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SIXTH AMENDMENT — STATE SENTENCING GUIDELINES

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

BY

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8. Sixth Amendment — State Sentencing Guidelines. — Since the Supreme Court announced its landmark decision in *Apprendi v. New Jersey*,[1] commentators have worried that the guideline schemes currently used to sentence criminals throughout the United States could no longer be reconciled with the Court's Sixth Amendment jurisprudence.[2] The Court appeared to confirm these fears last Term when, in

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[1] 530 U.S. 466, 476 (2000) (holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999))).

[2] For an especially helpful discussion of the evolution of the Court's Sixth Amendment jurisprudence and its consequences for the constitutionality of guideline-based sentencing regimes, see

Blakely v. Washington,[3] five Justices agreed that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to [his] punishment,"[4] and therefore that "the maximum sentence a judge may impose . . . [is] the maximum he may impose *without* any additional findings."[5] In response, the academy[6] and the *Blakely* dissenters[7] predicted the demise of guideline sentencing, and several courts have held various regimes unconstitutional.[8]

These analyses neglect that Washington's highest court had authoritatively interpreted the sentencing system at issue in *Blakely* as permitting judges to upwardly depart *only* on the basis of facts other than those found by the jury in reaching its verdict. That the Washington Supreme Court took the unusual step of explicitly foreclosing departures based on the elements of the crime[9] provides an opportunity for courts to reconsider these interpretations in view of *Blakely*'s constitutional command. Most "determinate" sentencing systems feature discretionary-departure mechanisms[10] that can be interpreted to

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Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236, 1252 (2004) [hereinafter *Unconstitutionality of Determinate Sentencing*], which suggests that "[u]nder the . . . plain language of *Apprendi* and its progeny, [determinate sentencing schemes are] unconstitutional."

[3] 124 S. Ct. 2531 (2004).

[4] *Id.* at 2543 (emphasis omitted) (paraphrasing 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 55 (2d ed. 1872)).

[5] *Id.* at 2537.

[6] *See, e.g.*, Stephanos Bibas, Blakely's *Federal Aftermath*, 16 FED. SENTENCING REP. 333 (2004); *see also* Rachel E. Barkow, *The Devil You Know: Federal Sentencing After* Blakely, 16 FED. SENTENCING REP. 314 (2004).

[7] *See Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting) ("What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."); *id.* (Kennedy, J., dissenting) ("The majority opinion does considerable damage to our laws and to the administration of the criminal justice system . . . .").

[8] *Compare* United States v. Booker, 375 F.3d 508, 515 (7th Cir. 2004) (holding upward adjustments based on judicial factfinding under the U.S. Sentencing Guidelines (the Guidelines) unconstitutional under *Blakely*), *cert. granted*, 2004 WL 1713654 (U.S. Aug. 2, 2004) (No. 04-104), *and* United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004) (holding the Guidelines unconstitutional under *Blakely*), *cert. granted before judgment*, 2004 WL 1713655 (U.S. Aug. 2, 2004) (No. 04-105), *with* United States v. Pineiro, 377 F.3d 464, 472–73 (5th Cir. 2004) (holding the Guidelines constitutional notwithstanding *Blakely*), *and* United States v. Penaranda, 375 F.3d 238, 245 (2d Cir. 2004) (en banc) (certifying the question to the Court).

[9] *See* State v. Gore, 21 P.3d 262, 277 (Wash. 2001) (citing *State v. Nordby*, 723 P.2d 1117, 1119 (Wash. 1986)). The conclusion that the Washington legislature intended to exclude the elements of the crime from factors justifying an extraordinary sentence was far from obvious; indeed, the Supreme Court of Washington was divided with respect to which "factors other than those which are necessarily considered in computing the presumptive range" should be excluded from consideration by the sentencing judge. *Nordby*, 723 P.2d at 1119; *see infra* note 45. *Compare id.* at 1119 n.4, *with id.* at 1120 (Utter, J., dissenting) (arguing that the identity of the victim does not vary enough between cases to be included in exceptional sentencing factors).

[10] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2)(A) (2003) (permitting departure from the Guidelines when the court concludes that the circumstances of the case have not been "adequately taken into consideration"); *see also* COLO. REV. STAT. § 18-1.3-401(6) (2004)

permit judges to depart from the guidelines based on the elements of the crime.[11] *Blakely* should be read in light of its deference to the Washington Supreme Court's interpretation of its sentencing regime. Therefore, the decision does not call into question sentences imposed in regimes that permit judges to depart "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[12] To the extent that courts must choose between jurisprudence that forecloses departures based on the elements of the crime and the constitutionality of determinate sentencing schemes, the canons of constitutional interpretation demand that this jurisprudence, rather than sentencing legislation, be the principal victim of *Blakely*'s scythe.[13]

Shortly after his wife filed for divorce, Ralph Blakely abducted her from their home in Grant County, Washington, and forced her at knifepoint into a wooden box in the bed of his pickup truck.[14] Blakely was arrested after driving himself and his wife to a friend's house in Montana.[15] Blakely eventually plead guilty to second-degree kidnaping,[16] then a class B felony punishable by up to ten years' confinement.[17]

Blakely's sentencing was governed by Washington's Sentencing Reform Act (the Act), which specified a standard range of forty-nine to fifty-three months' confinement for his offense.[18] The Act also provided, however, that a judge could depart from the sentencing range if he found "substantial and compelling reasons justifying an exceptional sentence."[19] Although the Act provided a nonexclusive list of factors justifying exceptional sentences, the Supreme Court of Washington

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(permitting courts to impose a sentence "lesser or greater than the presumptive range" if they conclude that a case features "extraordinary mitigating or aggravating circumstances").

[11] For example, a sentencing judge could depart from the Guidelines in the case of a crime composed of elements A, B, and C on the basis of a judgment that any or all of those elements were not "adequately taken into consideration" by the Sentencing Commission in computing its sentencing ranges. *Cf.* Koon v. United States, 518 U.S. 81, 98 (1996) ("[W]hether a given factor is present to a degree not adequately considered by the Commission . . . [is a] matter[] determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.").

[12] *Blakely*, 124 S. Ct. at 2537 (emphasis omitted).

[13] *See* Brief of Amici Curiae An Ad Hoc Group of Former Federal Judges in Support of Neither Party at 20, *Booker*, Nos. 04-104, 04-105 (U.S. filed Sept. 1, 2004) [hereinafter Former Federal Judges Brief] (indicating that judges "have broad authority to depart from the Guidelines").

[14] *Blakely*, 124 S. Ct. at 2534.

[15] *Id.*

[16] *Id.*; *see also* WASH. REV. CODE ANN. § 9A.40.030(1) (West Supp. 2004).

[17] *Blakely*, 124 S. Ct. at 2535 (citing WASH. REV. CODE ANN. §§ 9A.40.030(3), 9A.20.021(b) (West 2000)).

[18] *Id.* at 2535 (citing WASH. REV. CODE ANN. § 9.94A.320 (West 2000), *recodified at* WASH. REV. CODE ANN. § 9.94A.515 (West Supp. 2004) (specifying the offense's seriousness level)).

[19] *Id.* (citing WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000), *recodified at* WASH. REV. CODE ANN. § 9.94A.535 (West Supp. 2004)).

had narrowed this group of factors, holding in *State v. Gore*[20] that "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors *other than those which are used in computing the standard range sentence for the offense.*"[21]

While the Act specified a range of forty-nine to fifty-three months' imprisonment in Blakely's case, the sentencing judge imposed an exceptional sentence of ninety months.[22] The judge justified the sentence by concluding that Blakely had acted with "deliberate cruelty," one of the statutorily enumerated grounds for departure.[23] Blakely appealed, arguing that the lengthier sentence violated the procedural guarantees of the Sixth Amendment as articulated in *Apprendi*.[24] Noting that the Supreme Court of Washington had already rejected a similar challenge,[25] the Third Division of the Court of Appeals of Washington affirmed Blakely's sentence.[26] The Washington Supreme Court declined review,[27] and the Supreme Court granted certiorari.[28]

The Supreme Court reversed.[29] Writing for a five-Justice majority, Justice Scalia[30] argued that the Court has consistently "concluded that the defendant's constitutional rights [have] been violated [when] the judge ha[s] imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding."[31] Because the constitutionally relevant statutory maximum is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings," the Court concluded, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[32]

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[20] 21 P.3d 262 (Wash. 2001).

[21] *Id.* at 277 (emphasis added).

[22] *Blakely*, 124 S. Ct. at 2535.

[23] *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (West 2000), *recodified at* WASH. REV. CODE ANN. § 9.94A.535(2)(a) (West Supp. 2004)).

[24] *See id.* at 2536.

[25] *See id.* (citing *State v. Gore*, 21 P.3d 262, 311 (Wash. 2001)).

[26] *Id.*

[27] *Id.* (citing *State v. Blakely*, 62 P.3d 889 (Wash. 2003) (denying review)).

[28] Blakely v. Washington, 124 S. Ct. 429 (2003).

[29] *Blakely*, 124 S. Ct. at 2538.

[30] Justices Stevens, Souter, Ginsburg, and Thomas joined Justice Scalia's opinion.

[31] *Blakely*, 124 S. Ct. at 2537; *see also id.* (noting, in support of the claim that historical sources of criminal jurisprudence demanded the application of *Apprendi* to sentencing factors, that authorities from Blackstone to Holmes agreed that a right to trial by jury has been understood to require that the "truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbours" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343) (internal quotation marks omitted)).

[32] *Id.* (citation omitted) (quoting BISHOP, *supra* note 4, at 55).

In Blakely's case, Justice Scalia argued, the sentencing judge had done exactly that. The judge's decision to upwardly depart could *not* have been based upon the jury's factual findings "because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered *only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.*'"[33] Because the judge would have been reversed if he had imposed the ninety-month sentence without the challenged finding, Justice Scalia argued, the additional finding that Blakely acted with deliberate cruelty was logically necessary to the imposition of that sentence.[34]

The majority also held that the fact that aggravating factors in Washington's scheme were illustrative rather than exhaustive was "immaterial" to the constitutional analysis.[35] Because the State's highest court required trial judges to identify "factors other than those which are used in computing the standard range sentence for the offense," Justice Scalia argued, those judges acquired the authority to impose the higher sentence "only upon finding some additional fact,"[36] in violation of *Apprendi* and its progeny.

Justice O'Connor dissented.[37] Recalling the wide disparities in sentencing that preceded guideline-based regimes, Justice O'Connor argued that defendants' Sixth Amendment rights were better served by a system that offered a defendant "a good idea of the types of factors that a sentencing judge can and will consider when deciding [how] to sentence him" than by the indeterminate approach that preceded the Guidelines, under which "[t]he ultimate sentencing determination could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant's crime or background."[38] Justice O'Connor also lamented the "substantial constitutional tax" that the majority imposed upon the criminal justice system, noting that the rule of *Blakely* would require prosecutors to charge in an indictment and prove beyond a reasonable doubt all of the facts that have historically

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[33] *Id.* (alteration in original) (emphasis added) (quoting *State v. Gore*, 21 P.3d 262, 277 (Wash. 2001)).

[34] *See id.* at 2538. Justice Scalia also rejected the state's argument that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which held mandatory minimum sentences constitutional and which has apparently survived *Apprendi*, *cf. Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Scalia, J., concurring), suggested that Washington's sentencing regime passed constitutional muster. *See Blakely*, 124 S. Ct. at 2538.

[35] *Blakely*, 124 S. Ct. at 2538.

[36] *Id.*

[37] *Id.* at 2543 (O'Connor, J., dissenting). Justice Breyer joined Justice O'Connor's opinion in full; the Chief Justice and Justice Kennedy joined all but the final section, which discussed *Blakely*'s potential impact on other determinate sentencing schemes. *Id.*

[38] *Id.* at 2545.

been relevant to judicial discretion.[39] The dissenters further questioned the majority's disregard for legislative distinctions between sentencing factors and elements of crimes, noting that a "rule of deferring to legislative labels [would have] no less formal pedigree" and would "vest primary authority for defining crimes in the political branches, where it belongs."[40]

In a separate dissent, Justice Breyer[41] argued that all three alternatives that legislatures could adopt in response to *Blakely* — a "pure charge" regime, a return to fully indeterminate sentencing, or sentencing juries — risked creating more substantial constitutional problems than does guideline-based sentencing.[42] Justice Breyer noted that the use of sentencing juries would be feasible only if a significant proportion of defendants agreed to plea bargains, and that this would yield "a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints."[43]

Yet Justice Scalia's heavy reliance on the Washington courts' interpretation of the Act may prevent *Blakely* from "destroy[ing] everything in its path."[44] By proscribing judges from imposing extraordinary sentences based on the elements of the offense alone,[45] the Supreme Court of Washington made the imposition of an extraordinary sentence necessarily dependent upon the presence of a fact not found by the jury.[46]

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[39] *Id.* at 2546 (citing *In re Winship*, 397 U.S. 358 (1970)).

[40] *Id.* at 2548.

[41] *Id.* at 2551 (Breyer, J., dissenting). Justice O'Connor joined Justice Breyer's opinion. Justice Kennedy also issued a brief dissenting opinion, joined by Justice Breyer, which pointed out that the majority's analysis implicated "the interest of the States to serve as laboratories for innovation and experiment," an interest compromised by *Blakely*'s restrictions on sentencing reform. *Id.* (Kennedy, J., dissenting).

[42] *Id.* at 2552–58 (Breyer, J., dissenting).

[43] *Id.* at 2557. Justice Breyer also pointed out that defendants might be *harmed* by *Blakely*'s strictures if a single jury decided every sentencing factor, because defendants would be required to argue that they did not commit the substantive offense and argue in the alternative that, if they did commit the offense, they were not guilty of the facts at issue in the sentencing enhancements. *Id.* at 2555.

[44] *Id.* at 2547 (O'Connor, J., dissenting).

[45] *See* State v. Gore, 21 P.3d 262, 277 (Wash. 2001). To hold that the elements of the crime cannot serve as a basis for an extraordinary sentence, the Washington Supreme Court in *State v. Nordby*, 723 P.2d 1117 (Wash. 1986), relied upon a lower-court case reversing a departure based upon an element of a crime rather than the Act or its legislative history. *Id.* at 1119 n.4 (citing *State v. Baker*, 700 P.2d 1198 (Wash. Ct. App. 1985)). That the sentencing judge in *Baker* had departed on the basis of an element of the crime indicates that the court's holding in *Gore* was not the only plausible interpretation of the statute. In view of this ambiguity and the wide discretion that judges had before the passage of the Act, an explicit preclusion of the elements of the crime was necessary to clarify the Washington Supreme Court's view.

[46] To the extent that other state courts of last resort have interpreted sentencing schemes similar to Washington's in a manner that prohibits reliance upon the elements of the crime to sustain departure from the guideline-mandated sentence, *see, e.g.*, People v. Walker, 724 P.2d 666, 670 (Colo. 1986), *Blakely* may press upon those courts a choice between these interpretations and the constitutionality of all upward adjustments in their sentencing system. These courts may wish to

Justice Scalia seized upon this interpretation to conclude — correctly — that Blakely's sentence could not be authorized by the facts admitted in his plea.[47] Because *Blakely* forbids only factfinding that is the *exclusive* source of the authority to impose a sentence, reinterpreting the Act to permit departure on the basis of elements of the crime would accommodate *Blakely* by providing a basis for the imposition of increased punishments not dependent upon judicial factfinding.[48]

Most sentencing systems feature a mechanism that permits sentencing courts to depart from the prescribed sentencing range.[49] On their face, these provisions do not explicitly preclude the possibility that sentencing courts will depart from the guidelines range *solely* on the basis of the elements of the substantive crime.[50] While these departure provisions also typically indicate that the set of cases in which courts

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revisit this approach in view of its heretofore-unknown constitutional consequence. *See infra* note 68 and accompanying text.

[47] *Blakely*, 124 S. Ct. at 2538 & n.8.

[48] Indeed, in response to *Blakely*, the Second Division of the Washington Court of Appeals has reinterpreted the Act's exceptional-sentence provisions to permit judges "to determine whether facts [found by the jury] are sufficiently substantial and compelling to warrant imposing an exceptional sentence." State v. Van Buren, No. 30237-3-II, 2004 WL 2222263, at *5 (Wash. Ct. App. Oct. 5, 2004). Although the court agreed that *Blakely* invalidated upward adjustments predicated upon judicial factfinding, the court affirmed the defendant's sentence, holding that the sentencing judge's departure power provided the authority necessary to impose additional punishment. The Guidelines are equally amenable to a similar reinterpretation. *See infra* notes 49–52.

[49] For example, the statute implementing the Guidelines provides:

> [T]he court shall impose a sentence of the kind, and within the range, [provided by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C.A. § 3553(b)(1) (West Supp. 1 2003). Similar provisions govern the guided-discretion regimes in many states. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1.3-401(6) (West 2004).

[50] On the language of the federal statute, for example, it is unclear why a sentencing court could not hold that an element of an offense was not "adequately taken into consideration by the Sentencing Commission." 18 U.S.C.A. § 3553(b)(1) (West Supp. 1 2003). Although it is possible to interpret the statute, as the Washington Supreme Court did, as precluding such an interpretation, this view is not an inevitable consequence of the statutory language. Indeed, to the extent the Supreme Court has spoken on this question, its language suggests that this interpretation is available:

> A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. . . . Whether a given factor is present to a degree not adequately considered by the Commission . . . [is a] matter[] determined in large part by comparison with the facts of other Guidelines cases.

Koon v. United States, 518 U.S. 81, 98 (1996). The Court in *Koon* conceptualized sentencing in a manner fully consistent with departures based only upon the elements of the crime. The Sentencing Commission accordingly has explicitly chosen "not . . . to limit the kinds of factors . . . that could constitute grounds for departure," conceding in the Guidelines that courts retain the "legal freedom to depart from the guidelines." U.S. SENTENCING GUIDELINES MANUAL 1A4(b) (1995).

ought to depart is narrow,[51] in the absence of a limiting judicial interpretation, departure remains a *logical possibility* in every case, which suggests that an increased sentence is *never* above "the maximum [a judge] may impose without any additional findings."[52] Thus, even if a sentencing judge engages in additional factfinding, the constitutionally requisite interpretation of discretionary-departure mechanisms means that his "authority to impose an enhanced sentence" never "*depends* on finding . . . [an] aggravating fact,"[53] because the judge could employ his authority to impose an enhanced sentence up to the statutory maximum based solely upon the elements of the crime.[54]

Advocates of expanding *Blakely*'s rule to invalidate sentencing regimes featuring discretionary-departure mechanisms might advance two objections to this argument.[55] First, because many discretionary-

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[51] In the federal sentencing context, for example, the policy statements included at the outset of the Guidelines indicate the Commission's view that "sentencing courts [should] treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes," and that departures should only be considered in cases falling outside of this "heartland." U.S. SENTENCING GUIDELINES MANUAL 1A4(b) (1995). *But cf. Koon*, 518 U.S. at 95 (citing U.S. SENTENCING GUIDELINES MANUAL 5H, introductory cmt. (1995)) (noting that even discouraged factors for departure are a permitted basis for departure).

[52] *Blakely*, 124 S. Ct. at 2537 (emphasis omitted). Commentators have expressed skepticism at the possibility that the elements of the offense might be considered a basis for departure under Guidelines section 5K2.0. *See, e.g.*, *Unconstitutionality of Determinate Sentencing*, *supra* note 2, at 1251 n.117 (rejecting the argument that the departure mechanism undermines the functionally binding nature of the Guidelines ranges because the discretionary-departure mechanism remains dependent on "the finding of a fact" and because "the judge's application of the Guidelines is subject to appellate review"). In practice, federal judges do not view guideline ranges as mandatory — an empirical account that reflects the fact that, as a matter of law, they are not. *See generally* Former Federal Judges Brief, *supra* note 13 (noting that section 5K2.0 departure rates are as high as sixty-seven percent in some districts and arguing that courts retain substantial departure discretion under the Guidelines system).

[53] *Blakely*, 124 S. Ct. at 2538 (emphasis added). This reasoning is consistent with Justice Breyer's observation that "judges historically had discretion," limited only by the statutory maximum punishment, "to vary the sentence . . . based on facts not proved at the trial," because under this approach a court could increase punishment on the basis of these facts so long as additional punishment was not dependent on the factfinding. *Id.* at 2559 (Breyer, J., dissenting).

[54] This interpretation of Guidelines section 5K2.0 is functionally similar to a proposal set forth in a recent memorandum to the U.S. Sentencing Commission, which urged Congress to amend the sentencing ranges in the Guidelines such that the top of each guideline range is equivalent to the statutory maximum. *See* Letter from Frank Bowman to United States Sentencing Commission 7 (June 27, 2004) (on file with the Harvard Law School Library). Both approaches would permit judges to impose any sentence beneath the statutory maximum without requiring additional judicial factfinding, although the Bowman Proposal would also limit downward departures. This interpretation is also consistent with the view expressed by the dissenting opinion in *United States v. Booker*, 375 F.3d 508, 511 (7th Cir. 2004), in which the Seventh Circuit held upward adjustments under the Guidelines unconstitutional in view of *Blakely*. *See id.* at 520 (Easterbrook, J., dissenting) (noting that, "[g]iven the matrix-like nature of the [federal] system and the possibility of departure . . . the only finding that is indispensable to [a defendant's] sentence is the one specified by statute," or the elements of the crime).

[55] Proponents of expanding the *Blakely* rule might also argue that *Koon*, in which the Court held that a judge may depart "only if [a] factor is present to an exceptional degree or in some

departure mechanisms require that "extraordinary mitigating or aggravating circumstances"[56] exist as a prerequisite to departure, one could argue that a judge cannot depart "without finding some facts to support [the departure] beyond the bare elements of the offense."[57] It is entirely unclear, however, why the set of extraordinary mitigating or aggravating circumstances supporting a departure cannot include the elements of the offense.[58] For example, a judge could conclude that the guideline range systematically punishes the presence of a particular element inadequately and depart on the basis of this judgment. It is unclear why this could not provide the alternative authorization for increased punishment necessary to shield against *Apprendi*'s prohibitions.[59]

A second argument in support of extending *Blakely* to sentencing schemes featuring discretionary-departure mechanisms is that the *jurisprudence* interpreting these mechanisms functionally cabins district court discretion by threatening reversal of discretionary departures absent particular findings of fact.[60] As Justice Scalia indicated in *Blakely*, these jurisprudential limitations were firmly in place in Washington, for "[h]ad the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."[61] Indeed, propo-

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other way makes the case different from the ordinary case where the factor is present," forecloses departure from the Guidelines on the basis of the elements alone. *Koon*, 518 U.S. at 96. But to the extent that the Court must choose between *Koon* and the constitutionality of a legislatively approved sentencing scheme, the canons of constitutional interpretation demand that the Court choose the latter. *See infra* note 65 and accompanying text. Further, *Koon*'s discussion does not explicitly foreclose reliance on the elements of the crime as a basis for departure. *See Koon*, 518 U.S. at 98–99.

[56] COLO. REV. STAT. ANN. § 18-1.3-401(6) (West 2004); *see also* 18 U.S.C.A. § 3553(b) (West Supp. 1 2003).

[57] *Blakely*, 124 S. Ct. at 2538 n.8.

[58] For instance, the introductory policy statement to the Guidelines concedes that courts have the "legal freedom to depart from the guidelines" and makes clear that the Commission did not "intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure." U.S. SENTENCING GUIDELINES MANUAL 1A4(b) (1995); *see also Koon*, 518 U.S. at 98; *cf.* Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting, in support of the Guidelines' constitutionality, that the federal system allows a judge to depart if he "finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines").

[59] Under this analysis, Justice Scalia correctly concluded that it was logically impossible for the judge to depart on the basis of the facts found by the jury while applying *Apprendi* to Washington law, *see Blakely*, 124 S. Ct. at 2537–38, because the Supreme Court is "bound to accept the interpretation of [the State's] law by the highest court of the State," Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976). Of course, no such strictures operate on the Court's authority to interpret federal law.

[60] For commentary on the irony of the emergence of this sort of functional reasoning amidst the formalist landscape of *Blakely* and *Apprendi*, see Bibas, *supra* note 6, at 341–43.

[61] *Blakely*, 124 S. Ct. at 2538 (citing WASH. REV. CODE ANN. § 9.94A.210(4) (West 2000), *recodified at* WASH. REV. CODE ANN. § 9.94A.585(4) (West 2003)) (noting the Washington Supreme Court's requirement that departures be based on factors other than the elements of the crime).

nents of extending *Blakely* could argue that many sentencing regimes explicitly provide for appellate review of sentencing,[62] reflecting a legislative decision to constrain a sentencing court's discretion to depart from guidelines on the basis of the elements alone.

This analysis is unpersuasive for two reasons. First, appellate review of discretionary departures could simply implicate review of a court's legal conclusion that the sentencing regime inadequately took into consideration the elements of a crime. Only in cases in which discretionary departures were unavailable, depriving the sentencing court of independent authority for imposing the sentence, would upward adjustments violate *Blakely*.[63] In any particular case, then, the constitutionality of an upward adjustment would depend on an analysis of the availability of sentencing court discretion to impose the sentence without additional factfinding. In view of the lax standard of review for these departures in many systems, such an approach would considerably narrow *Blakely*'s application.[64] Second, to the extent appellate review of discretionary departures endangers all upward adjustments by making them logically contingent on judicial factfinding, legislatures must choose between the reviewability of discretionary departures and the constitutionality of upward adjustments. Surely this choice should be left to the legislatures rather than to the courts.

Two independent institutional rationales further counsel a reevaluation of discretionary-departure mechanisms in the wake of *Blakely*. First, the Supreme Court has long followed a "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues."[65] To the extent that the reevaluation of discretionary-departure mechanisms remains a *possible* interpretation of the statutes at issue, this policy demands that courts adopt that approach rather than interpret guided-discretion regimes in a manner that renders them violative of the Sixth Amendment.[66] Second, the presumption that state legisla-

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[62] *See, e.g.*, 18 U.S.C.A. § 3742(e)(3)(C) (West Supp. 1 2003) (providing for appellate review of sentences imposed under the Guidelines).

[63] Although the upward adjustments prescribed in the Guidelines clearly authorize judges to impose additional punishment on the basis of judicial factfinding, this feature of the Guidelines would only implicate *Blakely*'s protections in cases where the judge imposed punishment that exceeds "the maximum he may impose without any additional findings." *Blakely*, 124 S. Ct. at 2537. Upward adjustments would not raise constitutional concerns in any case in which an upward departure on the basis of the elements were permissible, because in such cases the maximum sentence the judge may impose is by definition equivalent to the statutory maximum.

[64] *See* Koon v. United States, 518 U.S. 81, 98–100 (1996) (holding abuse of discretion the appropriate standard for appellate review).

[65] Gomez v. United States, 490 U.S. 858, 864 (1989).

[66] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." (emphasis added) (quoting *Crowell v. Ben-*

tures and Congress have considered constitutional limitations is validated here because the institutions at issue have provided a means for resolving the constitutional question without sacrificing the legislative project as a whole.[67] When judicial extrapolation from the original statute has generated constitutional clutter, it is the judiciary and not the legislature that should first reconsider its interpretive accuracy.[68]

One might argue that this reinterpretation of discretionary-departure mechanisms so undermines the objectives of guideline-based regimes that it would be preferable for the courts to dispose of the existing system and to invite legislatures to revisit the problem.[69] As Justices O'Connor and Breyer argued, however, because guideline-based regimes sought at the outset to provide *some* guidance to judges operating with limitless discretion,[70] compared to the indeterminate alternative, legislatures may prefer a regime in which judges retain discretionary-departure authority but are encouraged to use it sparingly.

In creating guideline-based sentencing systems, legislatures have reserved space for the judicial discretion necessary to insulate guideline sentencing from the tumult of *Blakely*. When choosing between the courts' interpretive jurisprudence or legislatively approved sentencing schemes, it should be clear that only the latter approach affords adequate respect to legislatures' constitutional foresight.[71] *Blakely*, therefore, is best understood as an example of the Supreme Court's faithful adherence to its policy of deference to state courts' interpretation of state law, with relatively minor implications for sentencing regimes that do not jurisprudentially foreclose sentencing courts' reliance on the elements of the substantive offense as the basis for a departure from a guideline-based sentencing system.

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son, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted)). *But see* Reno v. Flores, 507 U.S. 292, 314 n.9 (1993) (dismissing "[t]he 'constitutional doubts' argument [as] the last refuge of many an interpretive lost cause").

[67] *See supra* note 58.

[68] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980); *see also id.* at 325–26 (discarding a district court's interpretation of a statute as going "beyond the judicial function" and concluding that "[s]uch decisions are entrusted under the Constitution to Congress, not the courts").

[69] *See, e.g.*, Benjamin Wittes, *Suspended Sentencing*, ATLANTIC MONTHLY, Oct. 2004, at 53 (describing such a reinterpretation as "loosen[ing the Guidelines] to the point of meaninglessness").

[70] *See Blakely*, 124 S. Ct. at 2544 (O'Connor, J., dissenting); *id.* at 2552 (Breyer, J., dissenting).

[71] *See* Rust v. Sullivan, 500 U.S. 173, 191 (1991).