2004

The Future of American Sentencing: A National Roundtable on Blakely

Ronald J. Allen
Northwestern University

Albert Alschuler
University of Chicago

Douglas A. Berman
Ohio State University Moritz College of Law

Stephanos Bibas
University of Iowa

Frank O. Bowman III
Indiana University, Indianapolis

See next page for additional authors

The Future of American Sentencing: A National Roundtable on *Blakely*

The transcripts were edited by Michael Romano, Stanford JD '03 and Robert Weisberg, with help from Stanford students David Lieberman, Julia Lipez, and Nolan Reichl, all class of '06.

In the wake of the dramatic Supreme Court decision in *Blakely v. Washington*, Stanford Law School convened an assembly of the most eminent academic and professional sentencing experts in the country to jointly assess the meaning of the decision and its implications for federal and state sentencing reform. The event took place on October 8 and 9, just a few months after *Blakely* came down and the very week that the Supreme Court heard the arguments in *United States v. Booker* and *United States v. Fanfan*, the cases that will test Blakely's application to the Federal Sentencing Guidelines. Thus the Roundtable offered these experts an "intellectual breathing space" at a crucial point in American criminal law.

The event was built around six sessions, with shifting panels of participants doing brief presentations on the subject of the session, and with others then joining in the discussion. We are pleased that *FSR* is able to publish this version of the proceedings of the event—a condensed and edited transcript of the sessions.

The six panels were titled and designed as follows:

1. The Jurisprudence of *Blakely*—Roots and Implications. Before inevitably launching into speculation about the effects of *Blakely*, panelists scrutinized the decision itself, tracing its constitutional roots and considering the various contexts—criminal procedure, substantive criminal law, sentencing policy, and others—in which it should be viewed.

2. Can We Reconceive a Good Guidelines System in Light of *Blakely*? This session jumped into the speculative fray about the form that guidelines systems could and must take in light of *Blakely*, and the likely legislative responses to it.

3. *Blakely* and the States: Effects on State Law and the Changing Roles of Sentencing Commissions. This session focused on states that have been laboratories of sentencing innovation to assess whether *Blakely* enhances, restricts, or confirms the approaches they have taken to sentencing reform.

4. Lawyering Strategies, Balances of Power, and Plea-Bargaining in the Wake of *Blakely*. On its face, of course, *Blakely* extends a constitutional right to criminal defendants, but as this session explored, in a world dominated by guilty pleas, an enhanced right to jury trial amounts mainly to a new factor in the dispersion of advantage in plea bargaining and a new influence on lawyering strategy in bargaining.

5. Lawyering One's Way Through Uncertainty and Transition—Including post-*Blakely* Matters of Appeal, Retroactivity, Habeas Corpus, and Ex Post Facto. *Blakely*, along with whatever decisions follow from it, will alter the future landscape of adjudication and sentencing, but this session considered how the new doctrines will affect the vast number of "pipeline" cases.

6. Idealistic Reflections: The Future of Sentencing Reform. Assuming that *Blakely* requires a reappraisal of sentencing, this session contemplated where the deeper aspirations of modern sentencing reform stood before this June and how the Supreme Court has altered the path towards achieving them.

List of Participants:

Ronald J. Allen, John Henry Wigmore Professor Law, Northwestern University
Albert Alschuler, Julius Kreeger Professor of Law and Criminology, University of Chicago
Douglas A. Berman, Professor of Law, The Ohio State University Moritz College of Law
Stephanos Bibas, Associate Professor of Law, University of Iowa
Frank O. Bowman III, M. Dale Palmer Professor of Law, Indiana University—Indianapolis
Daniel P. Blank, Federal Public Defender, San Francisco
Charles R. Breyer, United States District Judge, San Francisco
Steven Chanenson, Associate Professor Law, Villanova University
Michael R. Dreeben, Deputy Solicitor General, US Dept. of Justice
Margareth Etienne, Associate Professor of Law, University of Illinois
Jeffrey L. Fisher, Associate, Davis Wright Tremaine LLP, Seattle
Patrick Keenan, Assistant Professor of Law, University of Illinois

Federal Sentencing Reporter, Vol. 17, Issue 2, pp. 115–133, ISSN 1053-9867, electronic ISSN 1533-8363.

Joseph E. Kennedy, Associate Professor of law, University of North Carolina
Nancy J. King, Lee S. and Charles A. Speir Professor Law, Vanderbilt University
Susan R. Klein, Baker & Botts Professor of Law, University of Texas
Rory K. Little, Professor of Law, Hastings College of Law
Marc L. Miller, Professor of Law and Associate Dean, Emory University
J. Bradley O'Connell, Staff Attorney, First District Appellate Project, San Francisco
David Porter, Federal Public Defender, Sacramento
Kevin R. Reitz, Professor of Law, University of Colorado
Daniel C. Richman, Professor of Law, Fordham University
Kate Stith, Lafayette S. Foster Professor of Law, Yale University
Barbara Tombs, Executive Director, Minnesota Sentencing Commission
Richard B. Walker, Chief Judge, Ninth Judicial District, Kansas
Robert Weisberg, Edwin E. Huddleson, Jr. Professor of Law, Stanford University
Ronald F. Wright, Jr., Professor of Law, Wake Forest University
Jonathan Wroblewski, Deputy Director, Office of Policy and Legislation, Criminal Division, US Dept of Justice
David N. Yellen, Max Schmertz Distinguished Professor of Law, Hofstra University

Friday, October 8

Session 1

The Jurisprudence of *Blakely*: Roots and Implications. *Where did* Blakely *come from, how does it fit in criminal law jurisprudence, and where does it lead us? This panel addresses the Sixth (and Eighth) Amendment origins and implications of* Blakely. *Why did the Court reach such a formalistic rule, how has the constitutional significance of "crimes," "elements," and "sentencing facts" been retooled, and should the Court care about the far-reaching consequences of its decision?*

Ronald Allen: I think the way we got from the mid-70's, through the federal sentencing guidelines, to *Blakely* has some interesting implications for the conceptual issues that I think really dominate our current situation. I also want to offer what I call the external stance on some of the questions we'll be discussing—particularly why I think striking down the guidelines will be a mistake by the Supreme Court.

First, the ideology. *Mullaney* did exactly what *Blakely* did. It picked a few passages from *Winship* out of context, examined their logical implications, and applied them in a completely different context, with the result being a re-working of a substantial portion of the then-existing substantive criminal law.

Interestingly, *Patterson* saw this, and chose not to go down that path.

I made the argument that if a fact was necessary for the sentence, given an Eighth Amendment proportionality requirement, then it had to meet all the panoply of procedural rights. The Court accepted the argument that there had to be a constraint—that was *Patterson*. But they articulated an elements test: An element is what this legislature says it is, end of story. In fact, this logic doesn't work if you actually look at the cases, but that's what they said to get themselves out of a box.

Sandstrom did the same thing. It took a few passages from pre-existing cases and applied them in a way that would have again required substantial re-working of aspects of the criminal law. *Ulster*, a highly analogous case, saw this and said, "No, we're not going to do that."

So you have these formal arguments that are designed to get out of a box of infinite regress that prior cases led to.

Now, *Blakely* seems exactly like a rerun of this. *Blakely* takes bits and pieces of earlier cases to their logical conclusions without considering a lot of surrounding language. That's why I'm the only one in the world who thinks that the sentencing guidelines will not be struck down.

The idea that you can idealize the criminal jury to constrain the awful influence of government is just ridiculous. All three branches of the government, the executive, legislature, and judiciary, have their hands all over the inferential process at trial. The executive in determining what evidence to offer; the legislature in providing rules of admissibility-exclusion; the judiciary and their discrete trial choices.

How do you cabin that off? You either have to come up with a formal argument that distinguishes it, or you have to come up with a substantive theory.

Michael Dreeben: One piece of the puzzle that I don't think that Ron articulated as concretely as it was felt by the Court was that you actually are going to wipe out a lot valuable legislative innovation if you apply a rule that just about anything that increases a defendant's exposure to punishment has to be proved beyond a reasonable doubt. The Court picked up on this problem in *Patterson* when it rejected the *Mullaney* rule, saying, "We don't want to be interfering that much with legislative prerogatives."

What is remarkable and ironic about *Blakely* is that the Court pretty much turned the tables on *Patterson*.

Blakely says, "let's do something to protect against legislatures that are defeating the right to jury trial." But the vessel into which that spirit was poured was a very formal rule: any fact, other than a prior conviction, that raises the maximum statutory sentence has to be proved to a jury beyond a reasonable doubt.

On its surface, *Blakely* takes aim at hostile legislatures that have circumvented the circuit breaker in our machinery of justice, the jury, by assigning determinations that will affect the defendant's sentence to a judge.

If *Blakely* is about protecting the jury trial, then it's a very strange rule, because it allows legislatures to get out of the jury altogether by eliminating the guidance that they gave to the judge. If the legislature wants it can set your sentence for kidnapping from zero to ten, and the judge can make any findings he wants, we don't need a jury for this.

Or maybe *Blakely* is aimed at legislatures. It wants them to respect the jury trial right and provide a meaningful check on attempts to get around it. But *Blakely* can't possibly be about that either because, given its formal nature, and given the other cases that the Court has decided, including *Harris v. United States* and *Patterson*, any legislature that's bent on evading the jury trial guarantee has a plethora of options open to it.

So, if *Blakely* is really not about what says it's about on the surface, what is it about?

This is a particularly Court-centric, and perhaps oversimplistic, view from someone who's very nearsighted and sits very up close to them. I submit that *Blakely*'s formalism is really about Justice Scalia's view of constitutional interpretation.

It's "fear of judging" as applied to judges interpreting the Constitution. He just doesn't want the members of the Supreme Court and lower federal courts to do very much of it based on multi-factor balancing tasks and indeterminate assessment of where the values of a provision might take you.

He prefers tests that are grounded in constitutional text, bright line rules, history and other kinds of ways of deciding a case that don't require you to do much subjective thinking about the way the Constitution works. This is pretty clear in *Blakely*, which praises its own virtue of having a bright line rule. Scalia said the very reason that the framers put a jury trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Rory Little: The *Blakely* majority stressed that its Constitutional ruling was entirely procedural, not substantive. The Court has not redefined what an element is, for constitutional purposes. They've used the analogy of element to get to the constitutional process implications of their analysis.

One of the ways that you can discover that *Blakely* is not an elemental decision, is that Mr. Blakely would not be acquitted of kidnapping, even if you gave the jury the factual finding job on deliberate cruelty. If the jury were to find that he committed the elements of kidnapping, but without deliberate cruelty, he would not be acquitted.

It seems to me that *Blakely* is purely a Sixth Amendment jury trial decision. This is why Justice Scalia stresses that the decision reflects the need to give intelligible content to the right of the jury trial. I think he meant it. They were trying to protect the role of the jury.

Michael Dreeben is right when he says, "Well, if they were going to protect the role of the jury in a big way, this is a weak protection." But I think he may be wrong as to what the Court is prepared to permit down the line with regard to its jury trial right.

In my eyes, the triumphant architect in *Blakely* is not Justice Scalia; it's Justice Stevens. Justice Stevens in 1984 wrote a dissenting opinion in *Spazanio v. Florida*, in which he wrote about the need for the jury to be the decision maker to have a morally acceptable system of sentencing. His remarks were limited to the capital context, but the similarities between what he said in *Spaziano* and what Justice Scalia says at the end of *Blakely* are uncanny.

The genius of *Blakely* is that Justice Stevens found a way to get the constitutional originalists to come with him in this enterprise. Justice Stevens quietly allowed his idea to percolate, and allowed the constitutional history to be written in a way so that Justice Scalia and Justice Thomas could come join him at the table.

Finally, if *Blakely* is to stand, I don't think *Harris* or *Almendarez-Torres* survive. Justice Thomas already said, in *Apprendi*, that his vote in *Almendarez* was an "error." As for mandatory minimums and *Harris*, if Justice Breyer's baby (the federal sentencing guidelines) is buried in *Booker-Fanfan*, he will not allow mandatory minimums to continue unabated. He said in *Ring* that he didn't see how mandatory minumums could survive the logic of *Apprendi*, but that he couldn't yet accept that logic. Now he will have to.

Albert Alschuler: I wonder how much of the dark predictions emphasized by Justice O'Connor in her dissent in *Blakely* should matter in deciding a case like *Blakely*?

Do the predicted consequences bear at all on constitutional doctrine? Should they? Have the developments of the past thirty years changed the answer to the question, whether the Constitution entitles an offender to trial by jury on facts that can double and triple his sentence?

Let me initially explain the lunatic proposition that changed circumstances and consequences never matter in constitutional adjudication. If *Blakely* truly applies only to maximum sentences, Congress can resolve all of the federal guidelines' constitutional difficulties by enacting Frank Bowman's proposal to increase the top of every guidelines range to the formal statutory maximum while otherwise leaving the guidelines intact.

The fact that *Blakely*'s requirements would be satisfied by this pointless and perverse exercise reveals a defect of the decision.

Justice O'Connor's dissent offers a different reason for attending to the consequences: The life of the law has not been logic, but experience.

The alarmed response of lawyers and judges to *Blakely* may reflect their lack of confidence in both Congress and American democracy, and this lack of confidence may well be justified.

Congress, of course, is what critics of *Blakely* most fear. We know that Congress has enacted mandatory minimum sentences, rejected efforts to restrict the crack/powder disparity, multiplied the number of sprawling federal crimes, multiplied the number of capital crimes, given us AEDPA, the sentencing guidelines and the PROTECT Act. The list of Congressional disasters in the area of criminal justice could continue *ad nauseam,* if not *ad infinitum.*

I've written that Congress may well see *Blakely* as a dare, and an opportunity, to push voters' anti-crime hot buttons, to engage in a urinating contest with the Supreme Court, and to make federal sentences even more monstrous than they already are. I think the best guess, in fact, is that Congress will.

Jonathan Wroblewski: I'm probably one of the few people in this room that thinks the government ought to win the *Booker* and *Fanfan* cases, although I'm only a recent convert to this position.

At oral argument, Justice Breyer and Justice Kennedy asked a number of questions about indeterminate sentencing, parole, parole boards, parole commissions, and parole guidelines. It strikes me that all of these attributes of sentencing and corrections law are part of a continuous and very long progressive movement that has coincided in large part with the development of administrative law.

It started in sentencing and corrections with Benjamin Franklin and the Quakers with the idea of the penitentiary as a place to do penitence, which led to development of indeterminate sentencing. It developed further—along with the creation of the administrative state—with the advent of parole boards to bring expertise to sentencing and corrections decisionmaking. Parole guidelines came when the administrative state moved to administrative lawmaking. And it has continued with the advent of sentencing commission and sentencing guidelines.

It is this single and continuous progressive movement, which frankly, I think is at stake in *Booker* and *Fanfan,* because if aggravating sentencing factors are functionally treated as elements, both *Mistretta* and the ability of commissions to promulgate such factors are put seriously into question.

I say that because the Supreme Court has consistently said that the source of law matters.

Why should it matter whether an administrative agency creates a rule triggering a particular punishment or whether the Congress does? It matters because the values underlying the administrative state—of bringing expertise and the advancement of human knowledge to bear on public administration—have been long associated with different procedures.

If, on the other hand, sentencing factors are to be treated as elements in every way, then there is a very serious question whether a sentencing commission can promulgate such guidelines. If they can't, I think it's a shame, because if sentencing commissions go out of business or are less directly involved in the promulgation of sentencing rules, I think outcomes will be driven even more by politics.

If this issue gets punted back to the Congress, I think it's safe to say that severity and certainty will be the prime values underlying federal sentencing policy. That's the reality of the Congress that we have today.

The second thing that I think will help determine post-*Booker/Fanfan* sentencing policy is the Federal Criminal Code. The Federal Criminal Code is a hodgepodge of statutes, which frankly needs some type of comprehensive reform if it is to properly identify aggravating factors that are going to bring about the certainty and severity, not to mention proportionality, that Congress will require.

Ultimately, the state of the federal code means that there will need to be either comprehensive reform or some type of guidelines-like overlay to insure that all cases are not treated alike and that proper aggravating and mitigating factors are properly accounted for.

Joseph Kennedy: I think an essential context for understanding the *Blakely* decision is the state of legislative politics around crime over the last two decades.

The last two decades have seen a legislative process around crime that has been characterized by demagoguery, by moral panics, by hastily-drawn legislation passed in response to sort of high-profile crimes, by the use of crime as a weapon in an on-going culture war. And that was on our good days.

The bottom line of this dysfunctional period of legislative policy-making is two million people behind bars. It's a staggering fact, and it is the elephant in the room. But it's not talked about in *Blakely.*

My second point is, you can't take the majority's opinion in *Blakely* on its facts. Justices Scalia and Thomas may really believe in the formalism that they articulate.

My intuition is that for Justice Scalia and Justice Thomas, their position is a response to a particularly invasive type of intrusion by the legislature into the judicial domain. Obviously Justice Scalia doesn't have a problem with mandatory minimums; doesn't have a problem with "three-strikes" laws; and if you believe what he writes, he would not have a problem with a completely determinate system of sentencing.

What bothers Justice Scalia about guideline sentencing is that you're not just telling judges what to do, you're telling judges how to think. You're establishing a decision-making calculus and telling them, this is how they need to think about this decision they make.

I think the liberal justices are holding their noses, crossing their fingers, and kicking over the applecart in the hope that, if things have been so bad lately, that maybe it'll be better when they put all the apples back in.

Nancy King: One thing that people haven't looked at is the double-jeopardy ramifications of calling these sentencing facts elements. The Court must decide whether these are elements and whether along with the reasonable doubt

standard and the jury standard every other constitutional right applies.

For at least two justices, I believe that this is the formal retreat from the fuzzy (or should I say furry because of the tail wagging reference) tests of Justices O'Connor and Breyer. I think the Court is policing the line between what's a crime and what is not, where the Bill of Rights kicks in and where it doesn't. This is all part of the same effort to limit the legislature with formal constitutional rules that leave little leeway for judicial activism.

I also want to say that maybe the action isn't in the federal system after all. The most sweeping impact of *Blakely* might actually be in the states. Unlike in the federal system, the states have the constraint of cost. I've been sitting on the Tennessee Sentencing Commission that is working on revising the state sentencing law to respond to *Blakely*. When they look at the cost of lifting presumptive sentence caps versus the cost of leaving caps there, but eliminating some of these enhancements altogether, it's not clear which is more expensive for the state taxpayer and for the criminal justice system. States must ask:

Do we want more prisons? Can we continue the lowering effect of the guidelines by eliminating some of these aggravating factors and sticking with the criminal code as written?

The states are not interested as much in just having high sentences. State lawmakers want cheap, efficient rules that keep them in office. And those rules are not necessarily the same sky-is-falling proposals that people are predicting Congress will adopt.

Jeffrey Fisher: On reflection, I think that I was able to win the *Blakely* case because I gave the Court a clear test. If you accept that there is something wrong with the statute that was at issue in *Apprendi*, then I think it is very hard to come up with a rule that would prohibit that abuse but allow sentencing laws like Washington's to stand. The other side didn't really give the Court much of a proposal here, and the best the dissent could come up with on its own was the "tail wagging the dog" test.

I really do believe in the rule of *Apprendi* and of *Blakely*. I realize that it is quite a formalistic rule; and it is not particularly grounded in pragmatism. But I think formalism in this context is okay.

I think that the separation of powers is driving *Apprendi* and *Blakely*. I think both wings of the majority—represented by Justices Scalia and Stevens—are content, constitutionally speaking, to leave it to the legislature to come up with whatever system they want, and if they want to give judges complete discretion within a broad range, that's okay. These Justices really believe in the political process. They take a very long view of the Constitution, and they trust that if the public thinks overly broad discretion is unfair then legislatures will give the appropriate procedural protection to "sentencing factors" meant to separate exceptional from ordinary offenders.

Perhaps I'm young and a little naïve, but I'm willing to take the same bet. Kansas already went this route, and it looks like other states such as Washington will go this route. Even if we have an immediate reaction from Congress that we don't like, I still contend that, in the long term, laying bare the choices for sentencing before democratic bodies is a good thing.

To those people who say "I disagree with *Blakely* because I think a horrible legislative response is going to come," I hope you all will go to Congress and tell your Congressmen that the plans they have on the table are horrible.

Session 2

Can We Reconceive a Good Guidelines System in Light of *Blakely*?

Lawmakers are already preparing a legislative response to Blakely. *Proposals range from returning to indeterminate sentencing, to eliminating the upper guideline sentence, to discretionless definite sentences for specific convictions. What issues arise as we examine these alternatives? Can* Blakely *facilitate progressive reform?*

David Yellen: The good news is that I think the post-*Blakely* world even in the federal system can work quite well and may in fact lead to better guidelines. The bad news is I doubt Congress is going to let that happen.

In a perfect world, the federal system would adjust to *Blakely* by simplifying the federal guidelines. The greatest mistake that the Sentencing Commission made at the beginning was the particular form of real offense sentencing that they adopted. There are special problems in the federal system. In states you have a little fraud, a big fraud and a super-big fraud, and most federal statues are not constructed that way. So there would need to be some special rules. The federal guidelines could be greatly simplified and come close to the way the states deal with these issues and would work quite well, and I think it would an overall improvement in the system.

The bad news is what I think Congress is likely to do. I was a congressional staffer when the guidelines took effect. When the final guidelines were promulgated by the Commission, lots of serious concerns were raised about them. And our little subcommittee on the House Judiciary Committee wrote some legislation to delay the guidelines for six months to work out some of these issues. We had unanimous support for that on our subcommittee including some fairly conservative members of Congress and expected no opposition on the floor. Then Congressman Dan Lungren gave a speech suggesting that a six-month delay in the implementation of the Federal Sentencing Guidelines would be effectively opening up every jail cell, letting every child molester out to harm our children.

That's been the prevailing ethos in Congress pretty much ever since.

Susan Klein: I think the Federal Sentencing Guidelines are conceptually and practically sound, despite what seems

like the prevailing opinion here and Kate's really excellent book to the contrary.

I do fear judging. I think the legislature is the best institution to make normative and policy decisions on what sentencing facts matter and how much they should matter. In a democracy, the relevance of whether the defendant had a bad upbringing or whether he used a gun ought to be decided *ex ante* by a legislature. We shouldn't have judges imposing their own moral values on an ad hoc basis—different from courtroom to courtroom, depending on that judge's feelings about rehabilitation, and his view of human nature. These things ought to be up for public debates and the only way to do that is to leave them in the legislature and not put them in the judiciary. We also enhance equality in criminal sentencing by having guidelines: Everyone who did "x" crime in "y" manner gets "z" sentence, no matter where they are or who they are. So I think it's vital to have guidelines either enacted by Congress or a commission.

I do, however, think judges are probably better suited than juries to make fine-grade distinctions on enhancements and on mitigators, and therefore I like both aspects of the Federal Sentencing Guidelines.

In this way, *Blakely* provides an opportunity to keep some of the best aspects of the Federal Sentencing Guidelines and ditch some of the worst. Post-*Blakeley* we can retain judicial factfinding—but we must pay defendants to waive their jury rights. This could be accomplished by offering additional acceptance points, a decreased sentence, and better procedures at the sentencing hearing. Even post-*Blakely*, we can have judge-made factual findings, as long as we pay the defendant either by acceptance points or decreased sentences.

In sum, I'm much more optimistic about what Congress is going to do.

Douglas Berman: I think the academic overreaction to *Blakely* is a reflection of the fact that our sentencing reform efforts have been conceptually under-developed. I have become a big fan of *Blakely* because it's forced me, and a lot of others, to start thinking seriously about this.

Put simply, sentencing has been an academic backwater. We have not seen, for example, a serious or robust law and economics dialogue about sentencing reform, or a civic republican dialogue about sentencing reform, or a libertarian dialogue, or a feminist dialogue, or a critical race dialogue. And then along comes *Blakely*, crashing the sentencing reform party with some constitutional law.

I have been thinking about the constitutional conceptual tools that might have helped the Court. Consider simple distinctions between offense factors and offender factors, and how that might matter in how we develop a sensible constitutional theory and policy of sentencing reform. Then consider the distinction between factual and legal determinations at sentencing. When you jump into these concepts, you quickly discover they do a lot of interesting and important work.

First, I think it helps us conceptualize *Blakely*. It's saying that all factual findings relating to any offense conduct, but not relating to the offender, which by law impact punishment levels must be proven to jury beyond a reasonable doubt or admitted by the defendant.

Defined this way, seemingly illogical and unsound distinctions become a little bit more rational. A defendant's prior conviction is an offender fact, not an offense fact, and maybe it doesn't fall under the *Blakely* rule. A prior conviction is not a part of the offense. That doesn't have to go to a jury necessarily because it's an offender fact rather than an offense fact.

The other distinction, the law/fact distinction, is one that gives me a much different view of *Blakely*. We do not have to say that every sentencing judgment a judges makes necessarily implicates the jury right if it's not a factual judgment about the offense.

Divide up questions of fact, law, offender, offense and I think we get to if not necessarily a better model, a model that is more conceptually developed than what we've been working with today.

Kevin Reitz: I think that *Blakely* probably makes it a little bit harder for the federal system to import good ideas from successful sentencing reform on the state level.

Prior to *Blakely*, I suppose the top three complaints with the federal system were: First, the federal system does a bad job at balancing between sentencing rule and discretion—it's too rule-based. All the state systems that I know tilt more towards judicial discretion. Second, states have at least taken baby steps towards thinking through categories of facts that ought to be adjudicated as part of the conviction, and which ought to be left over for the sentencing hearing. Third, the federal scheme has tended to be a one-way ratchet towards greater severity in punishment levels. Again, on the state level we see a much better experience in that domain.

Now, if these are areas where the federal system can learn from the states, I think *Blakely* makes the project harder, or is irrelevant.

First, severity. To restrain the rate of prison growth in their jurisdictions, most state guideline systems have reprioritized how prison bed spaces are used. We have more violent offenders, fewer property and drug offenders in many state prisons. In the federal system the experience has been the exact opposite.

Blakely on this issue is just an irrelevancy. As a matter of constitutional law, the Supreme Court is not very concerned about the proportionality and severity levels of sentencing. We were reminded of that only last year with *Ewing* and *Andrade*.

The other two areas where states have made progress are knocked sideways by *Blakely*'s formalistic rule.

The Washington sentencing system and some other states like Minnesota and North Carolina maintained a policy that discrete elements of offenses that have not been charged or convicted should not be facts left on the table at a sentencing hearing. The federal system got that fundamental question wrong in my view. Whole offenses are retried, or tried for the first time, during federal sentence proceedings.

Blakely's formalistic approach makes it more difficult to conceive of a solution to this problem. Ideally, we ought to develop a substantive distinction between facts that should be litigated at trial and those that can be left over for sentencing. Instead everyone's attention under *Blakely* is devoted to what is the "statutory maximum"? Where is that line drawn and how can we move it up or down so we can free judges or require judges to do what we want them to do? That's a very serious distraction from the project I would have recommended to Congress.

Finally, there is the issue of judicial discretion. Pre-*Blakely*, in a state like Washington, there was a decent balance between rule and discretion. Under presumptive sentencing guidelines in Washington and other states, the departure power is much broader than under federal law. In Washington, the judge departed visibly, on the record, subject to appeal.

The guidelines commissions in Washington and many states looked to that sort of record making over time to decide whether guidelines needed to be adjusted up or down. *Blakely* makes it harder even for state systems to operate in this way, and harder still in the federal system. It subtracts from judicial departure discretion and makes the formal terms of statutes and guidelines more determinative than in the past.

Frank Bowman: I also think that *Blakely* is a bad decision. It's formalistic, which is a polite way of saying it's incredibly simplistic.

Blakely is a bad decision because it's bad policy at the federal level. It's not going to increase the number of jury trials or the real power of juries. It certainly is going to increase prosecutorial power and I think it's going decrease, paradoxically enough, the sentencing discretion of judges.

Blakely is bad constitutional law because it focuses narrowly on the role of juries without considering the institutional strengths and weaknesses in interrelationship to the other actors in the criminal law system. It's also bad constitutional law because it produces bad outcomes. I say baloney. It's madness to suggest that your role as an interpreter of the Constitution has nothing to do with producing fair outcomes. Even efficiency has some constitutional role to play.

Call me a consequentialist if you want. To me that just means I care what happens, and I think the Court by not caring what happens is doing itself and the rest of us a disservice.

So, why are so many people here so darn pleased with *Blakely*? It's because *Blakely* promises to bring down the federal sentencing structure. This group, the chattering classes of sentencing law, tends to fixate on the federal system.

I think a good part of the guidelines' problems is simple mechanics—something called the 25 percent rule. The 25 percent rule is a provision of the Sentencing Reform Act which requires that the top of any given guideline range be no greater than six months or 25 percent higher than the bottom. The idea of course was to make ranges small enough that you were going constrain judicial discretion to a reasonable degree.

The problem is that if you go by 25 percent increments from a sentence of zero months to a top sentence of 360 months, you need 22 boxes. Now, if you have 22 boxes vertically and you have some boxes horizontally for criminal history category, you've got a hugely complicated system. Complication creates detail, and detail actually translates into prosecutorial power because the detail always depends on proof of facts and prosecutors are the masters of facts. Complication also creates legislative power because it gives Congress the opportunity to fiddle. That's why the 25 percent rule has to go for any kind of meaningful sentencing reform, even if we didn't have *Blakely*.

Aside from Mr. Blakely, I'm not sure who was all that upset with these State systems. They looked pretty good to me. These states had a very good rules-based system that gave an appropriate amount of discretion to judges.

What are our options at this point?

If you could do it politically, I think making the federal guidelines advisory for a set period of time would actually be a great thing because it would be a marvelous natural experiment. You'd get to see what judges would really do with all of these rules relatively unconstrained by mandatory guidelines. But advisory guidelines are not in the political cards.

Only on July 6, I was in the House Judiciary Committee testifying against a bill which basically made every federal drug crime, regardless of quantity, committed in any urban area in America, subject to a minimum mandatory penalty of at least five years. To its eternal shame, the Justice Department walked in and supported that turkey. They should be ashamed. I am happy to say that that bill has died for this session, but certainly that's the kind of thinking that's out there.

Then of course we get to the infamous Bowman proposal, where you simply knock the tops off the guidelines, thus eliminating the *Blakely* problem. I think it's quite likely that some version of this idea will be brought forward by either the Department or Senator Hatch or somebody else in the near future. Where the rubber hits the road is whether or not defendants will have any right to appeal sentences in the newly-expanded range, and whether or not any appellate right that you create triggers a *Blakely* problem.

To the extent that I like this proposal at all it's only because I think it's the best of a bad job and that it might stabilize the situation for a while, while a political evolution takes place in which more meaningful reform is possible.

Saturday, October 9

Session 3

***Blakely* and the States: Effects on State Law and the Changing Roles of Sentencing Commissions.**

How have state legislatures and courts responded to Blakely? *Which states have the best approach, and what can we learn from them? Many states began implementing comprehensive sentencing reform long ago. How does* Blakely *impact these efforts? Why are certain states more willing and able to address problems with criminal sentencing systems?*

Barbara Tombs: In Minnesota, the biggest problem we faced initially was trying to educate people that our state system was different from the Federal Guidelines. Then we basically had to decide two things:

First, what was the underlying sentencing philosophy for the state? Because that guided us in how we approached the response to *Blakely*. In other words, what was the purpose for sending people to prison?

We use a lot of alternatives up front before we put somebody in prison. But when we put them in prison, we put them there because we are punishing them.

In light of *Blakely*, our aggravated departures appeared to be unconstitutional, in the manner in which they were applied. That's important. Yesterday, I heard several references to the fact that the *Blakely* decision ruled the Washington guidelines unconstitutional. That's incorrect. It says the way they apply the departures are unconstitutional.

So in looking at that, we decided that our statute was constitutional, but we had to modify the way in which we did our aggravated departures. Regarding specific statutory enhancements, for example, such as possession of a dangerous weapon, we are requesting that courts go with a bifurcated system because we actually don't have that many of them. We have about 40 to 60 a year. They're very serious offenses and just for the issue of public safety and the issue of possible appeals and so forth, we recommend the court goes with the bifurcated trial.

Another issue is juvenile adjudications and the calculation of criminal history. Does an adjudication qualify as a conviction? Can we count those in the criminal history? The general sense of our commission is that it probably can be, but we probably will to have some kind of court decision on that.

Probation revocation is another big issue. Does that trigger a *Blakely* problem?

Still, we took the approach that the sky is not falling in. We've recommend to our courts, prosecutors, and defense attorneys how to address some of these issues. We do not want to run into the problem that we see in the federal system where they're going in all different directions. We were very careful to say we assume without deciding, knowing that the Supreme Court has the final say. But, like I say, we have to keep on sentencing people.

Judge Richard Walker: It's been a long, strange journey from Kansas, being a garden variety indeterminate sentencing state, to the kind of state which drives Justice Scalia orgasmic in his opinions. And I wish I could say that there has been a straight line of progress, something that was incredibly logical and inevitable and legally majestic about it. But it's been just a series of happenstance occurrences which have been coupled with a willingness of Kansas to invest in the commission process and by willingness on the part of legislators to look to larger concepts than just their own parochial interests.

In 1989, Kansas was a mess. We were under prison over-crowding orders.

We had indeterminate sentencing system. It was not uncommon for somebody to have a five-to-life sentence. But this didn't mean five years and didn't mean life. Nobody knew what it meant. It could have meant two and a half years in prison, could have meant 20 years in prison.

There was also a perception of disparities in sentencing between urban and rural areas and along racial lines.

And so the Sentencing Commission was established to study this. We did a study which created all kinds of havoc, showing that in fact there was built in institutional discrimination in the system, simply because people who had good jobs and who had family support were being treated differently than folks who didn't.

Studying this, the Commission developed a sentencing system based upon a drug grid and a non-drug grid. We went from five classifications of felonies to ten classifications of non-drug felonies and four classifications of drug felonies, all with created presumptive sentences.

We also let judges make calls on the tough issues: People either who did serious crimes but didn't have that much record; or folks who did less serious crimes, but had more lengthy criminal history.

J. Bradley O'Connell: In California, we have a very high proportion of sentences affected by *Blakely*. Probably a much greater proportion than in the federal system or in any other system that uses guidelines for upper departures. Yet, ironically, *Blakely* is not all that important in the grand scheme of things.

California is a non-guidelines/determinate sentence state. We don't have points. We don't have a matrix. We don't have grids. A typical sentence consists of a base term plus enhancements. And our base terms are quite simple. They're triads, upper, middle, lower.

The reason we're affected by *Blakely* is that we use a presumptive sentencing system. We have a statute that says a judge shall impose the middle term unless he finds

aggravating or mitigating factors. And we have, in our rules of court, separate lists of aggravating and mitigating factors that can be applied to any crime.

I was shocked yesterday to hear that there were about one percent upward departures in the federal system. Sadly, there don't seem to be statistics on this in California, but I think maybe 20 to 30 percent of California sentences are upper terms. So you have a huge number of cases affected.

So why is *Blakely* not all that important? It's because long ago, our enhancements overtook our base terms as comprising the bulk of the sentence in serious cases. And enhancements are charged in the accusatory pleading, tried to a jury, and proved beyond a reasonable doubt. Our aggravating factors, the facts that then are used within our sentencing triads, are not.

The difference is that maybe in 1977, a robber who used a gun and caused serious bodily injury maybe would end up with a sentence of nine or ten years. Now, he might end up with a sentence on the order of 30 years to life. That's without any change in the base term—but the enhancements have changed.

So in the short immediate term, we are fighting all over the state over our upper terms. Our state Supreme Court has granted review in a couple of cases that should resolve some of those questions. But what we're fighting over is one- or two-year sentence increments per case. So we have a large percentage of cases affected but a lesser per case quantum of sentence affected.

Steven Chanenson: For about 25 years, Pennsylvania has had presumptive sentencing guidelines. However, we are also an indeterminate sentencing state, which means we have parole release authority. As such, judges impose a minimum and a maximum sentence. For state (as opposed to county) sentences, the defendant cannot be released before the expiration of the judicially imposed minimum sentence.

The Pennsylvania Sentencing Guidelines only apply to the minimum sentence. When a judge imposes this minimum sentence, she must follow the Guidelines, which are flexible and allow for a healthy amount of judicial discretion with some appellate review. The maximum sentence is left completely to the judge's discretion. A judge may impose a maximum sentence up to the statutory maximum. Furthermore, our state courts have long deemed the maximum sentence the true sentence.

For *Blakely* purposes, the fact that the Pennsylvania Guidelines allow judges unfettered discretion to impose the maximum sentence is critical. It is our view that we avoid any and all *Blakely* problems because the maximum or true sentence is still within the judge's complete discretion.

Nevertheless, *Blakely* has provided an opportunity to focus the attention of the General Assembly on sentencing issues. Pennsylvania still has some *Apprendi* issues floating about—particularly in the area of three-strikes. I am optimistic that the General Assembly will be willing to resolve these issues in the near future.

Ronald Wright: North Carolina has a standard presumptive grid, which looks a lot like Minnesota and maybe Kansas. What's distinctive about North Carolina is its emphasis on controls of intermediate sentences. And that I think is completely unaffected by *Blakely*.

There aren't any departures from the guidelines as such. Instead, judges are told, "you can pick a sentence within the standard—the presumptive range, the mitigated range or the aggravated range." But those are the only possibilities. There is no further statutory range for departures, up or down from that.

On the other hand, those ranges are somewhat generous so there's quite a bit of play for the judges within those three ranges. And if you look at the numbers of upward or of mitigating and aggravated sentence ranges, sentences that are imposed, the numbers look and awful like the departure numbers from other states. So functionally, our mitigated and aggravated ranges look like departures.

How does *Blakely* affect this system? The North Carolina courts have been quick to rule on the merits on these things. They say that any sentence that moved up into the aggravated range is affected by *Blakely* because you have to make certain findings to justify an aggravated range sentence.

The state commission is taking the lead on this. In January or maybe February, the commission is going to come back to the general assembly with some possible fixes that might be necessary for *Blakely*. So my impression is a reaction in the state that is patient. We're going to have to make changes, they won't be huge.

Kevin Reitz: It's pretty treacherous to generalize across states in the post-*Blakely* world. It seems to me that different states have different dimensions of *Blakely* problems.

Some are probably not affected at all on the systemic level. *Blakely* said that traditional indeterminate states remain constitutionally untroubled by the jury trial rule, even though we know the judges in those states engage in a lot of invisible fact finding. The very breadth of their discretion seems to somehow insulate them from jury trial scrutiny.

Then there is a universe of potentially as many as one-half of the states that have some sort of guideline of presumptive sentencing system. And I think across those states there is a range of uncertainty, even as a threshold matter, whether *Blakely* applies at all.

I know for example that Ohio has quite a detailed set of statutory presumptions, which they actually call guidelines. So there's a fierce debate: does *Blakely* even apply at all in Ohio? I think it does, but many in Ohio think it doesn't.

And so even on that threshold issue, there are states that have voluntary advisory guidelines. Yet in most the states that have voluntary guidelines, there is a statutory requirement that judges give a statement of the facts and circumstances that have persuaded the judge not to follow the recommended or advisory guideline sentence.

Now, it's at least possible that *Blakely* will attach to that sort of system. Is the requirement that you make a factual statement, the same thing as making a fact legally essential to punishment in the case?

Now, among the states that think they are affected by *Blakely* there are a broad range of potentially available responses. I tend to group of these under two headings: Approach and avoidance. It's possible to meet *Blakely* head on, as Kansas has done, as Minnesota proposes to do, by taking the Supreme Court's statement seriously—that juries are required to certain kinds of fact finding. For states that choose that option, you're taking *Blakely* on its word.

The avoidance strategies alter the fundamentals of a sentencing. In Pennsylvania, for example, the conjunction of guidelines plus parole release gives rise to the argument *Blakely* doesn't apply. Is that constitutionally airtight? No one knows for sure.

There's some discussion in some states that have presumptive guidelines, as in the federal system, to convert guidelines to voluntary advisory prescriptions, rather than prescriptions that have some force of law. That would be an avoidance technique.

Now, at the state level, this fundamental fork in the road, the choice between approach or avoidance, depends upon the minds of policymakers, depends upon how they weigh the prospective costs of either route. And I think for most of the states there would be real costs imposed in either direction.

The Kansas system, for example, does not function as well today as it did before it chose to meet *Blakely* head on. But yet, I think the landscape in Kansas would be far worse if Kansas had decided to dump its guideline systems entirely and go back do indeterminacy or move to voluntary guidelines or replace guidelines with mandatory minimums. So Kansas faced the choice between the incremental cost of creating a jury procedure for fact-finding and sentencing and making broader systemic changes that would have undone much of what the state has labored hard to achieve over many years.

In the better reform states where there is a real investment and a sense of accomplishment in what has occurred under sentencing reform, I think they are more likely to approach, rather avoid *Blakely*. These systems will probably lose something in judicial discretion, lose something in the transparency, perhaps even the reviewability of sentencing decisions. But the basic building blocks of structured sentencing, including an ability to predict and control prison growth and the use of prison resources over time. That basic function of guidelines, I think in a lot of places, certainly in Kansas and Minnesota and North Carolina, is seen as central, and the procedural cost of meeting *Blakely* head on are probably lower than opening the state up to uncontrolled discretion.

J. Bradley O'Connell: I think that to a greater degree than *Apprendi*, *Blakely* will reveal the practical difficulties with the two biggest anomalies in the *Apprendi* line of cases, which are *Almendarez-Torres* and *Harris*.

Let's just think of *Almendarez-Torres*. I'm thinking of what various people have said about their recidivist factors, custody points, prior offenses. I know in California we have several recidivist factors that go well beyond the bare fact of prior conviction.

For example, poor performance on probation or parole, which frequently is the probation report saying, "This guy's a disaster on parole. He's always using drugs, he's always getting arrested for stealing." Under a broad view of *Almendarez-Torres*, well, his parole is just part of his sentence on a prior case, that's a recidivist factor, you don't need to worry about that, no jury rights.

Yet that is a classic example of something depending on findings of historical fact, which have never been adjudicated at all, much less adjudicated in a prior proceeding in which the defendant had a right to a jury and truth beyond a reasonable doubt.

The second aspect is *Harris*. These systems were typically designed with the assumption that the same decision maker would be determining both aggravating and mitigating facts and balancing them. Now, a solution that says we're going to give you the constitutional rights required by *Blakely*, but no farther than that, would really create anomalies because you would have some aggravators found by juries, some aggravators found by judges and all mitigators found by judges.

You could do that, but it's certainly is an anomaly and it undermines a premise of most of these systems—whether they function as presumptive systems like California or guide line systems.

Ronald Wright: Most of the people actually working in individual states seem to think this is not that big of a problem. In that event, there's a very interesting inversion of the normal problem of constitutionalizing aspects of criminal procedure.

The normal problem of constitutionalizing aspects of the criminal procedure is you take provisions that are supposed to be applied to the Federal Government which worked in a certain sort of way, and applied them to the states, which have much different problems. And they become unworkable at the state level.

Whereas what I'm hearing here is kind of the inverse of that. That this problem may not be such a big problem for the states, but a much larger problem for the Federal Government.

But for what it's worth, during the procedural revolution of the late '50s to the early '60s, this issue of the

practicality of applying Bill of Rights provisions to the states is a really big ticket item.

Session 4

Lawyering Strategies, Balances of Power, and Plea Bargaining in the Wake of *Blakely*.

The Supreme Court openly debated whether Blakely *benefits prosecutors or defendants. Who is right—in the short-term and long-term? Who benefits if the federal guidelines are held unconstitutional? May federal and state legislators respond to defendants' new constitutional entitlements with stricter, harsher, sentencing rules?*

Ronald Wright: If you want to know the effects of *Blakely* on the ground, you've got to figure out the changes in plea negotiation dynamics. Plea bargaining is virtually the whole story of working criminal justice. It seems to me that it's useful to think back to what the world looked like just before *Blakely*—that is, the world created by *Apprendi*—and then to ask whether *Blakely* changes that world at all.

To some, *Apprendi* really only changed negotiations in two ways: the jury-trial right and the beyond-a-reasonable-doubt standard. Both of those changes favored the defense and nothing else changed. It's true these are trial rights and most defendants waive trial, but after *Apprendi* defendants could demand, during plea negotiations, a higher price for those trial rights and could get a lower sentence before waiving those now-strengthened trial rights. In other words, the new trial rights would spread smoothly over into the sentencing hearings. This is a classical microeconomic account of pricing in a well-functioning market, based on full information, with full transferability of rights and privileges.

On the other hand, some believe *Apprendi* trial rights didn't help the defendants who pled guilty because the rights are chunky. They won't spread very well from the trial setting to the sentencing setting. And they're non-spreadable because a defendant has to waive any factual disputes about the enhancements—now considered functional crime elements—to get to the sentencing hearing. Prosecutors don't have to pay that much more for waivers under *Apprendi*, even though technically the trial rights of defendants are strengthened, because the pricing devices for prosecutors are very clumsy. Sometimes you have to overpay to convince someone to waive a trial. You can't offer 1.5 points for acceptance of responsibility. You just grant the benefit or not, and it's not always possible to finely tune the offers. In economic terms, this account emphasizes the transaction costs of converting trial rights into sentence benefits in a world dominated by guilty pleas.

So which story is right? Well, whoever was right at the time, it does seem to me that *Blakely* makes these trial rights smoother and more spreadable. In other words, it is now easier for defendants to transfer some benefit at trial over into sentencing.

Justice Scalia's opinion in *Blakely* makes it clearer now that defendants can waive jury fact finding, so this trial right becomes, under the language of the *Blakely* opinion, a little more transferable.

But even more important, the beyond-a-reasonable-doubt standard just matters more often now. A huge number of enhancements go onto the table and now must be proven beyond a reasonable doubt. The beyond-a-reasonable-doubt benefit has become more weighty under *Blakely* and makes it easier to transfer because this higher proof standard could be used either at trial or at the sentencing hearing.

Margareth Etienne: It's hard to talk realistically about plea-bargaining without talking to some degree about whether or not *Blakely*, assuming it applies to the sentencing guidelines, will be a greater benefit to the defense or the prosecution. My prediction is that *Blakely* will benefit the defense in plea bargaining, but that it will do so only in the short run.

I want to make four points. The first two points go to the benefit that I think that the defense will receive from *Blakely*, and then the last two points are reasons why I think those benefits will be short-lived.

The first point is that chaos and confusion are generally helpful to the defense. Period. Sometimes the only bargaining chip available to the defense is the offer to make the prosecutor's life easier. And in the chaos and confusion that follows *Blakely*, that's not a trivial offer. Point number two is that *Blakely* potentially raises the cost of prosecuting cases. And to the extent that it raises the costs of prosecuting cases, it makes the work of prosecutors more difficult, thereby again giving the defense something to exchange in bargaining.

Now, a quick caveat regarding these two points is that they will be disproportionately helpful to defendants with good attorneys. Defendants with marginally competent lawyers will not be as well equipped to benefit from the increased chaos and cost of prosecuting cases. But this is generally true about the use of leverage in plea bargaining. It is most helpful to those who know how to use it.

Now, let me just get to the reasons why I think the benefits to the defense are not going to last. First of all, the chaos, the confusion will be sorted out fairly quickly. Congress will likely undo whatever it is that the courts decide to do in *Blakely*.

The last point that I want to make, the second reason I think that any post-*Blakely* or post-*Booker/Fanfan* changes will not last, is really a point about sentencing norms and path dependence. It seems to me that a lasting effect of the federal sentencing guidelines is that they've created a new norm in this country of what an appropriate sentence is. We've become a more punitive society. Sentences that we now believe are appropriate for crimes are sentences that would have been unfathomable fifteen or twenty years ago.

It seems to me that judges who have only judged under the sentencing guidelines in the last eighteen years have a very guidelines-based sense of what an appropriate sentence is going to be. And nothing that *Blakely* does is going to change that, I think, in the long run.

Daniel Richman: One of the things we looked at this morning was the pressure for dispositions in state courts and the readiness of prosecutors to compromise, because intake continues. In the federal system, intake must continue, but, in contrast to state sytems, it could be regulated to a spectacular degree.

Federal prosecutors essentially decide whether they want to expend federal resources on a case, and I assume that the price of trial will slightly go up now. But the way you deal with that isn't necessarily plea flexibility. You just take fewer cases.

Another way one can distinguish the federal structure from that in states is the greater distance between the policymakers and the line prosecutors. To the extent that there is an interest on the part of line prosecutors to compromise cases and move on to other things, that's not a view shared by the attorney general and the policymakers around him.

You all are celebrating *Blakely* and how it will make clear what factors are in an indictment, so that bargaining can be about them, but that is also radically going to increase the ability of Washington to monitor plea dispositions. And that leads to completely different consequences.

One of two things can happen if you *Blakely*-ize indictments. One is that the sentencing factors will be in the indictments, and that will make it more obvious when a prosecutor moves off the charge. The alternative is preindictment bargaining, which happens very frequently in white collar cases.

Whatever we can say about pre-indictment plea bargaining, we can agree that it's weird. Both sides have to go on the basis of really undeveloped information, trying to structure a deal that will pass the smell test either by a judge or by the prosecutorial hierarchy. This is a strange place to be, but we will move toward it, as we increase the inflexibility of the system.

One striking thing about state systems is that, regardless of how complex their penal codes look, they actually have things called "crimes" that anyone on the street can look at and recognize. In federal criminal law, the lack of clarity as to how conduct should most obviously be pursued leads to a charging flexibility on the prosecutor's part that can easily undermine a lot of sentencing reform or a lot of *Blakely*'s result.

This same lack of definitional stability also gives Congress an ability to react to *Blakely* that is far greater than state legislatures have. When it comes to criminal law, the federal legislative process makes you feel like you're walking through the rain forests, discovering new species. And since there's a very close connection with the Attorney General, I think Congress will rewrite the code to diminish the effects of *Blakely*, to the extent that those effects favor defendants.

So I'm sorry this is pessimistic, but they print the sentencing money in Washington. They really do.

Daniel Blank: From a defense attorney's perspective, the guidelines are problematic not just because of the length of the sentences. There's also a major procedural defect.

The promise of the guidelines—fairness and predictability—had been broken before *Blakely*. The guideline system is both uncertain and unfair.

For example, if you pleaded guilty to alien transportation, you could be sentenced for a murder if the judge found, by preponderance of the evidence, that one of the aliens that was transported had died. Even if neither the prosecutor nor the defense lawyer had intended such a result, if the probation office found a death and the judge agreed with that, then he would sentence for murder rather than alien transpiration.

Acquitted conduct is another big problem. Imagine a defendant charged with two drug counts, one for distribution of a joint. The defendant was caught standing in front of a warehouse, passing his joint back and forth with a friend. Inside the warehouse is 500 kilograms of crack cocaine. So he's charged with distributing a joint and conspiracy to distribute 500 kilograms of crack cocaine. The jury convicts on the joint, acquits on the warehouse, and nevertheless, based upon a preponderance of the evidence, the defendant is sentenced for 500 kilograms of crack cocaine under acquitted conduct by not a jury, not reasonable doubt, not rules of evidence. This is all by a judge.

So the promise of the sentencing guidelines of certainty and fairness, from the defense perspective, at least, was really broken well before *Blakely*.

The issue of whether *Blakely* would be better for defendants, or worse, was something that was a fairly heated exchange between Justice Scalia and Justice Breyer in the text of *Blakely* itself. And Justice Breyer, I thought, really astutely wrote that this is a problem. You think this is good for the defendants. It's not, because the juries who are going to be determining guilt are going to be confronted with all this horrible stuff that otherwise would have normally gone in front of the judge. And how is that possibly going to be good for the defense? Justice Scalia wrote back, no, it's if the defense wants to have those go in front of the judge, rather than a jury, they can wait. They can say I'll take a bench trial on part of it and a jury trial on the other. Or you can plea on the charge and then go forward with a sentencing jury.

And that's how its played out in the Ninth Circuit, at least. There was a case that I worked on and took up to the Ninth, *United States v. Charles Thomas*.

Charles was the passenger in a car. And the driver of the car had a big bag of crack cocaine. And a cop

started following them and the driver pulled over, gave Charles, my client, the bag and said, "Run." Charles did, but unfortunately, he tripped and fell. The bag fell. He was arrested.

He told me this whole story. And he said, you know, "I knew there were drugs in there, and I really suspected there was crack cocaine, but I was really surprised to find out how much crack cocaine was in that bag. I don't want to admit that I'm good for all that. Really. I had no idea."

So I stood before the judge and said, "My client accepts responsibility. He wants to plead guilty. But he didn't know that there was so much crack in the bag. And in any event, I'm disputing the allegation here about the total quantity of drugs because it appears to be gross, rather than net. It looks like this lab guy weighted the drugs with the bag rather than without the bag. And so I want a hearing on this. And I want a jury to determine it."

And the judge said, "No. If it's in the indictment you have to plead to it. Take it or leave it. And you can take your chances in front of a jury, if you want, or not."

And it ended up that we put in the plea without admitting the quantity, and the judge sentenced Mr. Thomas, based upon the quantity alleged in the indictment. He didn't resolve the factual issue of whether the weight was net or gross, didn't give me a jury, just said, "This is what it's going to be."

I took it up to the Ninth Circuit and the Ninth Circuit said that even if a sentencing enhancement is required to be proven by reasonable doubt and alleged an indictment, you don't have to admit it to enter an open plea. You can have the amount decided at a sentencing hearing.

The point is that *Blakely* really opens up the possibility for open pleas. When I say "open pleas," I mean "a plea without an agreement." A plea without an agreement with the government where you can pick and choose what it is you're admitting to and what you're contesting. Open pleas just give defendants a little more bargaining power. We have more chips to trade.

Patrick Keenan: I want to talk about the dynamics of plea bargaining and case management after *Blakely*, and pick up on some of the points that other people have made which, I think, reinforce what appears to be an emerging consensus about what it's going to mean for the defense.

One thing that hasn't been mentioned is that *Blakely* is not just about jury trial rights and proof beyond a reasonable doubt—it's also about notice. I think notice of potential enhancements is tremendously important.

Before *Blakely*, defense lawyers knew at the beginning of the case what the minimum was that they were facing, not the maximum. After *Blakely*, defense lawyers should know what the maximum they're facing will be, not the minimum.

This puts defendants in a better bargaining position. I don't think it's a huge benefit. Defendants used to take longer sentences for a little bit of certainty.

The second issue that I want to talk about has to do with evidence. And this is where the requirement of proof beyond a reasonable doubt and the jury trial really does matter.

The first way that it matters is that it equalizes the universe of evidence available to the defense and the prosecution during the bargaining process. The prosecution could bargain with admissible evidence and inadmissible evidence, with acquitted conduct and just recently charged conduct. So the prosecution had a much greater pool of evidence to draw on during the negotiation process than was available to the defense, mostly because of the desire of defendants to get credit for acceptance of responsibility. Another component of the evidentiary issue is the prosecution before could bargain based on evidence that was admissible, but strategically, not very useful. The situation facing most lawyers with admissible evidence or testimony from a witness that you know can come in, but the witness is readily impeachable, is that that's not very effective. It's not very useful, because you don't want to taint your whole case by putting up a bad witness. Before *Blakely*, the prosecution could save those witnesses for sentencing, where judges would hear the testimony.

And the third way that *Blakely* affects evidence has to do with case management. It used to be that prosecutors paid virtually no penalty for bad investigative technique or bad collection of evidence, because they could use inadmissible evidence at sentencing. Under *Blakely*, they have no place to use their bad evidence anymore. Now, they have to try to make all the evidence meet the same standard.

And I think these things taken together amount to removing a subsidy from the prosecution.

Judge Charles Breyer: The question here for this panel, as I understand, is where is the power going? Who's got the power? And what, you know, what was pre-*Blakely* power, and what is post-*Blakely* power?

Well, I would say this, that the judges had a particular role in this process, pre-*Blakely*. And because they could intervene in situations in which they believed that the sentence being negotiated, or arrived at, or put in front of them was inappropriate.

And the complaints that I hear about, "well, the probation department does this," or "inadmissible evidence does that." I'm prepared to address those. As Dan Blank knows, if there is going to be any sentencing enhancement, which is contested, there's a hearing. And while the federal rules of evidence don't apply, the court must make a finding as to the probable truth of a factor.

You say, "the probable truth of a factor," what does that mean? And what standards ought to be applied? The Ninth Circuit has said where it's going to have a disproportionate effect on the sentencing, the standard must be clear and convincing evidence. So when you take the case of the victim who died, the homicide wagging the tail of the

illegal smuggling situation, again, that's something that had to be proven by, you know, in my view, clear and convincing evidence, which is the same thing as beyond a reasonable doubt.

That's just my view. If somebody can tell me the difference, between clear and convincing and beyond reasonable doubt I'll be enlightened. I understand they are different words. I got that much. But I don't really understand the practical difference.

So Dan would say, "Well, look, let's have the jury make those determinations. And why not? It's very important." But the interesting question isn't really going to be whether a jury is going to do it or not. The question is the impact in plea negotiations because 97 percent of the criminal cases are resolved by way of plea.

What will suffer in my view from all of this is that you are giving up at least the promise of uniformity in sentencing. And at least the promise that a person who commits a bank robbery in San Francisco will get the same sentence as somebody who commits the bank robbery in Omaha, Nebraska.

Though I'm probably the vast minority, I'm not in favor of a lot of judicial discretion. It was judicial discretion that got us into this mess. I'm telling you, when you invite judicial discretion, you're going to invite vast disparities, which in any given case, you might be very happy to see.

Ask a good defense lawyer. He'll say, "That's exactly what I want to do. I want to get a better deal for my client than is the norm for clients who have this particular problem."

But, of course that's not my interest. And I would suggest it's not actually in the public's interest.

Session 5

Navigating Uncertainty and Transition: Appellate Review, Retroactivity, Habeas Corpus, and the Ex Post Facto Clause.

Blakely's *impact will likely resonate beyond the continued viability of sentencing guidelines. Chief among these concerns is whether* Blakely *will be applied retroactively to prisoners sentenced without the protections now guaranteed by the Supreme Court. In other words, does* Blakely *announce a substantive constitutional right, or merely a new rule of criminal procedure?*

Stephanos Bibas: One of the central issues in *Apprendi* and *Blakely* is whether the rule is procedural or substantive.

That is important under two different doctrines. The obvious one is for retroactivity on habeas corpus. You could describe the *Blakely* rule as substantive: "These additional facts are now elements of the crime." If the rule is substantive, then it is fully retroactive under *Teague*.

You could also describe *Apprendi* and *Blakely* as procedural, saying the court is not adding to what is part of a crime. It is just saying that if the legislature has required proof of certain facts, then these procedural protections attach to them regardless of the label the legislature gave them.

This question also matters for the standards of guilty plea waivers. If the rule is substantive, then a plea is not knowing and intelligent if the defendant did not know of all the elements of the offense that he was pleading to. If it is procedural, then even a defendant who miscalculated his alternatives and their value because of a misinstruction about law gets no relief. His plea is still knowing and intelligent, because he knew that under his plea, he would be exposed to this maximum possible sentence.

We can also break up the procedural category to ask if *Blakely* is a watershed rule of criminal procedure that's fundamental to the reliability of the fact-finding process, and therefore also retroactive under *Teague*. Or is it just an ordinary procedural rule?

In the majority's view, *Blakely* is a ringing vindication of the adversarial system and populist jury. Before the community can brand someone with a certain stigma, before it can inflict a punishment, the conscience of the community has to speak through the jury. The right should be retroactive on this view, on habeas, as well as direct appeal. And anyone who pleads guilty without knowing about it, the plea should be invalid.

The dissents' fundamental point seem to be the majority's rule is so formalistic that it does not make any sense. It is just a set of procedural hoops they want the legislature to jump through. And if it is just a set of procedural hoops, then on this view, it is an artificial requirement about method of proof. It does not have anything to do with the bedrock of the substantive criminal law. It should not be retroactive.

As much as I have been a critic of *Apprendi* and *Blakely*, I think that logically, if there ever was anything that was a watershed rule of criminal procedure that is fundamental to the reliability of the fact-finding process, it is proof beyond a reasonable doubt.

The question here should not be whether a fact increases the maximum penalty, but whether, under the Eighth Amendment, the maximum sentence for a crime would be cruelly disproportional to the elements that the prosecution proved at trial. In that world, unlike the *Blakely* world, juries would, in a meaningful sense, actually authorize a particular punishment or stigma.

Michael Dreeben: I want to invite you into what the life has been like for federal prosecutors and federal appellate lawyers ever since *Blakely* came down. Just imagine a world that existed when you woke up on June 24 or June 25. All of a sudden, you now have thousands of new federal crimes; thousands of new federal elements, most of which had never really been authoritatively construed by courts of appeals; none of which had ever been used as the basis for jury instructions, or played any role in Rule 11 colloquies, or had been treated under the lesser included offense rules that governed trials, or had been adequately analyzed under double jeopardy, and so on. And all of a

sudden, you now had hundreds of new questions about what procedures are going to apply.

The government is assuming, prophylactically, that *Blakely* created the sentencing guidelines as new miniature elements, or sentencing elements. This is what it's like when you start calling something an element that never was an element before.

Blakely said that a defendant doesn't have to take a jury trial on sentencing factor issues. The defendant can either stipulate to the relevant facts, or consent to judicial fact finding. The court said, "You can waive your *Apprendi* rights if you want to."

So what does all that mean? Well, it creates a number of complications for guilty pleas. And I think I will focus first on guilty pleas that were entered before *Blakely* came down.

In a lot of those cases, you may very well have stipulations by a defendant as to the relevant facts that are going to control guideline sentencing, and they'll be in a plea agreement. Now, is that enough in order to ensure that *Blakely* has been complied with, and that the rights that the defendant has on it have been waived? Or is it necessary that there have been some sort of a plea colloquy in the Rule 11 format, in which the Judge turns to the defendant and says, "These are the facts that you've admitted, Mr. Defendant, you understand that you have a right to a jury trial on them, and a right to proof beyond a reasonable doubt, are you agreeing to waive that right?" What is supposed to happen with those cases on appeal? Do they comply with *Blakely*, or are they really defective because the Judge didn't engage in the Rule 11 colloquy?

On appeal, is this omission going to be subject to harmless error analysis?

And this tracks right back in to whether this is a substantive right, a procedural right, a watershed right, or simply one of the ordinary innovations in constitutional criminal procedure.

You could say that these are just part and parcel of a right that the defendant knew he was giving up. I mean, he knew he was giving up a jury, for sure. He may not have known that he was giving up the right to proof beyond a reasonable doubt on these particular facts, but he knew he was giving up a right to get the government to prove whatever it needed to prove. And on that analysis, you would probably say that if the defendant admitted the fact, even if he didn't know the right that he was waiving, the error would be harmless.

Alternatively, you could say, that *Blakely* holds that these are now elements of an offense, and it must appear on the record that the defendant knew he had his right, and he waived it.

Let me just add in one other ingredient: What kind of waivers of *Blakely* rights are constitutionally permissible? We know that a defendant can waive the right to a jury trial. But what about the right to proof beyond a reasonable doubt?

Can a defendant agree with the government that, "We're going to go back and try this old style. We'll agree to have a hearing where the Judge will find by a preponderance of the evidence that this particular sentencing factor, now deemed a constitutional element under *Blakely*, will be proved up at a separate sentencing hearing, just like nothing ever changed."

How many people think that the defendant and the government could go to the court and say, "Try this to the preponderance of the evidence, rather than beyond a reasonable doubt," that that can be waived?

If it's not waivable, the argument would have to be that in order to impose criminal sanctions of an individual, we have heightened protections because the government should be restrained in the exercise of this coercive ultimate power, unless we have a degree of reliability that is satisfied either by the defendant's own admission of the facts, or by an allocation of the risk of error that makes it awfully sure that it's not a mistake. Under this analysis—and I'm not saying that it is correct—the right to proof beyond a reasonable doubt would be non-waivable.

David Porter: I'm firmly in the naïvely optimistic camp about *Blakely*. I think in the short term you are seeing immediately substantial benefits for defendants. There are more rights and therefore more bargaining power.

Long term, the prospects are different. There is great uncertainly about what Congress might do, but I think you need to look at *Blakely* in terms of the larger debate on sentencing reform. Joe Kennedy put it best yesterday, when he said that the elephant in the room is that we just have way too many people in prison in this country, and for way too long.

When you have people from diverse views as Rehnquist, Kennedy, and Breyer basically agreeing on that basic proposition, I think that that says a lot.

Blakely is most valuable for individual defendants where, one, the evidence on the enhancing factors is weak. Two, where there are less prejudicial and sensationalistic types of enhancements involved. And three, where you have, frankly, lazy or overburdened prosecutors who are not eager to go to trial.

Let me now turn to direct appeals. On appeal, the first thing the Court is going to look at is, did you preserve the issue?

After *Apprendi*, the courts were asking, "Well, did you preserve the constitutional issue?" They insisted that unless you made a constitutionally based objection, that the jury should have decided the matter, you didn't preserve the issue.

I love practicing in the Ninth Circuit because in the first *Blakely* case it decided, the defendant raised the *Blakely* objection for the first time in post-submission briefing, after all the appeals briefs were in. So we're not talking about no-objection just in the trial court. Judge Paez said, "Well, *Blakely* is a sea change and we would be remiss in

not addressing the issue here." And he went on and he addressed it. And I think that's a wonderful way of cutting through the morass that's been created to avoid getting to the merits of these cases.

The fundamental question is does *Blakely* create elements with full constitutional protection? I don't think the Court is going to answer this in full, so we're going to have to address that in the time to come.

Steven Chanenson: Federal courts are in a transition period. We have *Blakely* but we do not yet have an answer in *Booker* and *Fanfan*. What should Judges do now? One interesting challenge is the question of alternative sentences. Once a District Court or a Court of Appeals has decided whether or how to apply *Blakely*, does it make sense for the District Court to address the possibility that their path of action on that central question is wrong?

Some courts have encouraged at least announcing alternative sentences, and have cited judicial economy as the primary justification. Others, notably Doug Berman, have argued that this path is, at best, misguided. Time is short so I want to simply raise this issue briefly and offer a modest defense of those District Courts that do consider the possibility that their prediction of *Booker/Fanfan* may be incorrect.

There was a somewhat comparable period after the federal Guidelines went into effect but before *Mistretta*. Many courts tossed out the Guidelines, finding that they were unconstitutional in part for reasons the Supreme Court ended up rejecting. During this period, a number of courts announced or even imposed alternative sentences. Several Courts of Appeals approved the practice to some degree, albeit often with limited analysis.

The admittedly questionable potential for judicial economy does not draw me to the area of alternative sentences. The primary issue for me is fairness to both sides. A key means for enhancing fairness is expanding the ability to present evidence at sentencing. Remember that most Courts of Appeals currently direct their District Courts to apply the Guidelines despite what apparently almost everyone in this room thinks is going to happen in *Booker* and *Fanfan*. As such, there are presently a number of arguments that are effectively, if not formally, foreclosed because they do not generally matter under the Guidelines, although they may be viable after *Booker* and *Fanfan*. Thinking about alternative sentences now should, at a minimum, allow the parties to raise claims that are foreclosed (legally or functionally) under the Guidelines. For example, between now and whenever *Booker* and *Fanfan* may come back to the District Court, witnesses crucial to either side concerning a defendant's alleged lack of guidance as a youth could disappear or be hit by a bus. There is also power in the argument that the parties and the Court best understand the case now, particularly if there was a trial. The case is fresh in everyone's mind today, not six months or a year from now.

Skipping over several issues in the interest of time, there are certainly concerns and difficulties in going all the way down the alternative sentencing path. Indeed, the extreme position of attempting to actually impose two sentences seems quite problematic. Yet, there are benefits in taking some smaller steps in this direction. In my view, these benefits are more about *fairness*—real and perceived—than judicial economy.

Ronald Wright: On the state level, it's not so much an evaluation of the constitutional and legal values involved that helps choose the procedural sort of details on the ground. Instead, it is really economy of effort. What can we do that will work the quickest, that leaves us the most certain about our outcome?

Let me tell you a quick story from North Carolina to illustrate this economy of effort dynamic. In North Carolina, after *Apprendi*, we had to figure out what to do with firearm enhancements. What do we do? Well, some prosecutor comes up with some language for special jury interrogatory forms on the fly, and tries it.

Lo and behold, this not very carefully thought out procedural way through the maze survives scrutiny. The North Carolina Supreme Court approves it.

Now you've got your antibody to *Blakely*. Now that *Blakely* has arrived, all of the prosecutors and defense attorneys that I've talked to are saying, "We'll handle it the same way we do firearm enhancements." Why? Is it elegant? Does it further the values of *Blakely*? Well, no, we'll do it because it works.

And an extra virtue for the defense is we don't have to be very explicit about going to the legislature and asking them to really think about what they want the world to look like now. So we can have a very low visibility, low impact, and appellate-approved fix.

For me, this whole sequence of events shows something about the genius of the common law.

J. Bradley O'Connell: In most appeals, we've found that all the action is on harmless error. And what I find most noteworthy is the framework for prejudice and harmless error for *Blakely* error is quite different than *Apprendi* error.

Under *Apprendi*, the harmless error analysis is pretty similar to that for an omitted element in a jury instruction. Especially if it was a jury trial, you look at the state of the evidence, you look at whether or not the issue was necessarily determined under other jury findings. You ask, is there any way the jury could have rendered the verdicts they did without necessarily finding these other facts? It's something we fight about a lot, but at least we know what the fight is.

On the other hand, let me give you what I consider the typical case of *Blakely* error we're seeing. You've got four aggravating factors cited by the court in support of an upper term. Two of those violate *Blakely*. On the other side, you've got two or three mitigating factors.

Our preferred framework for this problem goes like this: Once you have found that some factors violate *Blakely*, the fact that there's some other aggravating factors out there is certainly relevant, but that doesn't end the inquiry. What you have to do is you have to take the harmless error analysis and apply it to the ultimate sentencing decision. So if two out of four of the previously stated aggravating factors have been knocked out of the case, and there are also some mitigating factors over here, the reviewing court has to ask, "Is there a reasonable doubt whether the sentencing judge would have struck the same balance, and still come out with an aggravating term, if the number of available aggravating factors were so diminished?"

There are two competing models pressed by the state. One of which is, even if most of your aggravators have been thrown out, as long as there's one aggravator there, that ends the inquiry. Because *Blakely* is about authorization to impose an upper term, and because the presence of one aggravating factor theoretically would allow an upper term, the *Blakely* error is harmless.

Yet another model looks at everything, all the verdicts in the entire case, and counts up the maximum number of years one theoretically could have received. For example, if every count was sentenced consecutively or if certain enhancements that were dismissed as part of discretion had not been dismissed, the court could say, "Even though most of the factors cited in support of the upper term on the principal count were bad, if they'd sentence counts two and three consecutively instead of concurrently, you would have still ended up with a longer sentence, so there's no *Blakely* error."

We have absolutely no consensus emerging as to which of those frameworks is the correct one. Certainly, it is not answered directly by either *Apprendi* or *Blakely*.

Session 6

Idealistic Reflections: The Future of Sentencing Reform.

In this session U.S. District Judge Charles Breyer proposes that Congress make the Federal Sentencing Guidelines advisory. Judges would find sentencing facts beyond reasonable doubt, guideline ranges would be presumptively reasonable, and departures subject to appellate review. What does an ideal sentencing system look like? What are we likely to get in the wake of Blakely?

Kevin Reitz: I think some more successful state innovations in sentencing guideline reform have been one of the few bright spots in the American Criminal Justice history in the last 30 years. Now, post-*Blakely*, I think the calculus potentially changes.

If the basic structure of sentencing presumptions and guidelines and a permanent commission and appellate review give you results that you value, the incremental cost of accommodating to *Blakely* will be real. With respect to jurisdictions that already have a reform structure in place, this is, I think, going to be a relatively easy sell, as compared with states that are still thinking about their options or studying a potential reform trajectory for the future.

For example, Massachusetts, this year, brought forward legislation that they'd been working on for many years. It was really a progressive, innovative proposal, including giving judges power to depart from certain mandatory penalties. And it had a real chance of passing this year, at least, until *Blakely*. The big constitutional question mark posed by *Blakely* has shut down negotiations in the legislature and the proposal has been tabled.

That said, I think that the importance of a Model Penal Code project may increase rather than decrease if *Blakely* creates a perverse set of legislative incentives towards greater reliance on indeterminacy and mandatory minimum sentencing enhancements. And the gains that can be realized, if you go to a Minnesota structure or North Carolina structure, a structure similar to those in Oregon, Washington or Kansas may very well be worth having, despite the added cost.

Kate Stith: Let me applaud one consequence of *Blakely* that we haven't paid much attention to: The defendant will receive timely notice of all the charges against him. Under the current Federal system, and I gather in the state systems as well, there is no requirement that a defendant pleading guilty be advised of what additional charges are going to be brought against him, and proved only to a preponderance, at the sentencing hearing. So you could plead to one crime, and then at the sentencing hearing, "Surprise! We're going to show that you did it six times, and that's what you will be punished for." Indeed, under the Federal Guidelines this is *mandatory*. The judge is under a legal obligation to punish the defendant for "Guidelines crimes" he wasn't charged with until after he pleaded guilty or was convicted at trial. That has always seemed Orwellian to me.

When I served on the Criminal Rules Advisory Committee, I said, "Why don't we have a change in Rule 11, so that before the plea, the prosecutor must give notice of the aggravating factors she plans to allege at sentencing?" DOJ insisted it couldn't be done, even though in fact it was being done already in the Second Circuit, under *Pimentel*. The Advisory Committee voted seven to five to not adopt the proposal.

Marc Miller: I refer back to the 1970s, when Pierce O'Donnell, Michael Churgin, and Dennis Curtis wrote a book called, "Toward a Just and Effective Sentencing System: An Agenda for Legislative Reform."

I'm just going to read you a couple of the chapter titles, so that you realize how badly we are in need of another progressive effort to inform legislators.

Chapter One of that book is "A National Scandal." We could probably write that chapter again. Chapter Two, "Fingers in the Dike." Chapter Three: "Guidelines as a model for reform." Four, "Framework for Change." Five,

"Incarceration: The Sentence of Last Resort." There's a chapter on reasons and review, a chapter on the demise of parole.

This book was written to solve a different set of problems than we have. But it is an excellent example for what we can do.

This group can publish some very direct, short, readable, clear, reasonably widely-supported set of principles that could help to shape the debate. We know something's going to happen in Congress at some point.

What might that book look like?

Introduction, Constitutional moment. We could use that kind of language. You'd talk about the experiments and lessons from 25 years, celebrate the states up front, celebrate the Sentencing Reform Act, and praise Congress for its original principles and wisdom.

There's an opportunity to inform and define the notion of disparity. You talk about warranted and unwarranted disparity, uniformity and disparity. Mandatory penalties.

I think you talk about the purposes of punishment or justifications. What is the relationship between sentencing and the problem of crime?

We can write about the rights and responsibilities, not the constitutional constraints, of legislatures, commissions, sentencing judges.

And it's perfectly doable. There's my thought.

Judge Breyer: The question we started out with, "Where do we go from here?" reminds me of the lobster in the fish tank in a restaurant. I mean, you sort of know where you're going to go from there, right? And we're all very nervous.

If you were to ask the question, "Where would I *like* to go from here?" I would like to go as follows: I would like the sentencing guidelines to be advisory. I would like judges to view the guideline range as presumptively reasonable. I would like judges to be able to give reasons why they don't follow the range that is set forth in writing; their reasons for any particular deviation from the range. That reason would be subject to appellate review. I would like to have, in sentencing issues, the standard of beyond a reasonable doubt.

I would like to make sure that notice is given prior to the entry of plea, as to what the prosecutor believes the range of sentencing to be and the factors to be included in it.

Now, why won't we be there? I think we might not be there because as Justice O'Connor pointed out at oral argument, she said, "Well, I just think we have to leave all this up to Congress."

I'm not terribly sanguine about that possibility.

Albert Alschuler: I love Judge Breyer's proposal. I think it makes tremendous sense. And I have two questions about it. Is there any serious doubt that this would be constitutional under *Blakely*? The second question I want to ask is, who's against this proposal? Congress? The Department of Justice? Is anybody in this room against it? Would there be a consensus of federal judges?

Jonathan Wroblewski: I can respond to that. I think the answer at the Justice Department is "no." No likely administration that I can think of, would ever be in favor of that, if what they could have, by contrast, is anything like the system we've got.

Frank Bowman: I would be in favor of Judge Breyer's proposal. As a matter of fact, I've said so to the Senate. I favor advisory guidelines. Even if it wasn't a permanent solution, I'd be all in favor of it. But I don't think any line prosecutor is going to want that, at least relative to what you got.

Joseph Kennedy: Judge, I had two small picky questions about the proposal. One is, when you say they can depart, is that just depart down? Or depart up or down?

Judge Breyer: Either direction. As soon as they depart, in either direction, they have to give their reasons.

Joseph Kennedy: My last question is academic. When I was listening to you earlier, I got the sense that you were a Marvin Frankel disciple. So I was surprised when I heard you say you'd be okay with advisory guidelines. So my question to you is, if you could've had this system back at the time that Frankel made his proposal, would you have supported it then? Or are your concerns about disparity not as great now, because we've had a couple of decades of guideline sentencing, and the culture of judging has changed in a way that makes a disparity problem less serious?

Judge Breyer: I am concerned about disparities occurring without principled reasons.

Let me tell you: I started out as a D.A. And as a D.A., the one part of the job I really hated was sitting down with the defense lawyer and starting to argue about how many months. First of all, I felt like I was in a bazaar. Secondly, I also thought that I didn't know what I was talking about, because my idea of four months is different from somebody else's idea of four months

So I don't want to go back to that system, where every judge simply puts on paper whatever they think is a reasonable sentence under the circumstances. Unless you have to give your reasons for it, and then somebody looks at your reasons and makes a determination whether those are good reasons from an appellate point of view.

Albert Alschuler: I want to ask Kevin a quick follow-up. Why do you think the states have been so much more accepting of moderate sentencing variations than at the Federal level, where it's a talismanic thing?

Kevin Reitz: You're right that the sense of necessity to impose some detailed conception of uniformity on sentences in state systems just doesn't exist. At the state level, I think there's always been a recognition that no

code or Sentencing Commission can, in advance, predict the particular factual considerations that judges should be allowed to consider in individual cases. No one's smart enough, in advance, to do that.

And the philosophy of uniformity was different. I think there was more of a sense that uniformity means we give judges a starting point, and we ask them to engage in a uniform thought process that is visible and reviewable when moving away from that starting point. And, in fact, it's a good thing when judges do that in appropriate cases.

Robert Weisberg: This is a *realpolitik* question. Before *Blakely* I started to observe some interesting things happening to mandatory minimum drug sentences in the states: Basically, the potential repeal or actual repeal in some states of what we'll call the Rockefeller-era drug laws.

Why? Well, gee, it was budgetary stuff. In fact, this reform was significantly led by Republicans or conservatives. It was a true "Nixon goes to China."

So why are we so worried about Congress? Is it that the Federal system isn't even susceptible to the kind of budgetary constraints, as compared to the state system? Is it because the Federal criminal system doesn't involve that many criminals—but Federal legislators are the most visible legislators, so they are the most recklessly indifferent to what they do? And if you also combine it with the fact that crime is supposed to be down, are we too pessimistic about what would happen in Congress?

Michael Dreeben: Many people have observed that the sentencing guidelines emerged as a surrogate Federal Criminal Code, layered right on top of the defective structure in Title 18, which was never reformed because Congress could never muster the political will to do it. There were too many committees that blocked action on it, and with all the different constituents fighting over it, it became a politically untenable project.

Yet Judge Breyer's proposal would require the Congress to do far more. It requires them to properly graduate various crimes and punishments. Given that Congress failed, given a decade to do a similar project before, what should we think about the actual prospects for enlightened form, in a short period of time in a panicked environment after *Booker* and *Fanfan*?

Judge Breyer: I suppose my answer would be in three parts. One, I'm not terribly optimistic, but I think Congress will perceive that they've got to act quickly. Two, I would sunset the proposal. One of the effects of sun-setting is to focus the legislative mind on a point certain, at which you may be back to chaos again. Part three of my answer is: You've got to figure out a way to make the solution, comprehensive though it is, simpler. And I have a couple of ideas about that but time does not permit.

Susan Klein: I don't think voluntary guidelines are going to work. It might depend on who drafts them. Because over time, judges will just do whatever they want. Some kind of appeal will not solve the problem because it's going to be meaningless, right? There's always a reason to depart from the guidelines: "I didn't like it. I thought it was too high." Or if you really put bite into the appeal and you say, "You have to have a reason that follows all the policy judgments of the guidelines," then you have a *Blakely* problem, right?