decided that departure rates needed to be low not only to substantially reduce sentencing disparity but also to achieve the goal of maintaining prison populations at or below the existing prison capacity. Matching sentencing policy with available correctional resources requires accurate predictions of future resource impacts; high departure rates limit the accuracy of such impact projections. By the time the Commission completed its work, it was evident that in states with judicially developed voluntary sentencing guidelines judges departed freely from the guideline sentences, and that such guidelines were not reducing disparity.[19] Accordingly, the Commission decided to set a high threshold for departures, stating that guideline sentences were presumed to be appropriate for all cases, and that judges would need to cite "substantial and compelling" circumstances to overcome that presumption and impose a departure. The Commission included an illustrative and nonexclusive list of departure criteria that described rare but persuasive reasons for departure. These criteria reflected the Commission's earlier choices on using conviction offenses to determine presumptive sentences and prohibiting departures for facts that were inconsistent with conviction offenses.

Implementation of the Commission's Policy Choices

The adoption of guidelines required changes in sentencing hearing procedures. One judicial member of the Commission convened a committee to consider necessary revisions in Minnesota's Rules of Criminal Procedure, and the committee's recommendations were formally incorporated into the Rules. As amended, the Rules require judges to give notice to the state and the defense if they are considering departing from a presumptive sentence. At the sentencing hearing, both sides are permitted to present evidence and witnesses and make arguments on factors that might permit a departure. At the conclusion of this hearing, the judge decides questions of fact and enters the sentence. If the sentence is a departure, the guidelines require the judge to state on the record the factors that justified the departure. Under the constitutional standards that applied prior to the *Apprendi-Blakely* line of cases, contested sentencing facts needed to be proved only by a preponderance of the evidence.

Judges and practitioners accepted most of the Commission's sentencing policy choices. In the first two years of guidelines sentencing, judges departed from presumptive dispositions in only 6.2 percent of all cases, with about equal numbers of aggravated and mitigated departures. This low departure rate reduced variance in judges' dispositional decisions (compared to pre-guideline practice) by 52 percent.[20] Prison populations remained under prison capacity for the five-year term covered by the Commission's projections.[21]

The Commission had no power to enforce its guidelines—that was reserved to the Minnesota Supreme Court[22] (the new Minnesota Court of Appeals did not begin hearing cases until early 1984, so most of the critical, early guidelines case law was shaped by a single court). The Commission's enabling legislation gave both the state and the defendant the right to appeal any sentence.

Early case law uniformly reinforced the Commission's key choices with respect to the use of conviction offenses to determine presumptive sentences and to determine appropriate reasons for departures. The Supreme Court ruled that judges could not enhance a sentence based on offenses for which the defendant had not been charged or for which charges had been dropped.[23] The Court disallowed departures based on speculation about crimes a defendant might commit in the future.[24] The Court further ruled that judges could not depart on the basis of alleged crimes to which the defendant maintained his or

her innocence[25] but could depart on the basis of non-charged offenses if the defendant admitted them on the record.[26] The Court also adopted a very deferential standard of review of decisions not to depart;[27] this ruling strongly reinforced the presumption in favor of imposing the recommended guidelines sentence and made clear that when unusual circumstances are present judges are authorized but not required to depart.

The Minnesota guidelines permit departures not only as to the duration of a prison sentence but also as to "disposition." An offender with a presumptive executed prison sentence may instead be given a stayed prison term and placed on probation (downward dispositional departure), or an offender with a presumptive stayed prison sentence may be given an executed prison term (upward dispositional departure). Although the permissible departure factors in the guidelines as originally written implied that all departures should be based on increased or decreased desert, the Minnesota Supreme Court soon recognized non-desert grounds—but only as to dispositional departures.[28] Offenders who are particularly amenable to probation and/or unamenable to prison can receive downward dispositional departures; offenders who are particularly unamenable to probation (e.g., because they have failed on probation in the past) can receive an upward dispositional departure. In practice, downward amenability departures are common, but upward departures (the ones now subject to *Blakely* requirements) are quite rare; indeed, upward dispositional departure on *any* grounds is rare and is usually agreed to by the defendant.[29]

Departures are often agreed to as part of plea negotiations. Defendants will sometimes agree to an upward durational departure in order to limit the extent of that departure; upward durational and/or dispositional departures may also be agreed to in return for dismissal of other charges, and defendants will sometimes trade an upward durational departure for a downward dispositional departure. In an early case,[30] the Supreme Court held that a plea agreement is an improper basis for departure. A 1996 case, *State v. Givens*,[31] created at least a limited exception; the defendant had agreed to an upward durational departure in return for a stayed prison term, and the Court held that he could not contest the grounds for that departure when the stay was later revoked. But this ruling was promptly limited by legislation and disapproving language in the Guidelines Commentary; the Court then overruled *Givens* and held that a plea agreement can never, by itself, justify an upward dispositional or durational departure.[32] Thus, by the time *Blakely* was decided, courts were once again required to find aggravated circumstances (enhanced desert; unamenability to probation) in order to justify an upward departure. And those findings, unlike most negotiated departures, are subject to *Blakely* standards.

Political and sentencing policy developments in Minnesota in recent years have increased the number of *Apprendi* (statutory-enhancement) issues but may have decreased the number of potential *Blakely* (guidelines departure) issues. In the past two decades there has been nearly continuous political and media attention to issues of crime and sentencing.[33] Drug penalties and presumptive sentence durations began to go up in the mid-1980s, and the late 1980s and early 1990s witnessed substantial increases in penalties for violent and repeat offending. The statutory enhancements provided for these offenders are subject to *Apprendi* requirements. However, the increased presumptive guidelines durations may have reduced the frequency of upward durational departures. These increases were usually followed by steady or declining upward departure rates, presumably because of the higher "starting point" provided by the increased presumptive durations.

Minnesota *Blakely* Case Law

The Minnesota Supreme Court has decided several important *Blakely* issues. In *State v. Shattuck*[34] the Court held that upward durational departures under Minnesota's guidelines are subject to *Blakely* requirements. The Court further held that the invalid upward departure provisions are severable from the rest of the guidelines and remanded the case for resentencing. The Court thus rejected *all three* of the options considered by Justice Breyer in his "remedy" opinion in *Booker*—total invalidity of the guidelines, excision of all provisions making the guidelines legally binding, and engrafting onto the guidelines a set of judge-made procedures for jury trial of aggravating facts.[35] In *State v. Houston*,[36] the Court addressed retroactivity issues, holding that *Blakely* is a "new rule" but not a "watershed" new rule; it therefore applies to all cases still pending on direct review at the time *Blakely* was decided (which was the case in *Shattuck*) but does not apply to defendants like Houston whose convictions had already become final.

Several early decisions of the Minnesota Court of Appeals held that *Blakely* does not apply to upward dispositional departures (executed prison sentence instead of the presumptive stayed term). In *State v Hanf*,[37] the Court reasoned that dispositional departures are based on offender characteristics, which makes these decisions unlike the aggravated offense factors at issue in *Apprendi* and *Blakely* and more akin to *Blakely*-exempt indeterminate sentencing (and/or more akin to prior record, which relates only to punishment and which is also exempt from *Apprendi-Blakely* requirements). The Court also noted that juries have not traditionally been involved in choosing sentence dispositions, at least since courts were granted authority to stay sentences. The Court of Appeals may have further assumed that while jurors are equipped to distinguish atypical offense conduct which increases the deserved sentence duration, they would have difficulty assessing atypical offender characteristics which relate to the appropriate sentence disposition. Exclusion of upward dispositional departures also serves

to insulate probation revocation decisions from *Blakely*. On the other hand, the Appeals Court's arguments are inconsistent with the broad language of *Blakely*, holding that the "maximum" sentence for *Apprendi* purposes is the most severe sentence that the judge may legally impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"[38] (i.e., without finding additional facts). In *State v. Allen*,[39] the Minnesota Supreme Court accepted this broader reading and held that upward dispositional departures *are* covered by *Blakely*.

The Minnesota Sentencing Guidelines Commission's Proposed *Blakely* Modifications

The Sentencing guidelines Commission's proposed response to *Blakely* is a mixture of compliance and avoidance.[40] Compliance measures include proposed changes in pretrial and trial rules, similar to those previously adopted in Kansas, requiring jury trials of sentence-enhancing facts unless such facts are admitted by the defendant or the defendant requests the court to make the findings.[41] The Minnesota Legislature agreed with this recommendation, specifying that a unitary jury trial will be used unless a bifurcated trial is requested by the prosecutor or the evidence supporting an upward departure is inadmissible on the elements of the charged offense(s) and would result in unfair prejudice to the defendant.[42] The Commission also added language to the guidelines, stating that sentencing outside of the guidelines range "is an exercise of judicial discretion constrained by case law and appellate review," and that if aggravated facts are proved beyond a reasonable doubt, "the judge may exercise the discretion to depart."[43] This language, to which the Legislature did not object, confirms that even where a jury has found that aggravated circumstances are present judges retain discretion not to depart, or to depart by less than the maximum allowed.

The Commission's *Blakely* avoidance strategies seek to insulate consecutive sentencing from *Blakely* and to reduce the number of upward durational departures. The Commission provided a list of crimes permitting consecutive sentencing, in lieu of the former rule requiring the court to find that the crimes were "person" offenses.[44] As for departures, the Commission substantially broadened the cell ranges on the guidelines grid, taking full advantage of the enabling statute provision authorizing ranges as broad as 15 percent above and below the midpoint.[45] The Legislature went further, specifying that cell ranges should extend 20 percent above the midpoint (and 15 percent below).[46] For example, at offense severity level IX (first-degree criminal sexual conduct; first-degree assault) the final (legislative) version yields a cell width of twenty-nine months (74 to 103) at zero criminal history and a cell width of fifty-four months (135 to 189) at criminal history of 6 or higher; previously, all cells at level IX had a width of ten months. These changes will allow sentences to be enhanced substantially without exceeding the top of the cell range and triggering *Blakely* rights (courts will also have more discretion to mitigate sentence duration without departing).

Conclusion

The Minnesota Sentencing Guidelines Commission's policy choices and the state Supreme Court's interpretive case law have worked together to soften *Blakely*'s impact by limiting the number of cases where *Blakely* might apply. Presumptive sentences are based almost entirely on the elements of the conviction offenses, so judges are rarely required to find additional facts that could increase the presumptive sentence. Case law strongly reinforced the Commission's approach by prohibiting upward departures based on contested facts not included in any conviction offense and making clear that judges have substantial discretion not to depart even when grounds for departure exist. This structure has largely survived intact, despite numerous changes in the guidelines and sentencing statutes. Some of those changes called for additional sentencing fact-finding subject to *Blakely*, but other changes reduced the need for upward departure. The *Blakely*-avoiding policy choices made by the Commission and the Supreme Court have been widely accepted by Minnesota practitioners and policy makers and have not been controversial.

Minnesota was the first state to implement sentencing guidelines written and monitored by an independent sentencing commission.[47] The many states that later adopted such guidelines have generally made similar choices to avoid or minimize "real-offense" sentencing and have based their recommended sentences and departure grounds on conviction offenses. The U.S. Sentencing Commission took a very different approach, requiring judges to make frequent factual determinations in computing the presumptive sentence and explicitly permitting such sentences to be enhanced by facts not included in, or even closely associated with, the conviction offense. These choices have made the federal guidelines more severe and more controversial, and they also make *Blakely* compliance much more difficult—many more determinations would have to be made by juries and, at least as the guidelines are currently written, those determinations would often be highly complex. Federal compliance problems have been avoided, at least temporarily, by the Supreme Court's holding in *Booker* that the guidelines will be "voluntary" pending congressional review of how to respond to the new constitutional requirements. It may be that Congress will take no action; indeed, in the context of the federal criminal justice system, voluntary guidelines (subject to "reasonableness" review, under *Booker*) may be the best version of guidelines that can be implemented. But if the federal guidelines are ever again to be made legally binding, they will probably have to be completely rewritten, more along the lines of the simpler, conviction-offense-based model adopted by Minnesota and other guidelines states.

The guidelines model adopted by Minnesota and other states with legally binding guidelines makes *Blakely* compliance much easier, but such compliance still imposes some additional burdens. Will these states accept those burdens? In Justice O'Connor's terms,[48] will they pay the "constitutional tax" imposed by *Blakely*? Or will they choose the "easy out," offered by *Booker*, of making their guidelines voluntary? And will other states, when contemplating the adoption of guidelines, prefer voluntary over legally binding guidelines so as to avoid *Blakely* problems? Time will tell.

However, there is reason to believe that states like Minnesota will retain their legally binding guidelines and will pay the *Blakely* "tax," because these states have learned the value of guidelines which, while preserving substantial case-level flexibility, produce reasonably uniform and predictable sentences. Voluntary guidelines are unlikely to produce high enough levels of compliance to achieve these results, at least in large jurisdictions with prescriptive rather than purely descriptive guidelines. One of the most important benefits of more uniform sentencing is the ability to predict future resource impacts and needs. As pioneered in Minnesota and adopted in most other guidelines states, accurate resource-impact projections permit policy makers to avoid prison overcrowding, set priorities in the use of limited and expensive correctional resources, and make clear to everyone the true costs of particular sentencing policy proposals. These management tools are critically important to state policy makers who, unlike their federal counterparts, must balance their budgets and deal with strongly competing demands for limited state funds. In the federal system huge budget deficits are the norm, and correctional expenses are a tiny fraction of the overall budget. This may be one reason why resource-impact assessments have never been seriously considered in formulating federal sentencing policy; it also means that the switch to voluntary federal sentencing guidelines will not interfere with such assessments. In state systems, however, a switch to voluntary guidelines risks depriving policy makers of a valuable tool upon which they have come to rely. That risk, combined with the broad support that state guidelines have generally enjoyed and the relative ease of *Blakely* compliance, should ensure the survival of Minnesota-style guidelines.

Notes

1 124 S.Ct. 2531 (2004).

2 125 S.Ct. 738 (2005).

3 *See*, e.g., *State v. Shattuck*, 689 N.W.2d 785 (Minn. 2004) (order summarizing substantive holdings); the Court's full opinion on substantive and remedy issues is discussed *infra* at notes 34-35.

4 *Blakely*, 124 S.Ct. at 2550.

5 Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington—*Practical Implications for State Sentencing Systems*, 17 FED. SENT. REP. 60, 60-62 (2004).

6 *Id.* at 60.

7 Minn. Sent. Guidelines Comm., *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* (Sept. 2004).

8 *Id.* at 3, 9. The Commission's conclusion that only upward departures are implicated assumed that these decisions are "severable" from other aspects of guidelines sentencing, and the Minnesota Supreme Court subsequently so held in *State v. Shattuck*, 704 N.W.2d 131, (Minn. 2005). For further discussion of *Shattuck*, see *infra*, text at notes 34-35. See also *infra*, text at notes 37-39 (discussing whether upward dispositional departures are subject to *Blakely*).

9 See *infra*, text at notes 40-45 (also discussing the Commission's later proposals for changes in the guidelines grid to further reduce the impact of *Blakely*).

10 House File No. 1, Art. 16. For further discussion, see *infra*, text at notes 40-45.

11 1978 Minn. Laws, chap. 723.

12 The enabling statute directed the Commission to "take into substantial consideration current . . . correctional resources, including but not limited to the capacities of local and state correctional facilities." *Id.* Sec. 9 (codified as Minn. Stat. Sec. 244.09, subd. 5).

13 Michael Tonry, *Real Offense Sentencing-The Model Sentencing and Corrections Act*, 72 J. CRIM. LAW & CRIMINOLOGY 1550 (1981).

14 Commission staff were researchers, not attorneys, and lacked direct experience in charging and bargaining decisions. They developed an exercise that seemed abstract and academic to Commission members and that "overloaded" Commission members by requiring them to consider and weigh too many variables at one time.

15 Minn Stat. Sec. 609.52, subd. 3 (1980).

16 Minnesota criminal law was recodified in 1963. As of the late 1970s the Code's provisions were still generally congruent with the views of practitioners and had not become excessively fragmented or internally inconsistent due to piecemeal amendments. In contrast, federal criminal law has never been subject to comprehensive recodification and is widely viewed as outdated, incomplete, and incoherent, thus providing a much less satisfactory basis for guidelines offense classifications and ranking.

17 For a detailed account of the ranking exercise, *see* DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 55-63 (Butterworth 1987).

18 Douglas K. Amdahl was a trial court judge in Hennepin County (Minneapolis) when he was appointed to the Commission in 1979. In July 1980, while still on the Commission, he was named associate justice of the Minnesota Supreme Court, and in 1982 he was named chief justice. His presence on the Court helped to ensure that the Court's decisions reinforced the Commission's rejection of real-offense departures (see *infra*, text at notes 23-26, discussing case law on this point).

19 Few studies of voluntary guidelines had been published at this time, but Commission staff communicated with staff in states with voluntary sentencing guidelines and with researchers who were studying their application.

20 Minn. Sent. Guidelines Comm., *The Impact of the Minnesota Sentencing Guidelines, Three Year Evaluation* (Sept. 1984), p. 34 (comparing "grid variance" measures of dispositional uniformity for the pre-guidelines year of 1978 and the first full year of guidelines sentencing, 1981). Of course, all sentencing "disparity" measures are relative and value-laden—they examine sentences given to offenders who are defined as "similar" relative to the sentencing goals and criteria deemed most appropriate. Post-guidelines dispositions may have been *more* disparate relative to rehabilitative assessments and offender-risk criteria, but when evaluated relative to the Commission's desert-based standards, 1981 dispositions were less disparate.

21 *See* Parent, *supra* note 17, pp. 177-201.

[22] The Commission routinely monitored every case sentenced under the guidelines, and designed a sentencing database that was integrated into Minnesota's then-developing offender-based criminal justice management information system. The Commission provided quick feedback to officials to support accurate guideline application and used its data to refine and improve the guidelines over time.

[23] *See State v. Brusven*, 327 N.W. 2d 591 (Minn. 1982); *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1981).

[24] *See State v. Hagen*, 317 N.W.2d 701, 703 (Minn. 1982); *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

[25] *State v. Womack*, 319 N.W. 2d 17, 19-20 (Minn. 1982).

[26] *See State v. Rott*, 313 N.W.2d 574, 575 (Minn. 1981); *State v. Garcia*, 302 N.W.2d 643 (Minn. 1981).

[27] *State v. Kindem*, 313 N.W. 2d 6, 7 (Minn. 1981) (stating that "[although] we do not intend to entirely close the door, it would be a rare case which would warrant reversal of the refusal to depart").

[28] For discussions of this line of cases, see Richard S. Frase, *Sentencing Guidelines in Minnesota: 1978-2003*, in Crime and Justice: A Review of Research (M. Tonry, edit.) (2005), vol. 32, pp. 131, 155; Richard S. Frase, *Sentencing Principles in Theory and Practice*, in Crime and Justice: A Review of Research (M. Tonry, edit.) (1997), vol. 22, pp. 363, 399-403.

[29] See Frase, *Sentencing Guidelines*, *supra* note 28, at 173, 179, 185; Frase, *Sentencing Principles*, *supra* note 28, at 402 n21, 416, See also *supra*, text at note 8 (discussing Guidelines Commission data on infrequency of *Blakely* issues).

[30] *State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981).

[31] 544 N.W.2d 774, 777 (Minn. 1996).

[32] *State v. Misquadace*, 644 N.W.2d, 65, 71 (Minn. 2002).

[33] See generally Frase, *Sentencing Guidelines*, *supra* note 28.

[34] 704 N.W.2d 131, (Minn. 2005).

[35] *Id.* at 143-48. The majority opinion in *Shattuck* assumed that the Court had inherent judicial authority to establish jury trial procedures to comply with *Blakely* requirements, but it declined to invoke those powers and engraft jury trial procedures onto the guidelines, preferring to leave that task to the Legislature. *Id.* at 148. In a footnote, the Court noted that the Legislature had recently enacted jury trial and other procedures to comply with *Blakely* and further noted that these procedures apply both prospectively and to resentencing hearings; the Court added: "We express no opinion about these recent changes, and do not foreclose the district court [from applying them on remand]." *Id.* at 148 n 17. (Readers who may have read the Court's opinion shortly after it was handed down on August 18, 2005, are advised to consult the amended version. On October 6 the Court issued an order deleting language requiring imposition of the presumptive sentence on remand and adding the "we do not foreclose" language to the footnote. [The Court also clarified that it was only holding Section II.D of the guidelines unconstitutional as applied.])

[36] 702 N.W.2d 268 (Minn. 2005).

[37] 687 N.W.2d 659, 661-66 (Minn. App. 2004). See also *State v. Saue*, 688 N.W.2d 337, 345-46 (Minn. App. 2004). In *State v. Carr*, 53 P.3d 843, 844-49 (Kan. 2002), the Kansas Supreme Court held, on somewhat different grounds, that upward dispositional departures are not subject to *Apprendi* (and now, *Blakely*) requirements. For an argument in favor of distinguishing between offense and offender factors, under *Blakely*, see Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT. REP. 89 (2004).

[38] *Blakely*, 124 S.Ct. at 2537.

[39] __N.W.2d__, 2005 WL 3117280 (Minn. 2005).

[40] Cf. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes*, 105 COLUM. L. REV. 1082, 1108-18 (2005) (discussing *Blakely* "approach" and "avoidance" strategies).

[41] Minn. Sent. Guidelines Comm., Long Term Recommendations, supra note 7, at 12-19. See also http://www.ussc.gov/STATES/blakely/Kansas%20Statute%20Post%20Gould.pdf (Kansas changes).

[42] 2005 Minn. House File No. 1, Art. 16, Secs. 3 to 6, amending Minn. Stat. sec. 244.10. The legislation speaks only of upward departures on the prosecutor's motion, *id.*, Secs. 3 & 4. The Commission's report implied that courts could initiate such departures unless this would violate separation of powers. Minn. Sent. Guidelines Comm., *Long Term Recommendations*, *supra* note 7, at 14.

[43] Minn. Sent. Guidelines Comm., *Report to the Legislature* (Jan. 2005), p. 11.

[44] Minn. Sent. Guidelines Comm., *Long Term Recommendations*, *supra* note 7, at 18; Minn. Sent. Guidelines Comm., *Report to the Legislature*, *supra* note 43, pp. 6, 13-17.

[45] Minn. Sent. Guidelines Comm., *Report to the Legislature*, *supra* note 43, pp. 6, 17-18.

[46] House File No. 1, Art. 16, Sec. 1. See also http://www.msgc.state.mn.us/Guidelines/grid05.doc (revised Minnesota Guidelines grid, eff. Aug. 1, 2005).

[47] See generally Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

[48] *Blakely*, 124 S. Ct. at 2546 (Justice O'Connor, dissenting).