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Implementing *Blakely*

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In *Blakely v. Washington*, the Supreme Court aimed to give "intelligible content to the right of jury trial."[1] At present, however, the nature of that content appears less than obvious. By declaring the principle that facts resulting in enhanced sentences must be proven to a jury, the Court has raised a number of unanswered questions. One of these is the question of which sentencing regimes beyond the State of Washington the ruling will eventually affect. Another is whether application of the ruling might prompt abandonment of guidelines altogether, and a return to indeterminate sentencing by judges. But another question — only beginning to be explored — is what procedures would be needed in a system that both implements *Blakely* and preserves sentencing guidelines. In short, how can determinate sentencing be implemented in a way that respects the Court's interpretation of the Sixth Amendment?

The Court's decision offers little guidance as to what precise form a "*Blakely* jury" might take. What factors would be submitted to the jury and what instructions would be given? Would it be necessary to present sentencing issues to the jury in a separate hearing, distinct from the trial itself? If so, what evidentiary rules would apply?[2]

If *Blakely* is applied to the federal sentencing guidelines, these questions and others related to them will likely occupy the attention of courts and legislatures for some time to come. But an initial attempt to answer these questions might begin with the decisions of federal courts that have already sought to apply *Blakely* without abandoning the guidelines. Several of these courts have empanelled special juries to find the facts relevant to sentencing enhancements.[3] Another helpful source of information is Kansas, the only jurisdiction in which the legislature has already provided for a modified guided sentencing scheme consistent with *Blakely*.[4] More guidance can be found in the handful of state systems where discretionary jury sentencing still exists,[5] and in the larger number of jurisdictions where jury sentencing is used only for capital cases.

These practical questions raised by *Blakely* point to an understanding of the jury's role at sentencing principally as safeguarding the rights of the defendant. *Blakely* introduces more formality and greater procedural protections during sentencing than exist under most current sentencing schemes. The government's sentencing allegations would be put to a higher standard of proof and to the test of an adversarial hearing. The allegations would then be checked by twelve ordinary citizens, rather than by employees of the state. The jury would be the neutral decisionmaker that restrains the state's ability to impose factually contested sentencing enhancements.

Still, the implications of *Blakely* stop well short of the more expansive understandings of the jury present in several state systems and implicit in some Supreme Court jurisprudence. While *Blakely* jurors would be making important factual findings, they would remain ignorant of the consequences of their findings.

A more complete endorsement of the jury would take into account the jury's ability to deliberate as a democratic body about the moral and legal questions inherent in sentencing. Some of the Court's statements in *Blakely* hint at the democratic features that qualify the jury to be more than a mere factfinder. It is therefore possible that the decision could prompt a conversation about even greater involvement of jurors in the sentencing process.

A. Facts To Be Decided by *Blakely* Juries

Blakely requires a jury finding on all facts that push a sentence beyond a legally prescribed range, whether the range is established by a statute or by legislatively mandated guidelines. But what questions are facts to be decided by jurors is not always obvious. Factors pertinent to sentencing are often complex and involve legal, factual and value judgments all at once. This murky boundary between law and fact makes the application of *Blakely* difficult.

Some questions are clearly factual and will be entrusted to the jury: What quantity of drugs did the defendant sell? Did the defendant use a gun? But other determinations, such as the role of the defendant in a conspiracy and the definition of loss in a complex fraud scheme,[6] involve mixed questions of fact and law. Courts may be reluctant to send such mixed questions to the jury. One post-*Blakely* court has already held, for example, that the calculation of the offender's criminal score falls to the judge, because it is based on mixed questions of fact and law.[7] Others have suggested that the court should attempt to separate the factual from the legal determinations, and submit only the former to the jury.[8]

Where separation of factual and legal issues is impossible, the most recent and relevant authority suggests that mixed questions should still go to the jury. In *United States v. Gaudin*, a pre-*Apprendi* case, the Supreme Court held that mixed questions of law and fact, such as the

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materiality of a false statement, properly fall within the jury's province at trial.[9] *Blakely* itself held that the question of whether the crime was committed with "deliberate cruelty," arguably a mixed question, is for the jury to resolve.[10]

It is also possible to distinguish among categories of facts and to submit only certain offense-related facts to the jury. In oral arguments for *United States v. Booker* and *United States v. Fanfan*, the two cases in which the Supreme Court will decide whether to extend *Blakely* to the federal sentencing guidelines, Justice Kennedy raised the possibility that the jury should determine only those facts that are most akin to traditional elements of the crime — drug quantity or use of a gun, for example.[11] Other facts historically considered sentencing factors, such as remorse of the defendant, would remain the judge's responsibility to decide.[12] Justice Kennedy has made a similar distinction between these two types of facts before. In *Mitchell v. United States*, he wrote the majority opinion holding that a defendant's silence about facts that concern "the circumstances and details of the crime" could not give rise to an adverse inference at sentencing.[13] By contrast, courts could draw adverse inferences from the defendant's refusal to speak about his remorse, since remorse has traditionally been a pure sentencing factor and is not related to the circumstances of the offense.

Drawing upon Justice Kennedy's reasoning, others have identified a distinction between "offense facts" and "offender facts" and argued that only the former should be determined by a jury. Doug Berman has noted that "the state accuses and prosecutes persons for what they do, not for who they are; consequently the jury trial right concerns offense conduct while having no application to offender characteristics."[14] As Berman points out, this interpretation has a solid textual basis.[15] The Constitution refers to a jury trial right for "crimes" and "prosecutions," suggesting that the jury should determine only facts pertaining to offense conduct.[16] This approach might also be seen as a reasonable means of limiting *Blakely*'s impact, since fewer facts would go the jury.

The distinction between offender and offense-related facts, however, is often not clear. Certain facts can be offense facts and offender characteristics at the same time. For example, is it an offender- or offense-related fact that the defendant committed the crime out of racial bias or that he was the leader in a criminal organization? Other determinations, such as the defendant's amenability to probation or future dangerousness, also seem to concern both offense-related facts and offender characteristics. More importantly, it is not certain that offender characteristics are the only facts extrinsic to the charged offense and thus outside the scope of the Sixth Amendment.

An alternative approach would view as "extrinsic" those facts that are removed in time and context from the charged offense. This dividing line should not be too difficult to administer. Courts already distinguish in a similar fashion between "intrinsic" and "extrinsic" facts under Federal Rule of Evidence 404(b). Under Rule 404 (b),[17] facts are considered extrinsic to the offense (and generally inadmissible) when they relate to events that occur at a different time and under different circumstances from the charged offense.[18]

Following the intrinsic/extrinsic facts distinction, a post-*Blakely* court could submit to the jury only those sentence-aggravating facts that are contemporaneous with the charged offense or otherwise closely intertwined with it.[19] Because prior convictions occur before the offense charged, the jury would not consider the simple fact of a prior conviction. The jury would be involved, however, where a sentencing enhancement rests on a finding that a defendant has committed crimes "of increasing seriousness." For purposes of that enhancement, the prior conviction is closely intertwined with the facts of the charged offense and falls within the scope of the Sixth Amendment.

In the end, even a clear distinction between intrinsic and extrinsic facts may be in tension with the principle underlying *Blakely*. Both *Apprendi* and *Blakely* look to the consequences of facts, not to the way facts are formally categorized.[20] It is possible that courts following *Blakely* would reject both the intrinsic/extrinsic and the offense/offender distinctions and require that all sentence-enhancing facts be found by a jury.

From the standpoint of institutional competence, there is little reason to keep juries from deciding sentence-aggravating facts extrinsic to the charged offense. As long as the trial is bifurcated to prevent prejudicial evidence from influencing the guilt/innocence determination,[21] the jury is well-capable of finding facts that occur before and after the offense, as well as during the offense.

B. Recidivism Determinations

A related and important question about *Blakely*'s scope is whether juries would determine questions of recidivism. The answer may hinge largely on whether the Supreme Court reconsiders its pre-*Apprendi* decision, *Almendarez-Torres v. United States*,[22] holding that the fact of a prior conviction should be found by a judge. Even if *Almendarez-Torres* is overturned, some recidivism determinations may still be kept away from the jury on the grounds that they entail legal judgments or facts extrinsic to the offense.

In *Almendarez-Torres v. United States*, the Supreme Court excluded prior convictions from the list of sentence aggravators that have to be proven to a jury.[23] In *Jones v. United States*, the Court reaffirmed its position, noting that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[24] The Sixth Amendment was not violated in submitting the prior conviction to the judge, because the defendant had already had the opportunity to have a jury finding on the facts of the previous offense.

Consistent with *Almendarez-Torres*, lower courts after *Blakely* have commonly held that recidivism

determinations should be left with the judge.[25] These court decisions may need to be revisited, however, if in deciding *Shepard v. United States* this term,[26] the Supreme Court rejects the "prior conviction" exception to *Apprendi*. There is a reason to believe this could happen. *Blakely* has arguably redefined the meaning of "sentencing factor" developed in *Almendarez-Torres*. After *Blakely*, any factor that increases the sentence beyond a legally prescribed range must either be admitted by the defendant or decided by a jury. Taken literally, prior convictions would appear to fit this description. Justice Thomas, who voted with the 5-4 majority in *Almendarez-Torres*, may now agree with this argument.[27]

Even if prior convictions might literally fall within the ambit of *Blakely*, there are good reasons to believe that the Court will stop short of rejecting the prior conviction exception outright. The fact of a prior conviction is almost invariably a matter of public record that can easily be confirmed by judicial inquiry.[28] The prior conviction has already been admitted by the defendant or proven to a jury. Prosecutors can be expected to argue that it would make little practical sense to ask the jury to vote on whether to believe the public record. Further, *Blakely* arguably requires that sentencing-enhancing facts be not only proven to a jury, but also pled in the indictment.[29] Yet a requirement that prior convictions be pled in the indictment might also appear excessive. The inclusion of prior convictions in the indictment may raise Double Jeopardy concerns[30] and prejudice the jury's determination on guilt or innocence.[31] At the same time, such inclusion hardly serves a clear notice purpose since a defendant may reasonably be expected to be aware of his own prior convictions.[32]

The prejudicial effect of including prior convictions in the indictment could be remedied by allowing the defendant to sever the indictment. Alternatively, prosecutors could announce their intent to seek a recidivism enhancement through a pre-trial notice, rather than through the indictment itself.[33] The trial could also be bifurcated to avoid prejudicing the jury's guilt/innocence determination.[34] These procedural safeguards, however, would be quite costly, and it is not clear that the additional costs are warranted for the proof of facts that have already been admitted by the defendant or confirmed by a jury in a prior proceeding. It is to be expected that even if *Almendarez-Torres* is overruled, courts will try to find ways of limiting the number of cases in which prior convictions need to be proven to a jury.

For example, in the event that *Almendarez-Torres* is overruled, it might still be argued that certain recidivism questions should continue to be determined by judges, on the ground that these questions are non-factual.[35] That argument is undoubtedly applicable to certain determinations made by judges "as a matter of law," for example, whether a prior felony was a crime of violence for purposes of career offender status.[36] Other determinations about the nature of the prior crimes, however, such as whether those crimes were of "increasing seriousness," are at least partly factual and may have to be submitted to a jury.[37]

Another way in which courts could limit the cases in which a jury determines prior convictions is by adopting the intrinsic/extrinsic fact distinction discussed earlier. *Apprendi* itself noted that the prior conviction exception might endure because it "does not relate to the commission of the offense itself,"[38] but rather to prior conduct. Even if this distinction were to be adopted, many recidivism determinations might be so intertwined with the offense charged that they would need to be submitted to the jury. For example, the question of a defendant's "future dangerousness to society" is likely to be resolved through findings related to both prior convictions and the charged offense. Because the fact of prior conviction in this case is closely intertwined with the facts of the offense, the finding of "future dangerousness" might fall to the jury.

C. Bifurcation

In considering how to proceed with *Blakely* juries, legislatures and courts must decide whether to provide for a separate hearing for enhancement-related facts. Several courts refusing to empanel *Blakely* juries have justified their decision at least partly on the grounds that bifurcation would be cumbersome and unfeasible.[39] Yet bifurcation is long-established practice in capital and non-capital jury sentencing, as well as in civil jury damage determinations.[40]

Bifurcation might not be necessary for all aggravating facts. Some findings that are intrinsic to the crime, such as whether the offense involved a fiduciary relationship, could be resolved at trial. But in many cases, bifurcation is indispensable to ensuring a fair trial.[41] Some of the information yielding sentence enhancements, such as character evidence and prior criminal history, may unfairly influence the jury's determination of guilt or innocence.[42] A unitary trial could also place the defendant in the awkward position of simultaneously arguing his innocence and contesting sentencing facts of which he is not supposed to have any knowledge if he were innocent.[43] In some cases, the sentencing phase itself might need to be bifurcated, to prevent the possibility that findings on certain enhancement factors would be unduly prejudiced by evidence relating to other factors, particularly evidence of other crimes.[44]

Given the importance of bifurcation to the fairness of jury sentencing, elements requiring bifurcation are best identified in advance by legislation. As a second-best solution, where the legislature finds it too difficult to enumerate all the factors that would require a separate hearing, it could, following the Kansas model, let judges determine on a case-by-base basis when bifurcation would be in the interest of justice.[45]

D. Procedural and Evidentiary Rules at *Blakely* Hearings

Assuming that proceedings are bifurcated to accommodate *Blakely*, what procedural and evidentiary rules would apply to the sentencing factfinding stage? *Blakely* has established that the burden of proof for facts that increase the sentence beyond a legally prescribed range would be beyond a reasonable doubt. But would the jury have to make its decisions unanimously? There is no constitutional requirement of a unanimous jury verdict at the guilt-innocence stage.[46] Nonetheless, many states continue to require unanimity, and judging by the experience in Kansas and in traditional jury sentencing states, it is possible that legislatures will import the unanimity requirement from the trial stage.[47]

Whether the same evidentiary rules used at trial should be applied at *Blakely* hearings is less clear. Under the federal sentencing guidelines, judges are permitted to consider "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."[48] At capital jury sentencing proceedings, too, rules of evidence are relaxed[49] or not applicable at all.[50] Illegally obtained evidence and evidence that violates the Confrontation Clause, however, is generally excluded from capital sentencing proceedings.[51]

Because *Blakely* factors function as elements and must be proven beyond a reasonable doubt, the same constitutional safeguards would likely apply during sentencing factfinding pursuant to *Blakely*.[52] It is less certain that the Rules of Evidence would automatically be imported from trial. If legislatures find that more flexible rules are preferable in presenting evidence relating to sentencing enhancements, they would be constitutionally free to depart from the current Rules.[53]

It is worth noting that legislatures have adopted more relaxed evidentiary standards at sentencing primarily in order to allow decisionmaker to consider all relevant *mitigating* factors.[54] The consideration of such mitigating evidence is deemed essential to the imposition of a fair and individualized sentence.[55] Because *Blakely* would apply only to consideration of aggravating facts, and the jury will not be making the ultimate sentencing decision, stricter admissibility rules would be more appropriate. This approach would also be consistent with the Court's general treatment of *Blakely* factors as quasi-elements of the offense.

More significantly, if *Blakely* factors are found to be the functional equivalent of elements, heightened evidentiary and burden of proof standards should also apply to sentencing hearings before judges, in cases where the defendant has waived his right to a jury trial.[56] The waiver of a jury trial does not include a waiver of the right to higher procedural protections.[57] Therefore, "the Sixth Amendment protections of a higher burden of proof and the application of the rules of evidence should apply no matter which factfinder is selected."[58]

Were *Blakely* interpreted to require greater procedural protections at sentencing hearings before judges, it would significantly alter the landscape of federal sentencing. Its effect would no longer be limited to the small number of cases where a plea agreement could not be reached. It would apply across the board to all findings of aggravating facts under a guided sentencing regime. According to the Justice Department, applying the higher burden of proof and evidentiary standards to judicial factfinding at sentencing would render the federal sentencing guidelines regime too costly to be feasible.[59] The additional costs might be worth bearing, however, in order to enhance the accuracy and fairness of factfinding that could significantly increase a defendant's sentence.

E. Special Verdicts and the Ultimate Sentence

Blakely might transform criminal jury proceedings in yet another fundamental way — it might move such proceedings away from exclusive reliance on general verdicts. Whether at the conclusion of a unitary trial or after a separate sentencing hearing, a *Blakely* jury would likely be asked to record its sentencing-related findings on special verdict forms. On these forms, jurors would respond to questions about their findings by simply checking a box.[60]

If bifurcation is not adopted, the special verdict could unduly influence the jury's guilt determination. "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. . . . By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted."[61]

Special verdict forms could also present practical challenges of comprehension for the jury. Some federal courts have refused to empanel *Blakely* juries in part because the federal sentencing guidelines are seen as "too complex for juries to decipher and apply correctly and consistently."[62] Of particular concern are mass fraud and conspiracy cases.[63] Fraud cases, however, represent a small percent of cases at the federal level, and the guidelines are most frequently applied to drug, firearms and immigration offenses.[64] Therefore, many of the determinations that juries will make will be purely factual and will involve only a few enhancement factors.[65] Even where multiple sentencing factors are present, courts will be able to draw on prior experience in drafting interrogatories and instructions under *Apprendi* and capital cases — not to mention complex civil cases, including civil RICO and fraud actions.[66] Jurors have generally proven adept at handling such interrogatories and instructions.[67] At the same time, inconsistent application of the guidelines has occurred even under the current regime of professional sentencing. At least one empirical study has shown that probation officers' uncertainty about the meaning of various guideline provisions has resulted in significantly disparate sentence recommendations.[68]

If the requirements of *Blakely* are to be carried out without abandoning determinate sentencing, there seems to be little choice but to devise the requisite forms and instructions. The Sixth Amendment does not evaporate simply because the guidelines are too complex.[69] Consequently, the move toward jury factfinding may finally spur the Sentencing Commission to simplify the federal sentencing guidelines along the lines of the guidelines used in Minnesota, Kansas, and Washington.

F. The Cost of *Blakely* Juries

One of the main reasons why many federal courts have refused to convene sentencing juries after *Blakely* has been the cost of such a procedure. Bifurcation has been criticized as impractical and expensive, "a cumbersome, burdensome procedure that, even in cases where there is a plea agreement, would often result in a full trial in order to resolve enhancement issues."[70] *Blakely* juries are expected to "cause substantial resource problems" and "result in delays."[71] The *Blakely* dissenters themselves expressed serious concerns about the costs of sentencing juries.[72]

Yet experience with the procedure at the state level belies these concerns. In Kansas, jury sentencing hearings have generally taken about an hour.[73] Furthermore, the number of cases affected by *Apprendi/Blakely*, at least in state systems, is not likely to be high. In Kansas, fewer than 10% of criminal cases have been affected by the application of *Apprendi* to the Kansas Sentencing Guidelines.[74] Juries have been empanelled in only around twenty cases per year in 2003 and 2004.[75] In Minnesota, less than 8% of felony sentences (approximately 1,000 cases per year) involve aggravated departures that would be affected by *Blakely*.[76] Of these cases, approximately 92% are resolved through a guilty plea.[77] Similarly, out of 30,000 felony sentences in Washington last year, only about a hundred cases involved upward departures without the consent of the defendant.[78]

It is also unlikely that *Blakely* would lead to an explosion in trials on sentencing enhancements. To date, Kansas has not seen a significant increase in the number of trials related to aggravated departures.[79] Perhaps one reason for this relative stability is the requirement in Kansas that if a defendant waives the right to a jury trial, he also waives the right to have a jury determine aggravating circumstances.[80] The same rule has been applied by most jury sentencing states[81] and by at least one federal court that empanelled a jury to comply with *Blakely*.[82]

Whether or not this double-waiver requirement is applied more widely, the number of trials is unlikely to increase significantly as a result of *Blakely*. In a plea-driven system, enhancements are already adequately factored into the bargains struck by prosecutors. Interviews with prosecutors and judges in Kansas indicate that "it had already been rare for judges to sentence defendants to enhanced sentences after trial, largely because in a plea-driven system the available sentences after trial are already effectively 'enhanced.'"[83] In the end, unless the prior conviction exception to *Blakely* is abolished, many states will be able to keep their current sentencing schemes intact. Those that are affected by *Blakely* will likely implement an easy fix along the lines of the Kansas model.[84]

The impact on the federal system is likely to be much more significant. The federal sentencing guidelines include a greater number of sentencing factors affected by *Blakely*.[85] The Sentencing Commission estimates that sixty-five percent of the 1,200 federal sentencings that happen each week involve at least one *Blakely* factor.[86] Furthermore, the guidelines sometimes require the jury to make several enhancement-related findings in the same case, which would significantly extend the sentencing proceedings. In a recent case of a conspiracy to pass and produce fraudulent money orders, the *Blakely* sentencing hearing itself had to be bifurcated to allow for separate consideration of an obstruction of justice enhancement. The two sentencing hearings took four days of trial and three days of deliberation for the jury to reach its findings on a total of twenty-eight sentencing facts.[87]

As the U.S. Sentencing Commission itself acknowledges, however, the impact of *Blakely* is still unknown, and over the long run, it will be minimized as a result of factual stipulations in plea bargains in more than ninety percent of federal prosecutions.[88] Although some conspiracy or mass fraud cases will entail longer jury trials as a result of *Blakely*, the typical sentencing will involve few enhancing factors — "just the drug quantity and a gun."[89]

In the end, whatever the costs of implementing *Blakely*, the Court has made clear that when it comes to fulfilling the mandates of the Sixth Amendment, principle is more important than pragmatism. Implementing *Blakely*, therefore, "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."[90] It remains to be seen, of course, whether Congress and the states will seek to avoid this cost altogether by simply abolishing determinate sentencing.

G. The *Blakely* Jury: A Mere Factfinder or a Democratic Institution?

Blakely is centered on an understanding of the jury as a neutral factfinder and a procedural safeguard. In both *Blakely* and *Apprendi*, the Court affirms that the Constitution establishes a clear preference for jury factfinding in criminal cases.[91] More subtly, the Court suggests that this constitutional preference is well-grounded in practice and that twelve ordinary citizens are in fact likely to be fairer factfinders than a single employee of the state.[92]

Fairer verdicts are also expected to follow from the heightened procedural standards that accompany jury trials. A jury trial on enhancements would essentially transform federal sentencing from a quasi-administrative to an adversary process.[93] Under the current federal sentencing regime, judges make findings upon preponderance of the evidence and in reliance on probation

officers' reports full of hearsay. Defendants have limited opportunities to contest disputed facts.[94] Although this process has the advantages of efficiency and ease of administration, it may undermine the accuracy and fairness of the ultimate sentence. *Blakely*, on the other hand, introduces greater formality and procedural protections at the sentencing stage. Under *Blakely*, the government's case would be subject to proof beyond a reasonable doubt, and defendants would be able to challenge each sentencing allegation directly before the jury. The jury would serve as the "circuitbreaker in the State's machinery of justice"[95] and ensure the fairness of sentence enhancements.

Blakely does not explain, however, why the jury's role as a "circuitbreaker" should be confined to factfinding. The history of the jury includes a limited power to make legal and moral judgments related to sentencing.[96] And there is a strong argument that the jury is just as well-equipped to make fair assessments of blameworthiness as it is to make impartial findings of fact.[97]

Indeed, advocates of the jury have never relied solely on the objective superiority of the jury as a factfinding body.[98] Defenses of the jury have long drawn on its function as a democratic institution.[99] The Supreme Court hints at this conception in *Blakely*, when it compares jury participation to suffrage.[100] The Court further describes the jury as "no mere procedural formality, but a fundamental reservation of power in our constitutional structure .... meant to ensure [the people's] control in the judiciary."[101] The jury is not a mere factfinder, but an important element in our system of popular sovereignty and separation of powers.

It may seem peculiar to emphasize the function of the jury as a democratic institution in the sentencing process, given the central role of the legislature in defining statutory sentencing ranges. Yet social science suggests that there may be good reasons to think that the legislative process may not adequately reflect popular sentiments on questions of sentencing. Citizens hold very different attitudes about sentencing in the abstract versus sentencing in a particular case.[102] Furthermore, legislatures could not be expected to provide sufficiently detailed rules for the complex sentencing scenarios that arise in individual cases.[103]

Pointing to the inability of the legislature to provide adequate guidance in this area, many have called for a return to discretionary judicial sentencing. Although discretionary judicial sentencing is consistent with the narrow holding of *Blakely*, it does not effectively serve the democratic ideals of the Sixth Amendment. The Sixth Amendment was meant to reinforce the people's "control in the judiciary"[104] and to limit state power in criminal cases. These concerns do not disappear — indeed, they may increase — in discretionary sentencing schemes. While present-day judges are not the Crown appointees feared by ordinary citizens in colonial America, they may still be too removed from the communities most affected by their sentencing decisions.[105] Greater jury involvement in sentencing ensures that sentences do not stray too far from popular understandings of blameworthiness and fairness.[106]

To give content to the notion of the jury as a democratic institution, innovative legislatures could consider going beyond *Blakely*. The most interesting consequence of *Blakely* could come about if it prompted more states or the federal system to move toward the systems of the six states where full jury sentencing exists,[107] while preserving a place for simplified or advisory guidelines and judicial review.[108] Juries could be entrusted not only with the duty of finding the facts, but also with a greater share of the moral and legal decision-making that underlies sentencing.

Notes

1 Blakely v. Washington, 124 S.Ct. 2531, 2538 (2004).

2 *Cf. id.* at 2561 (Breyer, J., dissenting) ("Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay?").

3 *E.g.*, United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967, 983 (9th Cir. 2004); United States v. O'Daniel, 328 F. Supp. 2d 1168, 1177 (N.D. Okla. 2004); United States v. Harris, 2004 WL 1853920 (D.N.J. Aug. 18, 2004); United States v. Khan, 325 F. Supp. 2d 218, 232 (E.D.N.Y. July 12, 2004); United States v. Banton, 2004 WL 2285958 (E.D.N.Y. Oct. 12, 2004; *cf.* United States v. Landgarten, 325 F. Supp. 2d 235, 236 (E.D.N.Y. 2004) (court empanelled a sentencing jury, but the issue became moot after the parties agreed on the enhancement-related facts).

4 KAN. STAT. ANN. § 21-4718. The Kansas legislature enacted the legislation in response to a pre-Blakely decision by the Kansas Supreme Court, holding that all facts that enhance a sentence beyond a sentencing guideline range must be proven to a jury. State v. Gould, 23 P.3d 801, 809–814 (Kan. 2001).

5 These states include Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 n.16 (2003).

6 *Cf.* United States v. Pepsny, 2004 WL 1873996, *3 (3d Cir. Aug 23, 2004) (unpublished).

7 State v. Van Buren, 2004 WL 2222263 (Wash. App. Div. 2 Oct. 5, 2004) ("[C]riminal history is the result of a complicated calculation of rules and statutory applications.... This calculation is a mixed question of law and fact. The 'fact' is the fact of the conviction, which is not a jury question.... The law is the proper application of the law to the fact of the defendant's criminal record.").

8 United States v. O'Daniel, 328 F. Supp. 2d 1168, 1182 (N.D. Okla. 2004) ("For certain complex enhancements, it may be possible to establish the requisite factual basis without requiring the jury to sift through all the applicable definitions described in the Guidelines."); *cf.* State v. Kaua, 72 P.3d 473, 482 (Haw. 2003) (separating "historical facts" that are "extrinsic to the specific circumstances of the defendant's offense and therefore have no bearing on the issue of guilt *per se*" from facts that are "enmeshed in, or ... intrinsic to the commission of the crime charged, and submitting only the latter to a jury).

9 515 U.S. 506 (1995).

10 124 S. Ct. 2531 (2004).

11 Oral Arguments, United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105, Oct. 4, 2004, at

24–25, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-104.pdf (last visited Oct. 16, 2004).

[12] *Id.*

[13] 526 U.S. 314, 328 (1999).

[14] Doug Berman, Conceptualizing Blakely, *in* Sentencing Law and Policy Blog, Oregon Gives *Blakely* a Broad Reading, Oct. 15, 2004, *at* http://sentencing.typepad.com (last visited Oct. 15, 2004); *see also* New Jersey v. Abdullah, 2004 WL 2281236, at *15 (N.J. Super. A.D. Oct. 12, 2004).

[15] Berman, *supra* note 14.

[16] *Id.*

[17] Rule 404 (b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice ... of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404 (b).

[18] *E.g.*, United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995) ("When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed 'extrinsic.' 'Intrinsic' acts, on the other hand, are those that are part of a single criminal episode."); United States v. Allison, 120 F.3d 71, 74–75 (7th Cir.1997); Lee v. State, 689 N.E.2d 435, 439 (Ind.1997).

[19] *See* State v. Kaua, 72 P.3d 473, 482 (Haw. 2003) ("'[I]ntrinsic' factors, required to be pled in the indictment and found by the jury, are distinguishable in that they are contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense. Contrarily, 'extrinsic' factors are separable from the offense itself in that they involve consideration of collateral events or information.").

[20] *See* Apprendi v. New Jersey, 530 U.S. 466, 494 (2000) (noting that "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"); State v. Warren, 2004 WL 2293688, at *7 (Or. App. Ct. Oct. 13, 2004); *cf.* State v. Eddings, 2004 WL 2266794, at *13–14 (Tenn. Crim. App. Oct. 8, 2004) (unpublished) (reversing a sentence because the court did not submit to the jury, among other sentencing-enhancing facts, an offender characteristic — whether the defendant had "a previous history of unwillingness to comply with the conditions of a sentence involving release into the community")

[21] *See infra* Section C.

[22] 523 U.S. 224 (1997).

[23] *Id.*

[24] Jones v. United States, 526 U.S. 227 (1999).

[25] *E.g.*, People v. Winn, 2004 WL 1903428 (Cal. App. Aug. 26, 2004) (unpublished); State v. Henderson, 2004 WL 1925395 (Minn. App. Aug. 31, 2004) (unpublished); State v. Sanko, 771 A.2d 149, 155 (Conn. App. Ct. 2001); United States v. Losoya-Mancias, 2004 WL 1903390 (D.N.D. Aug. 25, 2004); United States v. Mohr, 2004 WL 1872701 (8th Cir. Aug. 23, 2004).

[26] United States v. Shepard, 348 F.3d 308 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 2871 (2004).

[27] Apprendi v. New Jersey, 530 U.S. 466, 499–500 (2000) (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact — of whatever sort, including the fact of a prior conviction — the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

[28] United States v. Johns, 2004 WL 2053275 (M.D. Pa. Sep.15, 2004); United States v. McGatha, 891 F.2d 1520, 1526 (11th Cir.) ("Prior convictions are highly verifiable matters of public record ....").

[29] Almendarez-Torrez v. United States, 523 U.S. 224, 256–57, 261 (1997) (Scalia, J., dissenting) (suggesting that many states have long treated prior convictions that raise the statutory maximum as elements of the offense and have required that they be pled in the indictment and be proven to a jury).

[30] *Almendarez-Torres*, 523 U.S. at 247 (pointing to potential Double Jeopardy problems if "prior convictions" were treated as an element of the crime).

[31] *Id.* at 235.

[32] Even when the defendant is aware of his prior convictions, however, pretrial notice would allow him to evaluate the risks and potential punishment at trial. *See* State v. Lowe, 811 S.W.2d 526, 527 (Tenn. 1991).

[33] *E.g.*, TENN. CODE ANN. § 40-35-202(a) (providing for pretrial notice when the state plans to pursue sentencing enhancement for career or persistent offenders).

[34] *See infra* Section C.

[35] *E.g.*, People v. Vonner, 17 Cal. Rptr. 3d 460 (Cal. App. 2 Dist. 2004).

[36] United States v. Taylor, 495 U.S. 575, 600–02 (1990) (holding that courts should make such determinations under a categorical approach, looking solely to the statutory definition of the offense and not to the facts underlying the particular convictions).

[37] People v. Gaitan, 2004 WL 2212089 (Cal. App. 1 Dist. Oct. 04, 2004) (unpublished) (holding that the jury should determine the question of whether prior convictions were "numerous" and whether appellant's performance on probation was "unsatisfactory"); People v. Perry, 2004 WL 1931773 (Cal. App. 1 Dist. Aug. 31, 2004) (unpublished); State v. Quinones, 2004 WL 1903250 (Ohio App. Aug. 26, 2004) (unpublished) (remanding for resentencing because a jury "did not make a finding that Quinones had committed the worst form of the offense or that he posed the greatest likelihood of recidivism, nor did he admit to either"); *see also* State v. Gross, 31 P.3d 815 (Ariz. Ct. App. 2001) (holding that defendant's release status had to be determined by a jury for purposes of recidivism enhancement); Hurst Laviana, *Trial Ordered for Man with 11 DUIs*, WICHITA EAGLE, Aug. 18, 2004, *at* http://www.kansas.com/mld/kansas/news/local/9427095.htm; *cf.* United States v. Gaudin, 515 U.S. 506 (1995) (holding that mixed questions of law and fact have to be determined by a jury).

[38] Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

[39] *E.g.*, United States v. Agett, 2004 WL 1698094, at *4 (E.D. Tenn., July 23, 2004).

[40] *E.g.*, ALA. CODE § 13A-5-45(a); IND. CODE ANN. § 35-50-2-8(f); N.C. GEN. STAT. § 14-7.5; OR. REV. STAT. § 163.150(1)(a); United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004) ("There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if and only if it finds liability, determines damages. Separate hearings before a jury on the issue of sentence is the norm in capital cases."); Iontcheva, *supra* note 5, at 354 (citing authorities for the proposition that four out of the six states that use jury sentencing in noncapital cases provide for bifurcated proceedings).

[41] *See* Gregg v. Georgia, 428 U.S. 153, 191 (1976); Holmes v. United States, 363 F.2d 281, 283 (D.C. Cir. 1966). *But see* Marshall v. Lonberger, 459 U.S. 422 (1983) (holding that bifurcation is not constitutionally required).

[42] *E.g.*, Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington — Practical Considerations for State Sentencing Systems*, POL'Y & PRACTICE REV. 7–8 (Aug. 2004) (reporting that the main concern of defense attorneys in Kansas with *Blakely* juries is that, absent bifurcation, prejudicial sentencing factors might be presented during trial).

[43] Monge v. California, 524 U.S. 721, 729 (1998); Apprendi v. New Jersey, 530 U.S. 466, 557 (2000) (Breyer, J. dissenting).

[44] United States v. Harris, 2004 WL 1853920, *10 (D.N.J. Aug. 18, 2004) (bifurcating sentencing phase to prevent jury from hearing evidence on obstruction of justice charges simultaneously with other evidence on other sentencing enhancements).

[45] KAN. STAT. ANN. § 21-4718 (b)(4) (2002).

[46] Apodaca v. Oregon, 406 U.S. 404 (1972).

[47] KAN. STAT. ANN. § 21-4718 (b)(4) (2002); *see also* Iontcheva, *supra* note 5, at 355.

[48] U.S.S.G. § 6A1.3.

[49] *E.g.*, 21 U.S.C. § 848(j) (2000); Oken v. State, 835 A.2d 1105 (Md. 2003).

[50] *E.g.*, State v. Nobles, 584 S.E.2d 765 (N.C. 2003); ALA. CODE § 13A-5-45(d); FLA. STAT. ANN. § 921.141(1); MONT. CODE ANN. § 46-18-302.

[51] *See, e.g.*, ALA. CODE § 13A-5-45(d); FLA. STAT. ANN. § 921.141(1); TENN. CODE ANN. § 39-13- 204(c); State v. Nobles, 584 S.E.2d 765 (N.C. 2003).

[52] *See* Harris v. United States, 122 S. Ct. 2406, 2425 (2002) (Thomas, J., dissenting); United States v. Croxford, 324 F. Supp. 2d 1230, 1240 (D. Utah 2004) ("Presumably, if sentence-enhancing facts must now be charged and proven to a jury beyond a reasonable doubt, constitutional evidentiary safeguards will apply."); *see also* State v. Kaua, 72 P.3d 473 (Haw. 2003) (constitutional safeguards apply to first-step of sentencing hearing to determine beyond a reasonable doubt if defendant is a "multiple offender").

[53] Williams v. New York, 337 U.S. 241, 251 (1949) ("The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."); United States v. Regan, 221 F. Supp. 2d 672 (E.D. Va. 2002) (holding that "regardless of whether the statutory aggravating factors are substantive elements, or merely the functional equivalent of elements, the Federal Rules of Evidence are not constitutionally mandated" in capital sentencing proceedings under 18 U.S.C. § 3593 (2000)).

[54] Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982) (holding that a capital sentencing jury must consider all relevant mitigating evidence); *see also* ARK. CODE ANN. § 5-4-602(4) (stricter Rules of Evidence apply to mitigating, but not aggravating evidence); CONN. GEN. STAT. ANN. § 53a-46a (c) (same).

[55] *Eddings*, 455 U.S. at 113–14.

[56] United States v. O'Daniel, 328 F. Supp. 2d 1168, 1177 (N.D. Okla. 2004); United States v. Ameline, 376 F.3d 967, 980 n.15, 983 n.19 (2004).

[57] *O'Daniel*, 328 F. Supp. 2d at 1180.

[58] *Id.*

[59] Memorandum from Assistant Attorney General Christopher A. Wray to All Federal Prosecutors 9 (2004), *at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/more_doj_analys.html.

[60] *E.g.*, KAN. STAT. ANN. § 21-4178; United States v. Harris, 2004 WL 1853920, *12 (D.N.J. Aug.18 2004); United States v. Banton, 2004 WL 2285958 (E.D.N.Y. Oct. 12, 2004). The prosecution would have to provide the defense and the court with adequate notice of the verdict forms it will seek. United States v. Khan, 325 F. Supp. 2d 218, 224 (E.D.N.Y. July 12, 2004).

[61] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

[62] *See* United States v. Medas, 323 F. Supp. 2d 436 (E.D.N.Y. 2004) (reproducing special verdict forms submitted to juries to comply with *Blakely*).

[63] Oral Arguments, United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105, Oct. 4, 2004, at 39–41, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-104.pdf (last visited Oct. 16, 2004) (arguments by Mr. Clement on behalf of the petitioner); *see also* United States v. Mueffelman, 327 F. Supp. 2d 79, 92 (D. Mass. 2004) (pointing to the difficulties juries will have in interpreting vague language of the guidelines, such as whether a criminal organization was "otherwise extensive" and whether the victim was vulnerable).

[64] *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 11, Fig. A (2002), *at* http://www.ussc.gov/ANNRPT/2002/Fig-a.pdf (last visited Oct. 31, 2004).

[65] Dahlia Lithwick, *Batman and the Penguin Eat* Blakely, SLATE, Oct. 4, 2004, *at* http://www.slate.com (last visited Oct. 9, 2004) (relating a remark made by Justice Stevens during *Booker/Fanfan* oral arguments); *see also* United States v. Banton, 2004 WL 2285958 (E.D.N.Y. Oct. 12, 2004) (relying on a special verdict form with two questions to the jury in the second, *Blakely* phase of a drug conspiracy case).

[66] *O'Daniel*, 328 F. Supp. 2d at 1182. ("While posing several questions to the jury in a criminal setting will be more delicate, the civil case experience informs district court judges on the best manner in which to implement this process, and puts district judges on ground that is both solid and familiar.")

[67] *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 206, 211 (1987). Special verdict forms are said to be helpful to jurors in handling complex evidence. Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 741 (1991).

[68] Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 FED. SENT. REP. 16, 17–18 (1997).

[69] Lithwick, *supra* note 65 (quoting a remark made by Justice Souter during *Booker/Fanfan* oral arguments).

[70] United States v. Agett, 2004 WL 1698094, *4 (E.D. Tenn., July 23, 2004).

[71] United States v. Toro, 2004 WL 1575325, *5 n.2 (D. Conn. 2004).

[72] Blakely v. Washington, 124 S.Ct. 2531, 2546 (2004) (O'Connor, J., dissenting) (noting that to prevent sentencing information prejudicing the jury during the guilt determination stage, the government "may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.").

[73] Emily Bazelon, *Locked in*, BOSTON GLOBE, Aug. 1, 2004, at D1; Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12.

[74] Bazelon, *supra* note 73.

[75] *Id.*; Jason Hernandez, Focus on the States — A Report from New Mexico, Aug. 19, 2004, *at* http://blakelyblog.blogspot.com (quoting Kansas Judge Richard Walker) (last visited Sept. 24, 2004).

[76] Minnesota Sentencing Guidelines Comm'n, The Impact of Blakely v. Washington on Sentencing in Minnesota 6 (Aug. 6, 2004).

[77] *Id.*

[78] Hernandez, *supra* note 75 (quoting Russ Hauge from the Washington Sentencing Commission).

[79] Minnesota Sentencing Guidelines Comm'n, *supra* note 76, at 7.

[80] The Minnesota Commission was hesitant to recommend that Minnesota follow this route because of potential constitutional concerns about tying the two waivers. *Id.*

[81] Iontcheva, *supra* note 5, at 355.

[82] United States v. O'Daniel, 328 F. Supp. 2d 1168, 1177 (N.D. Okla. 2004). *But see* United States v. Roper, 2004 WL 2358314, at *1 (D. Me. Oct. 19, 2004) (allowing partial waiver of *Blakely* rights).

[83] Wool & Stemen, *supra* note 42, at 8.

[84] Liptak, *supra* note 73, at A12.

[85] One estimate is that the vast majority of the 270,000 federal sentences handed down in the last four years since *Apprendi* may need to be revisited. (By contrast, the figure for affected state cases from the same period is estimated to be around 90,000.) Adam Liptak, *Sentencing Decision's Reach Is Far and Wide*, N.Y. TIMES, June 27, 2004, at 16.

[86] Memorandum from Lou Reedt, Director (Acting), Office of Policy Analysis, U.S. Sentencing Commission, to Tim McGrath, Staff Director, U.S. Sentencing Commission, Estimate of Number of Cases Possibly Impacted by the Blakely Decision, July 20, 2004, *in* The Data Plot Thickens, Oct. 7, 2004, *at* http://sentencing.typepad.com (last visited October 13, 2004).

[87] United States v. Harris, 2004 WL 1853920, at *4 (D.N.J. Aug.18 2004).

[88] Memorandum from Lou Reedt, *supra* note 86 (While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because most cases result in pleas accompanied by plea agreements which may contain stipulations of facts....).

[89] Lithwick, *supra* note 65 (quoting a remark made by Justice Stevens during *Booker/Fanfan* oral arguments); *see also* United States v. Banton, 2004 WL 2285958 (E.D.N.Y. Oct. 12, 2004) (relying on a special verdict form with two questions to the jury in the second, *Blakely* phase of a drug conspiracy case).

[90] Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004).

[91] *Id.* at 2543 (noting that the Constitution and the common law "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury").

[92] The Court insists that the *Apprendi/Blakely* model is fairer than the previous sentencing regime, in which:

> a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment ..., based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

Id. at 2542.

[93] *See* Apprendi v. New Jersey, 530 U.S. 466, 556–57 (2000) (Breyer, J. dissenting); *Blakely*, 124 S. Ct. at 2542–43; Doug Berman, Sentencing Law and Policy Blog, What Blakely Is Really About: Adversarial Versus Administrative Justice, Sept. 21, 2004, *at* http://sentencing.typepad.com (last visited Sept. 24, 2004).

[94] United States v. Robles-Torres, 109 F.3d 83, 85 (1st Cir. 1997) (observing that "evidentiary hearings at sentencing are — and should remain — the exception rather than the rule"); United States v. Jimenez Martinez, 83 F.3d 488, 498 (1st Cir. 1996) (finding no error in district court's denial of defendant's request to subpoena witnesses for purposes of challenging enhancement-related allegations).

[95] *Blakely*, 124 S.Ct. at 2539.

[96] United States v. Khan, 325 F. Supp. 2d 218, 228–31 (E.D.N.Y. 2004) (discussing the history); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 62–63 (1985); Letter from The Federal Farmer (Jan. 18, 1788), *reprinted in* 2 COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981); Matthew Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 378, 387.

[97] *See, e.g.*, Iontcheva, *supra* note 5, at 343–45 (observing that blameworthiness assessments are central to sentencing and that juries are better equipped to make such assessments than judges or legislatures); *id.* at 347 (citing studies indicating that juror deliberation leads to more informed verdicts); *id.* at 348 (citing studies showing that a vast majority of the public perceives jurors to be fairer decisionmakers than judges).

[98] *Cf.* Ring v. Arizona, 536 U.S. 584, 607 (2002) (Scalia, J., concurring) ("The Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness, or efficiency of potential factfinders .... The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free.").

[99] *See* Iontcheva, *supra* note 5.

[100] Blakely v. Washington, 124 S. Ct. 2531, 2539 (2004).

[101] *Id.* at 2538–39.

[102] Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1781 (1999); *see also* Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) ("Voting for a political candidate who vows to be 'tough on crime' differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death."); United States v. Khan, 325 F. Supp. 2d 218, 230 (E.D.N.Y. 2004) (noting that the jury "expresses the view of a sometimes compassionate free people faced with an individual miscreant in all of his or her tainted humanity, as opposed to the abstract cruelties of a more theoretical and doctrinaire distant representative government").

[103] Delegating this task to agencies gives rise to a new host of legitimacy problems. Agencies lack the democratic pedigree to make contested, value-laden judgments about blameworthiness, and such judgments are inherent in sentencing.

[104] *See Blakely*, 124 S.Ct. at 2539.

[105] *Cf. Khan*, 325 F. Supp. 2d at 220 ("[T]he judge is often unlikely to possess detailed knowledge or appreciation of the defendant's background with its subtle cultural and linguistic characterizations — usually so different from the court's: high status, relatively large income, assured medical care, well-to-do friends in high places, and the skills to take advantage of the system and to avoid its pitfalls.").

[106] Taylor v. Louisiana, 419 U.S. 522, 529 & n.7 (1975) (noting that the jury "plays a political function in the administration of the law" and that the "jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it").

[107] *See* Iontcheva, *supra* note 5, at 354–55 (reviewing the structure and function of these jury sentencing regimes).

[108] *See id.* at 365–76 (outlining a proposal for combining jury sentencing with guidelines and judicial review).