

HANDLING AGGRAVATING FACTS AFTER *BLAKELY*: FINDINGS FROM FIVE PRESUMPTIVE- GUIDELINES STATES*

NANCY J. KING**

This Article reveals how five states with presumptive (binding) sentencing guidelines have implemented the right announced in Blakely v. Washington to a jury finding of aggravating facts allowing upward departures from the presumptive range. Using data provided by the sentencing commissions and courts in Kansas, Minnesota, North Carolina, Oregon, and Washington, as well as information from more than 2,200 docket sheets, the study discloses how upward departures are used in plea bargaining, sometimes undercutting policy goals; how often aggravating facts are tried and by whom; common types of aggravating facts; and the remarkably different, sometimes controversial interpretations of Blakely and Alleyne v. United States that frame each state's practice. This new information is essential for any evaluation of presumptive-sentencing guidelines systems or the appropriate scope of the doctrine established in Apprendi v. New Jersey.

INTRODUCTION	1242
I. SUMMARY OF PRESUMPTIVE SENTENCING GUIDELINES, THE <i>BLAKELY</i> RULE, AND STUDY DATA.....	1245
A. <i>Presumptive Sentencing Guidelines in the States</i>	1245
B. <i>Why Study the Adjudication of Aggravating Facts?</i>	1247
C. <i>Summary of Data for Study</i>	1250
II. THE VOLUME OF UPWARD-DEPARTURE SENTENCES CARRYING A RIGHT TO A JURY FINDING BEYOND A REASONABLE DOUBT	1251
A. <i>Bypassing the Presumptive Sentencing Guidelines</i>	1252

* © 2021 Nancy J. King.

** Lee S. & Charles A. Speir Professor of Law, Vanderbilt University Law School. For their assistance on this project, thanks to my students Joey Cation, Ryan Everette, Michael Feeney, Lorenzo Fernandez, and Catilin McAuliffe, as well as to Quenna Stewart, Victoria Dorward, and Vanderbilt's wonderful tech and library staff. Thanks to Carissa Hessick for gathering sentencing scholars together for the twentieth anniversary of *Apprendi*. Finally, special thanks to all of those in Alabama, Kansas, Minnesota, North Carolina, Oregon, and Washington who patiently provided me with data, answers, leads and insights, including Ebo Browne, Kunlun Chang, Joseph Colquitt, Deb Dailey, Elaine Deschamps, Griffin Edwards, Richard Frase, Ginny Hevener, Grant Hoheisel, Kay Knapp, Duc Luu, Christopher Lyon, Kathleen Madland, John Madler, Kelly Lyn Mitchell, Kelly Officer, Kevin Reitz, Scott Schultz, Richard Walker, and Ron Wright.

1242	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 99-5
	B. <i>Broadening Presumptive-Sentencing Ranges</i>	1257
	C. <i>Bypassing Blakely</i>	1257
	1. Exempting Upward Dispositional Departures from <i>Blakely</i>	1258
	2. Exempting Upward Durational Departures for Probation	1261
	3. Exempting Prior Juvenile Adjudications or Supervisory Status at the Time of Commission	1261
	4. Other <i>Blakely</i> Exemptions	1263
III.	BARGAINING OVER UPWARD DEPARTURES: TOOLS TO ENGINEER STIPULATED SENTENCES AND LEVERAGE PLEAS	1264
	A. <i>Uncontested Upward Departures—A Tool To Engineer Stipulated Sentences</i>	1265
	1. The Extent of Agreement	1265
	2. Why Defendants Agree to Upward Departures	1267
	a. <i>Opting for Incarceration</i>	1268
	b. <i>Opting for Probation Instead of Incarceration, with a Longer Term if Revoked</i>	1270
	c. <i>Swapping Upward Departures for Lesser Charges; Avoiding Mandatory Minimum Sentences</i>	1272
	3. Why Judges Routinely Accept Stipulated Upward Departures	1273
	4. Easy for Prosecutors To Establish a Factual Basis for an Upward Departure	1275
	B. <i>Upward Departures in Bargaining—The Policy Debate over Power</i>	1277
	C. <i>Upward Departures as Leverage for Pleas in Minnesota</i>	1280
IV.	NOTICE, WAIVER, BIFURCATION, AND RETRIAL: THE PROCEDURAL CONSEQUENCES OF LESS-THAN-FULL- ELEMENT STATUS	1285
	A. <i>Notice</i>	1285
	B. <i>Waiver</i>	1288
	C. <i>Bifurcation</i>	1289
	D. <i>Remand and Retrial of Aggravating Factors</i>	1293
	CONCLUSION	1295

INTRODUCTION

We could be entering a renaissance for presumptive sentencing guidelines. The American Law Institute recently approved the new Model Penal Code:

Sentencing (“MPCS”) with presumptive sentencing guidelines at its heart.¹ Alabama adopted presumptive sentencing guidelines for property offenses in 2013,² and Nevada is considering whether they may help to reduce incarceration rates and racial disparities.³ Some sentencing scholars continue to praise them as a state’s best hope for achieving sentencing goals.⁴

This Article reports new empirical information about one important aspect of states’ experiences with presumptive sentencing guidelines: how they have implemented the right announced in *Blakely v. Washington*⁵ to a jury finding beyond a reasonable doubt of any aggravating fact allowing an upward departure from the presumptive-sentence range.⁶ Using data provided by the sentencing commissions and courts in Kansas, Minnesota, North Carolina, Oregon, and Washington, this Article reveals how upward departures are used in plea bargaining; how often aggravating facts are tried and by whom; common types of aggravating facts; and the remarkably different, sometimes controversial interpretations of *Blakely* that frame each state’s practice.

These new findings will inform ongoing debates about the appropriate scope of the *Apprendi v. New Jersey*⁷ line of cases and the merits of presumptive sentencing guidelines. Sentencing scholars tend to have strong views on these issues. Some may resent *Blakely* as a procedural tax, in their view perversely burdening only the best sentencing systems, while leaving seriously flawed

1. See, e.g., MODEL PENAL CODE: SENT’G § 1.02(2) cmt. j (AM. L. INST., forthcoming 2021) (on file with author) (“Presumptive guidelines, if they are the product of reasoned consideration by the commission, go a substantial way toward establishing uniformity of analysis as envisioned in the Code.”).

2. See ALA. SENTENCING COMM’N, PRESUMPTIVE AND VOLUNTARY SENTENCING STANDARDS: MANUAL 15–16 (2016), <http://sentencingcommission.alacourt.gov/media/1065/2016-presumptive-manual.pdf> [<https://perma.cc/SA8Q-HAZC>]; see also Griffin Edwards, Stephen Rushin & Joseph Colquitt, *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1, 24 (2019).

3. See, e.g., NEV. SENT’G COMM’N, FINAL REPORT 2, 6 (2019) (listing the Nevada Sentencing Commission’s duties, including to “[e]valuate whether sentencing guidelines recommended pursuant to subsection 8 should be mandatory”).

4. See, e.g., RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 44–45, 203–04 (2013) [hereinafter FRASE, JUST SENTENCING] (discussing the advantages of presumptive sentencing guidelines such as decreased risk of sentencing disparity between defendants and lowered probability of defendants receiving a level of punishment disproportionate to their culpability); MICHAEL O’HEAR, THE FAILED PROMISE OF SENTENCING REFORM 5 (2017) (discussing the link between presumptive sentencing guidelines and reduced growth in incarceration rates).

5. 542 U.S. 296 (2004).

6. *Id.* at 303–05. In Washington, departures are called “exceptional sentences.” WASH. STATE CASELOAD FORECAST COUNCIL, 2018 WASHINGTON STATE ADULT SENTENCING MANUAL 64 (2018) [hereinafter WASH. 2018 MANUAL]. In North Carolina, the term is “aggravated sentence.” See, e.g., *State v. Hurt*, 361 N.C. 325, 326, 643 S.E.2d 915, 916 (2007). In Minnesota, it is “aggravated departure.” See, e.g., *State v. Barker*, 705 N.W.2d 768, 776 (Minn. 2005). I will use “upward departure” to refer to all of these higher-than-presumptive-range sentences.

7. 530 U.S. 466 (2000).

systems untouched.⁸ Others may admire *Blakely* as an essential safeguard against the erosion of procedural protections in the Bill of Rights.⁹ This Article is full of new ammunition for both sides in such debates, including two novel analyses—one testing the claim that presumptive sentencing guidelines relinquish less sentencing power to the prosecutor than other fact-based sentencing enhancements and the other cataloguing the potential procedural advantages states enjoy by treating aggravating facts as something less than full offense elements.

One finding reported here that may encourage those interested in presumptive sentencing guidelines involves a concern that led some presumptive-guidelines states to shift to advisory guidelines after *Blakely* was decided fifteen years ago: the prospect of costly and cumbersome bifurcated jury trials for aggravating factors.¹⁰ This specter may well have deterred new adoption of presumptive sentencing guidelines and may continue to haunt adoption efforts today. But as Part III reports, aggravated factors are rarely tried for predictable as well as surprising reasons. More concerning for fans of presumptive sentencing guidelines is the uncertain future of some of the assumptions that have allowed these five states to limit their *Blakely* burden. The Supreme Court has continued to expand its rule from *Apprendi*, which requires that certain aggravating facts a legislature intends the judge to find at sentencing instead carry a right to proof beyond a reasonable doubt as determined by a jury.¹¹ These expansions may threaten narrow interpretations of *Blakely* by state courts, including holdings that exempt some upward departures from jury consideration or that decline to treat aggravating facts as elements for purposes of notice, waiver, double jeopardy, or due process.¹²

Another important contribution is this Article's original analysis of how parties use upward-departure sentences in plea bargaining. Bargaining inevitably circumvents any effort to structure sentencing discretion. Comparing the use of upward-departure sentences with other fact-based, range-raising devices such as mandatory minimum sentences, I find similar patterns as well as important differences.

8. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1101, 1106 (2005) (examining the concerns of Professor Richard Frase that *Blakely* “tends to attack the most desirable systems while giving a constitutional free pass to many of the worst”); *Blakely*, 542 U.S. at 314, 318 (O'Connor, J., dissenting) (objecting that the *Blakely* rule will “either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform” and that it imposes a “substantial constitutional tax”).

9. *E.g.*, *United States v. Booker*, 543 U.S. 220, 244 (2005) (recognizing that the *Blakely* rule advances “the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment”).

10. *See infra* note 18.

11. *Apprendi*, 530 U.S. at 490; *see, e.g.*, *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).

12. *See, e.g., infra* text accompanying notes 58–65, 78–79, 179–82, 195, 217–25.

Following an introduction to presumptive sentencing guidelines, the *Blakely* rule, and a short explanation of the data on which this study is based, Part II addresses the volume of upward-departure sentences in the five presumptive-guidelines states, as well as legal and policy choices that help define that volume. Part III examines how upward-departure sentences are used in plea bargaining, including examples of how parties manipulate these upward departures to reach results inconsistent with sentencing policy, and barriers to judicial control. Part IV reports detailed information about the adjudication of aggravating factors in contested cases. Specifically, it examines: (1) the low percentage of cases in which formal notice is docketed in advance of conviction, (2) the use of bifurcated jury proceedings, (3) the rate of stipulation to aggravated facts after conviction at trial, and (4) the many ways that state procedure for adjudicating these factors differs from the Supreme Court's characterization of aggravating facts as elements of the offense.

I. SUMMARY OF PRESUMPTIVE SENTENCING GUIDELINES, THE *BLAKELY* RULE, AND STUDY DATA

A. *Presumptive Sentencing Guidelines in the States*

Sentencing guidelines regulate a judge's sentencing discretion. Under a presumptive-guidelines system, the entire statutory range of punishment for a given offense is not available to the judge upon conviction.¹³ Instead, presumptive sentencing guidelines designate a narrower range as the presumptive sentence, appropriate for a typical violation. Sentence options above or below the presumptive range are available only after a finding of one or more aggravating or mitigating circumstances. Without these requisite findings, sentences outside of the presumptive range can be overturned on appeal; hence, some alternatively label presumptive sentencing guidelines as "binding"¹⁴ or "mandatory" guidelines.¹⁵

When initially adopted in the 1980s and 1990s, presumptive-guidelines systems allowed judges to determine, by a preponderance of proof, aggravating

13. *E.g.*, WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 6 CRIMINAL PROCEDURE § 26.3(e) (4th ed. 2015), Westlaw (database updated Dec. 2020).

14. Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME & JUST. 79, 99 (2019) [hereinafter Frase, *Forty Years*] (terming these presumptive-guidelines systems "binding systems with active appellate review").

15. *See, e.g.*, United States v. Booker, 543 U.S. 220, 245 (2005). Appellate oversight varies in degree. *See* Richard S. Frase, *Varying Binding Effects of Guidelines -- the Mandatory-to-Advisory Continuum*, UNIV. MINN.: SENT'G GUIDELINES RES. CTR. (Mar. 25, 2015), <https://sentencing.umn.edu/content/varying-binding-effects-guidelines-mandatory-advisory-continuum> [<https://perma.cc/W3NY-MPFK>].

facts required for sentencing above the presumptive range at sentencing.¹⁶ But in 2004, the Supreme Court in *Blakely* applied *Apprendi* to hold that when judicial adherence to a presumptive punishment range is enforceable through appeal, any fact (other than prior conviction) required to exceed that range must be proven beyond a reasonable doubt to a jury or admitted by the defendant.¹⁷ Although Kansas anticipated *Blakely*'s rule as an inevitable consequence of the Court's decision in *Apprendi*, *Blakely* surprised almost everyone else. Suddenly the Constitution required jury trials for facts that for years had been adjudicated less formally at sentencing. The prospect of complying with *Blakely* and proving aggravating facts beyond a reasonable doubt to juries prompted some states to abandon appellate enforcement of presumptive ranges, rendering their presumptive sentencing guidelines "advisory."¹⁸

The five states examined in this Article kept their presumptive sentencing guidelines, despite *Blakely*. Each state determines the presumptive-sentencing range for a defendant by cross referencing the defendant's criminal history with the severity level for the crime of conviction.¹⁹ Often, presumptive ranges specify a *type* of sentence (such as probation, jail, or prison) as well as the presumptive *duration* of sentence for each case.²⁰ A sentence that is more severe than a sentence within the presumptive range is an upward departure—either a more punitive type of sentence—(an "upward dispositional departure"), or a

16. See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 70–72 (1999); Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 FED. SENT'G REP. 7, 7 (2005).

17. See *Blakely v. Washington*, 542 U.S. 296, 303–05 (2004).

18. See, e.g., MODEL PENAL CODE: SENT'G § 10.07 reporters' note k (AM. L. INST., forthcoming 2021) (on file with author); Stemen & Wilhelm, *supra* note 16, at 9–10 (explaining that in Tennessee, "[t]he Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing . . . proposed the switch to a voluntary system . . . [and] noted that jury fact-finding could 'increase service time of jurors, increase jury trial time on the court docket, impose increased burdens on public defenders and district attorneys and otherwise increase the costs of the administration of justice'" (quoting GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIM. SENT'G, REPORT OF THE GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIMINAL SENTENCING 3 (2005))); see also Edwards et al., *supra* note 2, at 17 (collecting judicial and academic views that states' "attempts to maintain sentencing guidelines while complying with *Blakely* would prove unnecessarily burdensome and taxing to implement").

19. These states use a grid with criminal history on one axis and severity level for the offense of conviction on the other. Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROB., Sept. 2017, at 28, 28–29. Some states have separate grids for sex or drug offenses. For an excellent collection of information and law for every state using sentencing guidelines, see *Sentencing Guidelines Resource Center*, ROBINA INST. CRIM. L. & CRIM. JUST., <https://sentencing.umn.edu/> [<https://perma.cc/W3RU-YDJR>].

20. None set presumptive ranges for fines or other economic sanctions, although the MPCSC recommends that these be included. MODEL PENAL CODE: SENT'G § 9.04(3)(b) (AM. L. INST., forthcoming 2021) (on file with author). If they were included, upward departures above the presumptive ranges for financial sanctions would trigger *Apprendi*'s rule as affirmed by *Blakely*. See *S. Union Co. v. United States*, 567 U.S. 343, 348–51, 359–61 (2012).

longer term (an “upward durational departure”).²¹ In each state, proof of a single aggravating fact gives the judge the option of exceeding the presumptive range.²²

B. *Why Study the Adjudication of Aggravating Facts?*

Proponents of presumptive sentencing guidelines assert that concerns about the burdens of proving aggravating facts beyond a reasonable doubt to a jury are “unfounded”²³ and that the cost of adjudicating these facts is “small and manageable.”²⁴ Yet, other than annual reports from these states showing that only a very small percentage of felony sentences involve upward departures, no research has attempted to examine this particular claim. For example, there has been no effort to determine how aggravating facts are used in bargaining, how many defendants admit aggravating facts after conviction, how many trials are bifurcated, or how often defendants opt for a bench trial on the aggravating fact

21. The use of dispositional departures varies by state. *See infra* text accompanying notes 56–57.

22. *See* KAN. STAT. ANN. §§ 21-6815 to -6818 (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); N.C. GEN. STAT. § 15A-1340.16 (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. § 136.785 (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.); WASH. REV. CODE ANN. §§ 9.94A.535, 9.94A.537 (LEXIS through chapter 9 of the 2021 Reg. Sess.); *State v. Vance*, 765 N.W.2d 390, 394 (Minn. 2009).

This is one of many features that makes these systems simpler than the excessively complex U.S. Sentencing Guidelines. Instead of one presumptive range per offense varying only with criminal history, as in these states’ presumptive-guidelines systems, the federal guidelines provide dozens of possible ranges for a given offense for a given defendant. Which one applies depends on a score derived by adding and subtracting points for a very long list of often contestable aggravating and mitigating facts, including “relevant conduct.” Departure requirements are layered on top of all that. *See, e.g., United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring) (urging the U.S. Sentencing Commission to “simplify the Guidelines to avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls”); Richard B. Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCH. PUB. POL’Y & L. 739, 749–53 (2001) (discussing the complexity and perceived flaws in the structure of the federal guidelines); Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State’s Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105, 105–07 (2013) (explaining that Washington’s presumptive sentencing guidelines are less complex than the federal guidelines).

In some states, an additional showing is required for departure sentences that exceed twice the presumptive range. KAN. STAT. ANN. § 21-6818(b)–(c) (Westlaw); *State v. Jackson*, 749 N.W.2d 353, 359 (Minn. 2008); *Neal v. State*, 658 N.W.2d 536, 544 (Minn. 2003); *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999); OR. ADMIN. R. 213-008-0003(2), 213-008-0005(3) (Westlaw through rules filed through Mar. 23, 2021). In North Carolina, the judge imposes an aggravated minimum sentence, and the maximum becomes 120% of that plus a period of supervised release. N.C. GEN. STAT. § 15A-1340.17 (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.).

23. *See, e.g.,* FRASE, JUST SENTENCING, *supra* note 4, at 47 (calling concerns about “problems in complying with the requirements of *Blakely*” unfounded).

24. *See* MODEL PENAL CODE: SENT’G § 10.07 reporters’ note a (AM. L. INST., forthcoming 2021) (on file with author).

rather than a jury trial. Nor has there been any effort to determine the reasons why some states have higher upward-departure rates than others.

In addition to addressing these issues, this Article also sheds new light on the purported advantages of relying upon presumptive sentencing guidelines over other methods of calibrating sentences using factual findings beyond those inherent in a conviction. Probably the most traditional alternative method has been for the legislature to enact a separate, aggravated version of a core offense, tacking on an aggravating fact to create a greater offense, such as robbery and armed robbery. Such “nested” or “graded” offenses exist in every type of sentencing system, indeterminate and determinate, guidelines or no guidelines. So do mandatory minimum sentences and other sentence enhancements, which became popular in the second half of the twentieth century.²⁵ Mandatory minimum statutes raise the floor of the available sentence range for an offense whenever a designated fact is determined; sentence-enhancement statutes either mandate or permit a more severe sentence once the designated fact is determined.²⁶

The Court’s *Apprendi* doctrine does not distinguish between these alternative ways of keying punishment ranges to factfinding. *Apprendi* guarantees to the defendant the right to a unanimous jury determination, beyond a reasonable doubt, of any fact (other than the fact of a previous conviction) that raises the minimum or maximum penalty beyond what was authorized by the conviction alone.²⁷ In the Court’s view, that range-raising fact is an element, like any other element.²⁸ Because they all should trigger the same

25. See generally Erik Luna, *Mandatory Minimums*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 117, 117–24 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf [<https://perma.cc/VTK8-5Q84>]; DALE PARENT, TERENCE DUNWORTH, DOUGLAS McDONALD & WILLIAM RHODES, U.S. DEP’T OF JUST., KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING 1 (1997), <https://www.ncjrs.gov/pdffiles/161839.pdf> [<https://perma.cc/5FRL-MY33>]; see also *infra* note 40 and accompanying text.

26. Luna, *supra* note 25, at 117, 119; PARENT ET AL., *supra* note 25, at 1.

27. See *Alleyne v. United States*, 570 U.S. 99, 111–12 (2013).

28. See, e.g., *id.* (“*Apprendi* concluded that any ‘facts that increase the prescribed range of penalties to which a criminal defendant is exposed’ are elements of the crime . . . ([F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (stating the “aggravating factors” that render a defendant eligible for capital punishment in Arizona “operate as ‘the functional equivalent of an element of a greater offense’” (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000))); see also *Burrage v. United States*, 571 U.S. 204, 210 (2014) (“Because the ‘death results’ enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt . . . Thus, the crime charged in count 2 of Burrage’s superseding indictment has two principal elements: (i) knowing or intentional distribution of heroin, § 841(a)(1), and (ii) death caused by (‘resulting from’) the use of that drug, § 841(b)(1)(C).” (first quoting *Alleyne*, 570 U.S. at 115–16; and then quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000))); *United States v. Haymond*, 139 S. Ct. 2369, 2395 (2019) (Alito, J., dissenting) (distinguishing the situation in

constitutional protections, any of the alternative range-raising devices should impose similar procedural costs. Yet advocates of presumptive sentencing guidelines have argued that presumptive guidelines are a superior option because they enforce judicial adherence to fact-based calibration while relinquishing less sentencing power to the prosecutor.²⁹ As noted earlier, this Article is the first to address the merits of this claim in states with presumptive sentencing guidelines. It also reveals the potential procedural advantages these states enjoy by withholding protections for the adjudication of aggravating facts that are normally afforded other elements of the offense.

Lastly, information about how judges and prosecutors use upward departures in these presumptive-guidelines states can inform ongoing research evaluating the impact of presumptive sentencing guidelines. Quantitative research about presumptive sentencing guidelines has focused, understandably, on whether they exacerbate or mitigate incarceration growth and racial inequities, compared to other sentencing systems. This is important and promising research, but no consensus on these points has emerged.³⁰ Knowing

United States v. Haymond, 139 S. Ct. 2369 (2019), from the Court's *Apprendi* line of cases, where the Court "rejected what it saw as attempts to place the label 'sentencing enhancement' on what, in its view, were essentially elements of charged offenses").

29. See *infra* notes 149–68 and accompanying text.

30. On impacting incarceration rates, see, for example, MODEL PENAL CODE: SENT'G app. B at 916 (AM. L. INST., forthcoming 2021) (on file with author); NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 76–78 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION]; Richard S. Frase, *Can Sentencing Guidelines Commissions Help States Substantially Reduce Mass Incarceration?*, 104 MINN. L. REV. 2781, 2796–97 (2020) (noting that data comparing systems is "inconclusive" on whether presumptive sentencing guidelines are better at reducing incarceration); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 261–65 (2006) (providing statistics and noting that presumptive sentencing guidelines appear to be more effective than voluntary guidelines at reducing the variation in sentences between defendants); Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2745, 2769–79 (2020).

On racial disparities, see Edwards et al., *supra* note 2, at 19–20 nn.107–13, 32 (collecting research that was inconclusive regarding whether making federal guidelines advisory increased racial disparity and also finding that "the introduction of sentencing guidelines in Alabama contributed to reductions in sentence length, reductions in racial disparities in sentences for similar offenses, and reductions in interjudge disparities in sentence lengths"); RICHARD S. FRASE & JULIAN V. ROBERTS, *PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS* 128–48 (2019); WASH. SENT'G GUIDELINES COMM'N, *REVIEW OF THE SENTENCING REFORM ACT 8–9* (2019) [hereinafter WASH. COMM'N, 2019 REVIEW], https://sentencing.umn.edu/sites/sentencing.umn.edu/files/washington_review_of_the_sentencing_reform_act_2019.pdf [https://perma.cc/36N9-EVCG] ("[S]ystems where judges have the greatest discretion, where they are not required to abide by the guidelines, do not have an increase in racial disparity over those that are more restrictive."); MODEL PENAL CODE: SENT'G § 1.02(2) cmt. k, reporters' note k (AM. L. INST., forthcoming 2021) (on file with author) (collecting research and claiming it "suggests that presumptive sentencing guidelines systems and determinate (non-paroling) systems have produced lower levels of racial and ethnic disparities compared with advisory guidelines systems, nonguidelines systems, and indeterminate systems").

more about how these presumptive sentencing guidelines are applied by the lawyers and judges who use them can help inform *why* presumptive sentencing guidelines may or may not impact incarceration rates, racial disparities, rates of recidivism and crime, and perceived legitimacy.³¹

C. *Summary of Data for Study*

For this study, all five presumptive-guidelines states provided information about adult felony cases where the sentence included an upward departure from the presumptive range.³² Detail varied considerably but included the type of offense, year of conviction, sentence or commitment, type of sentence (for example, probation or incarceration), and whether the conviction was by plea or trial. Analysis of Oregon's data was limited to the years 2016 and 2017 because departure data was not collected until 2015. The other states' data covered eight years of sentencing, 2010–2017.

Using case numbers in data sets from Kansas, Minnesota, and Oregon, my research assistants and I were able to obtain and examine trial court registers or

Simple comparisons of the presumptive-guidelines states with other states are suggestive, but the effects of supervision, revocation, good-time credit, and release practices and policies may dwarf the effects of the type of guidelines system a state follows. *See, e.g.,* Reitz, *supra*, at 2748 (discussing parole release generally and stating, “The cumulative actions of parole boards can generate large swings in a state’s prison population while hardly alerting anyone to the source of the change”). Another challenge for these analyses is that even if it is possible to control for the constantly changing law and practice within and between states, most studies examine sentencing information by crime of conviction alone, masking the arrest, charging, and bargaining decisions that produce those sentences. *See, e.g.,* Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1684–85 (2012) (“[M]easuring disparity solely with reference to judicial decisionmaking ignores disparities inevitably created by differing prosecutorial charging and plea-bargaining policies and strategies across cases and districts.”).

31. *See, e.g.,* O’HEAR, *supra* note 4, at 5 (“[R]estricting judicial discretion in this way does not necessarily lead to tougher sentences; it all depends on how exactly the restriction is designed and implemented.”).

32. None of the data sets I obtained were or are publicly available online. Accordingly, I report only aggregate statistics and do not provide complete citations for individual cases. The Kansas Sentencing Commission provided data on adult felony sentences imposed for 2010–2017. The Washington State Caseload Forecasting Council provided adult sentencing data from Washington for the years 2010–2017. The Minnesota Sentencing Guidelines Commission provided data on adult criminal cases with felony sentences that included an aggravated departure imposed for the years 2010–2017. The Research and Evaluation Unit of the Minnesota Judicial Branch also provided, for the same time period, data on adult felony cases ending in conviction with specified “*Blakely*” events. *See infra* note 156 and accompanying text. The Oregon Criminal Justice Commission provided data on adult sentences imposed in Oregon for the years 2016 and 2017. Felony historical data for North Carolina cases—Statistical Report Data for the years 2010–2017—were provided by the North Carolina Sentencing and Policy Advisory Commission (“NCSPAC”). My analysis of these data sets took place between February and August of 2020. It included date limiting, consolidating multiple annual data sets with different variables, consolidating multiple observations for a single case, removing duplicate entries, and creating dozens of new variables for analysis. My analysis and any conclusions in this Article may not be attributed to, and are not endorsed by, the NCSPAC or any of the other data providers listed above.

docket sheets for many of the upward-departure cases.³³ These docket sheets often included information not available in the relevant state sentencing commission's data—such as whether the trial was bifurcated, whether the defendant admitted the aggravating fact, or the reason for the upward departure.³⁴

II. THE VOLUME OF UPWARD-DEPARTURE SENTENCES CARRYING A RIGHT TO A JURY FINDING BEYOND A REASONABLE DOUBT

Before turning to the number of aggravated sentences subject to the *Blakely* rule, consider what factors might determine that number. One factor is the extent to which a state allows sentencing *outside* the presumptive sentencing guidelines. The celebrated capacity of presumptive sentencing guidelines to achieve sentences with greater consistency, legitimacy, and more effective fiscal management³⁵ presupposes a sentencing system designed and amended as a whole. But the gradual accretion of mandatory minimum sentences and sentencing-enhancement provisions³⁶ removes an ever-increasing portion of

33. Information from the docket sheets in more than 2,200 cases was collected. From Minnesota, I gathered information for the more than 400 cases from 2010 to 2017 that included an upward-departure sentence and an indication in data from either the Minnesota Judicial Branch or the Minnesota Sentencing Guidelines Commission that a bench or jury trial had been held. Using Minnesota Judicial Branch data, I also coded the dockets of 332 cases (including all tried cases) in which the data indicated that the prosecutor had sought an upward departure but one was not imposed. Finally, I coded a nonrandom sample of 186 cases from among guilty plea cases with upward departures in Minnesota Sentencing Guidelines Commission data. From Kansas, I collected docket information for all 135 cases including an upward *durational* departure sentence from 2010 to 2017. From Oregon, I gathered docket information for 1,132 cases, consisting of all cases from 2016 to 2017 with both an upward dispositional and upward durational departure, an upward durational departure only, or an upward dispositional and downward durational departure, as well as a 13.2% random sample of the 1,087 downward dispositional / upward durational departure cases, and a 6.4% random sample of the 3,064 upward dispositional departure cases.

For Minnesota and Oregon, I downloaded trial court dockets from each state court's website. In Kansas, dockets from a few counties were publicly available online, and others I purchased.

34. For cases that had been appealed, this information was sometimes available in an appellate opinion, which I located by searching for the appellate opinion on the public websites in Kansas, Minnesota, and Oregon. In Kansas and Minnesota, many of the tried cases with upward durational departures had been appealed, but often the appeal challenged the conviction alone and shed no additional light on the adjudication of the fact underlying the upward departure.

35. See, e.g., MODEL PENAL CODE: SENT'G § 1.02(2)(b) cmts. j, k, l, o (AM. L. INST., forthcoming 2021) (on file with author) (explaining the advantages of presumptive sentencing guidelines in meeting these ends).

36. See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 33–36 (2019) [hereinafter BARKOW, PRISONERS OF POLITICS] (discussing the history and rise in popularity of mandatory minimum sentences); Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald Wright, Kay Levine & Russel Gold eds., forthcoming 2021) (manuscript at 546, 555–62) (on file with author) (discussing the development and increasing prevalence of mandatory minimums and sentence enhancements); Michael Tonry, *Sentencing in America, 1975–2025*, in 42 CRIME

felony adjudication from sentencing guidelines regulation. The result is that every presumptive-guidelines state has some set of cases to which the guidelines do not apply. This not only undercuts the ability of presumptive sentencing guidelines to meet policy goals,³⁷ but it also affects the amount and type of upward departures. A state in which most offenses are sentenced under the presumptive sentencing guidelines is likely to have more upward departures than a state in which a legislature has opted for alternative ways to increase punishment when designated circumstances are present.

Two other factors may affect the volume of aggravated sentences that carry a right to a jury finding: the breadth of a state's presumptive-sentencing ranges and a state's unique interpretations of the Court's *Apprendi* doctrine. The sections below examine how each of these three factors may have influenced the magnitude of aggravated sentencing subject to the *Blakely* rule in the five states examined in this Article.

A. *Bypassing the Presumptive Sentencing Guidelines*

The MPCs advances a model sentencing scheme that abolishes mandatory minimum sentences³⁸ and only rarely exempts offenses from guidelines sentencing.³⁹ Legislators are supposed to set broad sentence ranges and then keep their hands off, refraining from boosting minimum or maximum sentences for specified scenarios beyond the ranges adopted by the state's sentencing commission. The five states using presumptive sentencing guidelines discussed in this study fall short of this ideal, to differing degrees. In each, the reach of the guidelines has contracted as legislators have expanded the number of

AND JUSTICE IN AMERICA, 1975-2025, at 141, 144-45 (Michael Tonry ed., 2013) (explaining the proliferation of mandatory minimums).

37. A sentencing commission can slow this trend by warning legislators about such negative effects, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 810-11 (2005), but that requires that a state's sentencing commission receive sustained funding for research, independence from political pressure, and significant deference from those with the power to undercut its penalty or policy choices, see *id.* at 781-87; see also MODEL PENAL CODE: SENT'G § 8.01 cmts. b-d (AM. L. INST., forthcoming 2021) (on file with author) (discussing required attributes of state sentencing commissions); BARKOW, PRISONERS OF POLITICS, *supra* note 36, at 171-77 (discussing various issues with existing state sentencing commissions and more advantageous approaches to avoid those problems in both state sentencing commissions and criminal justice agencies at large); FRASE, JUST SENTENCING, *supra* note 4, at 42-44 (describing the ideal structure and characteristics of a state sentencing commission); Stemen & Wilhelm, *supra* note 16, at 9-10 (arguing that presumptive-sentencing systems survived *Blakely* in states where legislatures fund strong state sentencing commissions that were able to provide reports that could explain procedural changes required in response).

38. MODEL PENAL CODE: SENT'G §§ 1.02(2) cmt. i, 6.02 cmt. c (AM. L. INST., forthcoming 2021) (on file with author).

39. *Id.* § 9.09(2) (stating that offenses should be excluded from sentencing guidelines only if "prosecutions are rarely initiated, if the offense definitions are so broad that presumptive sentences cannot reasonably be fashioned, or for other sufficient reasons that inclusion in the guidelines would be of marginal utility").

mandatory minimum and special-sentencing statutes that trump the application of the guidelines.⁴⁰

Kansas dramatically illustrates this phenomenon. Many have pointed to Kansas as proof that the number of upward departures subject to the *Blakely* rule in a presumptive-guidelines system can be quite small and manageable.⁴¹ Kansas Sentencing Commission reports suggest that no more than four percent of total guidelines sentences—probation and incarceration combined—involve any upward departure.⁴² Yet a close look at sentencing in Kansas suggests that

40. In Washington, enhancements have grown over the years. WASH. COMM’N, 2019 REVIEW, *supra* note 30, at 20 (noting the increase in the list of offenses to which firearm enhancements could be applied, the creation of eleven other enhancements, and the complexity of these enhancements that “are, at their core, mandatory minimums”); *id.* at app. E (displaying a three-page “Sentencing Enhancement Reference Guide”); *see also* WASH. REV. CODE ANN. § 9.94A.540 (LEXIS through chapter 9 of the 2021 Reg. Sess.) (providing mandatory minimum terms for certain murders, assaults, rapes, and escapes); James Drew, *Is Giving Judges More Discretion in Sentencing the Right Reform? Lawmakers To Decide*, NEWS TRIB., <https://www.thenewstribune.com/news/politics-government/article234301847.html> [<https://perma.cc/8VZ2-FDFU>] (Aug. 25, 2019, 9:46 AM) (“Hauge, chairman of the Sentencing Guidelines Commission and a former Kitsap County Prosecuting Attorney, said there have been several ‘good-faith’ efforts to make the law better, but ‘what we have created is a system of almost impenetrable complexity that the Department of Corrections is charged with making sense of.”).

In North Carolina, drug trafficking crimes and violent habitual offenders are sentenced outside the presumptive sentencing guidelines. N.C. GEN. STAT. § 90-95(h) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.) (covering drug trafficking crimes); *id.* § 14-7.12 (LEXIS) (covering violent habitual offenders). There are a number of other sentence-enhancement provisions raising the presumptive-sentencing range based on a finding of fact, including possession of a bulletproof vest, knowing the behavior violates a protective order, and use of a firearm. N.C. SENT’G & POL’Y ADVISORY COMM’N, STRUCTURED SENTENCING TRAINING AND REFERENCE MANUAL 9, 26 (2014) [hereinafter 2014 N.C. STRUCTURED SENTENCING MANUAL] (listing offense class enhancement facts).

In Minnesota, mandatory minimum provisions include terms for felony DWI, MINN. STAT. § 169A.276 (2020), and firearm enhancements, *id.* § 609.11. Other mandatory sentences are provided for sex offender–registration violations, furnishing alcohol to minors, assaults against police officers, any gang-related felony, and more. *See* MINN. HOUSE OF REPRESENTATIVES RSCH. DEP’T, MANDATORY SENTENCING LAWS INFORMATION BRIEF 4, 6 (2011); *see also* MINN. SENT’G GUIDELINES COMM’N, MINNESOTA FELONY STATUTORY SENTENCING ENHANCEMENTS: HIGHLIGHTS FROM 1987 TO 2017, at 1–6 (2017) (listing the development of different sentencing enhancements over a thirty-year period).

41. *See, e.g.*, WASH. SENT’G GUIDELINES COMM’N, REPORT OF THE SENTENCING GUIDELINES COMMISSION: DISCRETION UNDER THE SENTENCING REFORM ACT AND THE IMPACT OF *BLAKELY V. WASHINGTON* 10 (2005) [hereinafter WASH. SENT’G GUIDELINES COMM’N, *BLAKELY* REPORT] (reporting that a survey of judges, prosecutors and defense attorneys in Kansas “did not find anyone who believed that the post-*Gould* statutory changes have had any appreciable effect on the operation of the Kansas sentencing process.” (quoting Reitz, *The New Sentencing Conundrum*, *supra* note 8, at 1109 n.101)); Stemen & Wilhelm, *supra* note 16, at 8; MODEL PENAL CODE: SENT’G § 10.07 reporters’ note a (AM. L. INST., forthcoming 2021) (on file with author) (noting that Kansas’s approach using jury factfinding does not burden their court system).

42. *See, e.g.*, KAN. SENT’G COMM’N, ANNUAL REPORT FY 2018: ANALYSIS OF SENTENCING GUIDELINES IN KANSAS 64–66 (2019) [hereinafter KAN. 2018 ANNUAL REPORT], https://www.sentencing.ks.gov/docs/default-source/annual-reports/fy2018annualreport.pdf?sfvrsn=5f8bfd3f_6 [<https://perma.cc/UH45-LFNG>] (reporting 85 upward dispositional and 188 upward durational

one contributor to this low number is the volume of cases that receive elevated sentences under separate sentencing provisions and are not counted as upward departures.

Kansas sentencing law diverts just under half of its prison sentences away from its guidelines, meaning those elevated sentences are not reported as upward departures from the guidelines. There are two reasons for this. First, as in many other presumptive-guidelines states, the most serious crimes in Kansas—murder, terrorism, and certain sex offenses—are sentenced under their own sentencing statutes rather than the presumptive sentencing guidelines.⁴³ Analysis of data from 2010 to 2017 provided by the Kansas Sentencing Commission shows that these “off-grid” cases accounted for about one percent of prison sentences imposed during that period.

In addition to this one percent of prison sentences diverted from departure analysis, a much larger set of felony sentences are not counted in the Kansas Sentencing Commission’s reports as upward departures because they are imposed under one of the four dozen special-sentencing rules that raise the sentence range available to the judge.⁴⁴ For example, in 2018, an estimated forty-five percent of prison sentences were not governed by the Kansas guidelines’ departure provisions because of one or more of these special rules.⁴⁵

departure sentences, of 6,891 total guideline sentences, or 3.96%, which counts cases with both upward dispositional and upward durational departures twice).

43. See KAN. SENT’G COMM’N, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 2018, at 14–16 (2018) [hereinafter KANSAS 2018 MANUAL] (explaining off-grid crimes).

44. KAN. SENT’G COMM’N, ANNUAL REPORT: FY 2019, at xiv–xv (2020); see also Terri Savely, *25 Years of the Kansas Sentencing Guidelines: Where We Were, Where We Are, and What’s Next?*, 86 J. KAN. BAR ASS’N 22, 30 (2017) (“The once essentially straightforward grid process has become fractured by constant legislative changes and the adoption of numerous special rules.”). All sentences imposed because of a special rule are entirely excluded from the Kansas Sentencing Commission’s reported upward-departure analysis. See, e.g., KAN. SENT’G COMM’N, ANNUAL REPORT: FISCAL YEAR 2017, at xiv–xv (2018).

45. KAN. 2018 ANNUAL REPORT, *supra* note 42, at 80–81. For diverted sentences from 2014 to 2017, see *id.* at 81 (showing, of sentences to prison, 43.5% were sentences with special rules and thus not considered upward departures). These figures exclude off-grid sentences as well as sentences that run concurrently with or consecutively to a preguideline sentence. See *id.* at 80.

Nearly ninety percent of all special-rule cases are sentenced under a rule that allows or mandates the imposition of an incarceration sentence despite a presumed sentence of nonincarceration. The three most commonly applied special-sentence rules raise the presumed sentence from nonprison to prison. One raises the presumed sentence for a “person” felony (a felony triggered by an act or threat of physical violence against another person) to imprisonment if a judge finds it was committed with a firearm, and the other two allow a sentence of imprisonment, even when the presumed sentence is nonprison, if the offense was committed while incarcerated, under supervision, or on felony bond. Other special rules tack on an additional term after the trier of fact finds a fact, such as possessing a firearm in furtherance of a drug felony (adds six months’ imprisonment) or discharging a firearm while committing a drug felony (adds eighteen months). These are essentially aggravated offenses, with the fact included as part of the verdict, but are enacted as a sentencing provision. Still other special rules are pure prior-conviction enhancements, or operate to permit consecutive sentencing, and thus do not

This removal of nearly half of Kansas’s prison sentences from departure analysis may explain, at least in part, why the percentage of all felony sentences including an upward departure is lower in Kansas compared to the other four states examined for this Article. See Table 1.

Table 1. Percentage of Adult Felony Sentences Including Upward Departure (“up dep”)⁴⁶

State	Years of Sentencing Data	Total Adult Felony Sentences	Upward-Departure Sentences	Up Deps. as a % of Adult Felony Sentences
KS	2010–2017	91,840	799	0.9
MN	2010–2017	127,530	5,620	4.4
NC	2010–2017	235,551	8,033	3.4
OR	2016–2017	53,441	4,946	9.3
WA	2010–2017	191,863	3,942	2.1

Shifting sentencing for certain cases away from the presumptive sentencing guidelines to other range-raising approaches can not only reduce the volume of upward departures, but can also change the mix of offenses that receive upward departures. Some common upward-departure factors related to victimization—such as unusually severe harm or loss, vulnerable victim, multiple victims, or deliberate cruelty—are more likely to apply in crimes

trigger *Blakely*. See KANSAS 2018 MANUAL, *supra* note 43, at 48–57 (outlining special-sentencing rules in Kansas).

I did not attempt to track the application of enhancements and other sentencing statutes in the other states. Even if data are available, the number, type, applicability, and scope of enhancements vary significantly, even within a single state from year to year. See, e.g., WASH. COMM’N, 2019 REVIEW, *supra* note 30, at app. E (showing Washington’s Sentencing Enhancement Reference Guide).

46. Table includes figures for Kansas, North Carolina, and Washington from data provided by each state’s sentencing commission. The number for total adult felony sentences for Minnesota is from the Minnesota Sentencing Guidelines Commission’s Sentencing Practices published in 2018, MINN. SENT’G GUIDELINES COMM’N, 2017 SENTENCING PRACTICES 36 tbl.5 (2018) [hereinafter MINN. 2017 SENTENCING PRACTICES], and the number of upward departures is from data that the Minnesota Sentencing Guidelines Commission provided to me for this Article.

The total number of felonies sentenced for Oregon was estimated by multiplying the conviction rates from 2016 to 2017 (83%), OR. CRIM. JUST. COMM’N, 2019 SAC GRANT REPORT: FELONY CASE PROCESSING TRENDS IN OREGON 9 tbl.4.2.1 (2019) [hereinafter 2019 SAC GRANT REPORT], by the total felony cases *terminated* from 2016 to 2017 (64,387), OR. JUD. DEP’T, STATISTICAL REPORT RELATING TO THE CIRCUIT COURTS OF OREGON 1 tbl.2 (2017), https://www.courts.oregon.gov/about/Documents/ojd_2016_and_2017_Terminated_Case_Trend_Data_v2.0_tas_2018-07-25.pdf [<https://perma.cc/WE62-XEBV>]. Even if the departure rate was calculated using all felony cases terminated—including dismissals, acquittals, and misdemeanor outcomes—instead of estimated felony convictions alone, Oregon’s departure rate would still be much higher than the rate in other states (7.7%).

against persons or property crimes than in drug crimes, for example. Crimes with victims also attract more public attention, making them targets for mandatory minimum sentencing or enhanced-sentence legislation.⁴⁷ When mandatory minimum and enhanced-sentencing provisions preempt guideline application to a particular crime type, the number of upward departures for that crime type may fall as well.

Oregon is an example of this form of guidelines displacement. In Oregon, Measure 11 created minimum sentences for most violent offenses and many other serious crimes,⁴⁸ essentially supplanting the presumptive sentencing guidelines for those cases.⁴⁹ A later referendum (Measure 57) imposed minimum sentences for a large group of drug and property offenses, taking them outside of the guidelines as well.⁵⁰ That may help to explain why less than eight percent of upward-departure sentences in Oregon are for crimes against persons, compared to other states, where the rate of upward departures is greatest for crimes against persons.⁵¹ See Table 2.

Table 2. Crime Type Percentage of Total Upward Departures⁵²

State	person		property		drug		other	
	% of up dep	# cases up dep	% of up dep	# cases up dep	% of up dep	# cases up dep	% of up dep	# cases up dep
KS	40.7	325	^	^	17.5	140	41.8^	334^
MN	27.4	1540	27.3	1533	37.4	2100	8.0	447
NC	28.2	2269	32.3	2595	26.1	2097	13.3	1072
OR	7.4	367	27.0	1336	49.0	2423	16.6	820
WA	43.4	1712	25.7	1015	14.5	572	16.3	643

^ In Kansas, “other” includes *both* property and other cases combined.

47. See, e.g., WASH. SENT’G GUIDELINES COMM’N, 20 YEARS IN SENTENCING: A LOOK AT WASHINGTON STATE ADULT FELONY SENTENCING FISCAL YEARS 1989 TO 2008, at 49 (2010) (“[T]he sentences most likely to receive an enhancement are generally violent sentences.”).

48. For a handy chart showing covered offenses and the mandatory minimum sentences for each, see *Measure 11 Crimes and Mandatory Minimum Sentences*, MULTNOMAH CNTY., <https://multco.us/dcj-juvenile/common-laws/measure-11> [<https://perma.cc/378U-KN2U>].

49. See *id.*; see also NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION, *supra* note 30, at 77 (“In Oregon, the committee that had drafted and monitored the guidelines was disbanded, and the guidelines were trumped by a broad-based mandatory minimum sentence law enacted in 1994.”).

50. OR. LEGIS. COMM. SERVS., BACKGROUND BRIEF ON FELONY SENTENCING 2–3 (2010) (listing sentence enhancements under Measure 57 for drug and property crimes).

51. See, e.g., MINN. 2017 SENTENCING PRACTICES, *supra* note 46, at 33 (“Aggravated durational departure rates were highest for intentional second-degree murder, assault in the first degree, and criminal sexual conduct in the first degree.”).

52. Figures are calculated from data provided by sentencing commissions in each state. All figures are for the years 2010–2017, except Oregon, where the data covers only 2016–2017.

B. *Broadening Presumptive-Sentencing Ranges*

A second control on the number of upward departures in each state is the breadth of the state's presumptive-sentencing ranges. Some states deliberately widened presumptive ranges after *Blakely* to allow judges to impose more severe sentences without triggering *Blakely* protections—a move that led to a drop in upward durational departures.⁵³ In states that had no presumptive ceiling on terms of probation,⁵⁴ judges could extend probation terms without an upward durational departure subject to *Blakely*.⁵⁵ North Carolina and Washington also avoided upward dispositional departures altogether by including incarceration in many⁵⁶ or all⁵⁷ presumptive-sentencing ranges.

C. *Bypassing Blakely*

Even among sentences that are considered by a state to be upward departures, because states interpret the reach of the Court's *Apprendi* doctrine differently, an upward departure may carry the right to a jury finding beyond a reasonable doubt in one state but not in another. The number of sentences affected by *Blakely* should shrink with narrow interpretations and grow with broader ones.

53. See WASH. COMM'N, 2019 REVIEW, *supra* note 30, at 5, 16–18; MINN. SENT'G GUIDELINES COMM'N, 2018 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2018, at 31 (2019) [hereinafter MINN. 2018 SENTENCING PRACTICES] (“In response to the *Blakely* decision, the 2005 Legislature widened the ranges on the Standard Grid to 15 percent below and 20 percent above the presumptive fixed sentenced, within which the court may sentence without departure.”); MINN. SENT'G GUIDELINES COMM'N, SENTENCING PRACTICES: IMPACT OF *BLAKELY* AND EXPANDED RANGES ON SENTENCING GRID 6 (2010) (reporting that “aggravated durational departures decreased from 6 to 3 percent” after *Blakely* and the legislature widening the sentencing range); see also FRASE, JUST SENTENCING, *supra* note 4, at 126–27 (noting expanded ranges to ease compliance with *Blakely*).

54. See, e.g., FRASE, JUST SENTENCING, *supra* note 4, at 126.

55. Minnesota added presumptive-probation terms this past year. See MINN. SENT'G GUIDELINES COMM'N, 2020 REPORT TO THE LEGISLATURE, at app. 2.3 (2020) [hereinafter MINN. 2020 REPORT] (detailing an amendment that would make this departure subject to jury trial). The minority report, however, warned that “[a]dopting the majority's proposal for sentencing jury trials regarding the length of probation will increase costs for all criminal-justice stakeholders The judiciary, local county attorney offices, and the public-defense system will have to hear, prosecute, and defend the new *Blakely* trials. And, the public will be obligated to serve as jurors. The minority is concerned [about] the unprecedented, cost-increasing *Blakely* trial requirement” *Id.* at 110–11.

56. Of the seventy-two grid boxes on the Felony Punishment Chart in North Carolina, only three did not include active punishment as an option. N.C. SENT'G & POL'Y ADVISORY COMM'N, STRUCTURED SENTENCING TRAINING AND REFERENCE MANUAL 4 (2009).

57. See ROBINA INST. OF CRIM. L. & CRIM. JUST., JURISDICTION PROFILE: WASHINGTON 5–7 (2019), https://sentencing.umn.edu/sites/sentencing.umn.edu/files/washington_profile_0.pdf [<https://perma.cc/3R59-L9D6>].

1. Exempting Upward Dispositional Departures from *Blakely*

One way to narrow *Blakely*'s reach is to exclude upward dispositional departures altogether.⁵⁸ As noted above, Washington and North Carolina accomplished this by including both nonincarceration and incarceration options in their presumptive-sentencing ranges.⁵⁹ Kansas found a different way. Law there recognizes that imposing incarceration instead of presumptive probation is a dispositional departure but interprets *Blakely* narrowly to not reach this situation. Kansas courts continue to adhere to a 2002 Kansas Supreme Court decision that held that facts required for upward *dispositional* departures from the presumptive sentence may be found by judges at sentencing.⁶⁰

This position may have made some sense in 2002, as the U.S. Supreme Court's 2000 decision in *Apprendi* involved a fact that lengthened the maximum term of incarceration (a durational departure) and did not address probation or suspended sentences (a dispositional departure). But it has been a tenuous policy at least since 2013, when the Court held in *Allelyne v. United States*⁶¹ that any fact raising the *floor* of a permissible sentencing range must receive the same treatment as a fact that raises the ceiling.⁶² That the penalty is a more severe type of punishment rather than a longer term of incarceration does not matter. As stated in *Allelyne*,⁶³ increasing the "prescribed range of penalties" or "expos[ing] a defendant to a punishment greater than that otherwise legally prescribed" has the same constitutional meaning as raising the maximum term of incarceration.⁶⁴ Nor does the discretion a judge retains under a presumptive-

58. A later section in this Article examines upward dispositional departures in more detail, finding that almost all result from a plea agreement to a jail sentence rather than the presumptive-probation term. See *infra* notes 110–17 and accompanying text.

59. See *supra* notes 56–57 and accompanying text.

60. Before *Allelyne v. United States*, 570 U.S. 99 (2013), the Kansas Supreme Court held that the U.S. Constitution did not require jury factfinding for an upward dispositional departure—imposing a sentence of incarceration when the presumptive sentence is release on conditions. *State v. Carr*, 53 P.3d 843, 849–50 (Kan. 2002). The court reasoned that probation was an "act of grace," not a right, and that a judge's decision to depart from a presumed probation sentence to a prison sentence did not change the amount of punishment but only "determines where an individual's sentence will be supervised." *Id.*

61. 570 U.S. 99 (2013).

62. *Id.* at 112–14.

63. *Id.* at 111–12 ("Consistent with common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (emphasis added)); *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2002) ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." (emphasis added)); *Allelyne*, 570 U.S. at 111–12 ("We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. While *Harris* limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.").

64. *Allelyne*, 570 U.S. at 111–12; see also *Ring v. Arizona*, 536 U.S. 584, 601, 609 (2002) (applying *Apprendi* to the facts that make a defendant eligible for the death penalty, expanding the "range of

guidelines system to reject an upward departure appear to matter, as the Court explained when it applied *Apprendi* to the presumptive sentencing guidelines in *Blakely*.⁶⁵

Perhaps recognizing this, both Minnesota and Oregon treat upward dispositional departures—two-thirds of all upward departures in those states⁶⁶—the same as upward durational departures.⁶⁷ In Kansas, excluding upward dispositional departures shrinks the number of cases subject to the *Blakely* rule to an incredibly small 135 cases during the eight-year period spanning from 2010 to 2017—averaging about sixteen cases per year. See Table 3.

Table 3. Type of Upward Departure—Dispositional or Durational⁶⁸

State	Upward Dispositional (“up dis.”)			Upward Durational (“up dur.”)			Total	
	data years	up dis.	% of all up dep.	up dur.	up both	any up dur.		% of all up dep.
KS	2010–2017	664	83.1	122	13	135	16.9	799
MN	2010–2017	3705	65.9	1530	213	1793	31.9	5620
OR	2016–2017	3106	62.8	1796	41	1837	37.1	4946

A different policy decision slashed the number of upward dispositional departure cases reported in Minnesota. Until 2015, Minnesota followed the same practice as Oregon and Kansas: counting as an upward dispositional departure any sentence of incarceration when the presumed sentence was probation, including dispositional departures the defendant seeks.⁶⁹ It is not

penalties” from incarceration only to incarceration or death). Undoubtedly a fact that would change a presumptive sentence from a fine or incarceration to only incarceration would have the same effect.

65. *Blakely v. Washington*, 542 U.S. 296, 305 n.8 (2004) (“Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.”).

66. See *infra* text accompanying note 68 (displaying Table 3).

67. *State v. Allen*, 706 N.W.2d 40, 47 (Minn. 2005) (holding that a defendant has a Sixth Amendment right to a jury trial on the factors used to support a decision to sentence a defendant to an executed prison term if a term of probation supervision is presumed to be appropriate under the presumptive sentencing guidelines); *State v. Frinell*, 414 P.3d 430, 433 (Or. Ct. App. 2018) (same).

68. Calculated from data provided by the sentencing commissions in each state. Minnesota’s total includes 122 consecutive upward-departure cases not counted in either the upward dispositional or durational columns. See *infra* note 111 and accompanying text (displaying Table 6).

69. See, e.g., KAN. 2018 ANNUAL REPORT, *supra* note 42, at 64 (explaining that a dispositional departure occurs when incarceration is imposed instead of the recommended probation); OR. ADMIN. R. 213-003-0001(6) (Westlaw through rules filed through Mar. 23, 2021) (“Dispositional departure”

uncommon for a criminal defendant to request incarceration rather than probation.⁷⁰ If the defendant is serving time on a different charge, opting for incarceration rather than presumptive probation allows the defendant to complete both sentences simultaneously, rather than serving a supervised term on one offense only after completing a term of incarceration on the other.⁷¹ Or, instead of a probation term that would begin after sentencing, a defendant may prefer a sentence of time-served—a term of incarceration equivalent to the time already served in detention awaiting adjudication—which would end at sentencing. Also, a defendant may regard compliance with the conditions of probation as more onerous than serving a term of incarceration.⁷²

In 2015, the Minnesota Sentencing Guidelines Commission stopped counting requests for prison as upward dispositional departures.⁷³ Reportedly, trial judges demanded this change, after expressing concern that their individual departure rates could be used against them politically and that including incarceration sentences that defendants had a right to request distorted those rates.⁷⁴ Before the change, these requests for incarceration rather than probation constituted up to eighty-four percent of upward dispositional departures and fifty-one percent of all upward departures in the state.⁷⁵ By 2017, because of the change, the rate of upward dispositional departures in the state dropped from 3.3% of all cases to 0.8%.⁷⁶

As Part III will show, in every state, *most* upward departures, including upward dispositional departures, are imposed because defendants ask for them,

means a sentence which imposes probation when the presumptive sentence is prison *or* prison *when the presumptive sentence is probation.*" (emphasis added)).

70. See *infra* Section III.A.1.a.

71. See, e.g., MINN. STAT. § 609.135 subdiv. 7 (2020). For example, Minnesota limited the right to request incarceration rather than release on conditions to cases with incarceration terms that were concurrent with or consecutive to another incarceration term or were at least nine months in duration. *Id.*

72. See, e.g., *State v. Randolph*, 316 N.W.2d 508, 510 (Minn. 1982) (holding that defendants have a right to request incarceration rather than release on conditions—known in Minnesota as “execution of sentence”—when the proposed conditions of probation are, in effect, more severe than the prison term would be).

73. See MINN. 2018 SENTENCING PRACTICES, *supra* note 53, at 24.

74. Zoom Interview with Richard Frase, Professor, Univ. Minn. L. Sch., Kay Knapp, Consultant, Robina Inst., Kelly Mitchell, Lecturer, Univ. Minn. L. Sch., Kevin Reitz, Professor, Univ. Minn. L. Sch. & Richard Walker, Senior Judge, Kan. Ct. App. (Oct. 18, 2020).

75. MINN. SENT’G GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 23 & n.50 (2017); MINN. SENT’G GUIDELINES COMM’N, 2013 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS 24 (2014).

76. MINN. 2018 SENTENCING PRACTICES, *supra* note 53, at 24 (“The aggravated dispositional departure rate for [sentences in 2018 for offenses after the 2015 change] was 0.5 percent, compared to 6.3 percent for 2018 cases with offense dates prior to August 1, 2015.”); MINN. 2017 SENTENCING PRACTICES, *supra* note 46, at 23 (noting that the rate of upward dispositional departures for those cases with dates after the change was 1.1%, compared to 5.2% for 2017 cases with offense dates prior to August 1, 2015).

either as part of a plea or sentence agreement or in anticipation of some other benefit. Yet no state other than Minnesota has defined upward departures to exclude a sentence that is more severe in type or duration than the sentences permitted by the presumptive range *because* the defendant asked for that sentence. This manipulation of upward-departure statistics in Minnesota did not change the quantity of cases requiring proof beyond a reasonable doubt to a jury—a defendant who seeks an upward departure essentially waives that right.⁷⁷ But it is another striking example of how states construct those statistics differently.

2. Exempting Upward Durational Departures for Probation

Deliberately exempting probation terms that exceed the presumptive term from the *Blakely* rule is yet another way to shrink the impact of that case. Consider Kansas and Oregon. In both states, a term of probation that is longer than the term in the presumptive-sentencing range is an upward durational departure.⁷⁸ Indeed, analysis of Oregon data for 2015 and 2016 revealed that these lengthened-probation terms constituted ninety-two percent of *all* upward durational departures. Presumably, these upward departures, if not stipulated or requested, would require the same jury factfinding beyond a reasonable doubt as other upward departures, but so far Oregon and Kansas courts have yet to admit that they do.⁷⁹ Meanwhile, in 2020, Minnesota adopted a contrary position, that upward durational departures now carry the right to a jury determination beyond a reasonable doubt.⁸⁰

3. Exempting Prior Juvenile Adjudications or Supervisory Status at the Time of Commission

Relying on the “exception” to the *Apprendi* rule for prior convictions,⁸¹ all five states set increasingly severe presumptive-sentence ranges based on

77. For a discussion of waiver, see *infra* Section IV.B.

78. OR. ADMIN. R. 213-005-0016 (Westlaw through rules filed through Mar. 23, 2021); see also *State v. Hambright*, 447 P.3d 972, 979–80 (Kan. 2019) (refusing to overrule earlier, pre-*Apprendi* precedent—*State v. Whitesell*, 13 P.3d 887 (Kan. 2000)—and finding that imposition of a probation term longer than the presumptive period is an upward durational departure requiring that the judge state substantial and compelling reasons for departure).

79. See *State v. Gutierrez*, 112 P.3d 433, 434–35 (Or. 2005). In *State v. Hambright*, 447 P.3d 972 (Kan. 2019), the Kansas Supreme Court declined to address whether a defendant would have a right to a jury determination, stating “[I]t is not abundantly clear that *Apprendi* would be applicable here.” *Id.* at 979–80 (citing *State v. Carr*, 53 P.3d 843, 850 (Kan. 2002)).

80. See MINN. 2020 REPORT, *supra* note 55, at 101–19.

81. See *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (reiterating the “narrow exception” for the fact of a prior conviction (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998))).

increasingly severe criminal histories.⁸² Thus, there is no right to a jury finding of any of the prior convictions that make up the criminal history score, even when a higher score raises the presumptive-sentencing range. This free pass to use prior convictions to raise sentencing ranges also allows jurisdictions to condition the imposition of sentences higher than the presumptive-guideline range upon a judicial finding that a prior conviction was of a certain type, such as a violent offense or a sex offense.

But states do not agree on whether a prior adjudication of juvenile delinquency fits within the prior-conviction exception.⁸³ They also divide over how to treat the fact that an offense was committed while under supervision (on pretrial release, probation, or parole). Some states regard supervision status at the time of offense as a fact that falls outside the prior-conviction exception and thus it carries a right to proof beyond a reasonable doubt before a jury whenever it raises the presumptive-sentencing range.⁸⁴ Others assume it falls within the exception and rely on that status in the calculation of the criminal history score.⁸⁵ In these latter states, the set of cases implicating *Blakely* would be much

82. See KAN. STAT. ANN. §§ 21-6804 to -6805 (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); MINN. SENT'G GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § 2.C.1 & cmt. 2.C.01 (2019) [hereinafter 2019 MINN. GUIDELINES AND COMMENTARY]; 2014 N.C. STRUCTURED SENTENCING MANUAL, *supra* note 40, at 6; OR. ADMIN. R. 213-004-0001 (Westlaw through rules filed through Mar. 23, 2021); THE OREGON SENTENCING GUIDELINES GRID, <https://www.oregon.gov/cjc/resources/documents/guidelinesgrid.pdf> [<https://perma.cc/3XAV-88VX>]; WASH. STATE CASELOAD FORECAST COUNCIL, 2018 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUEL 52 (2018); see also WASH. REV. CODE ANN. § 9.94A.535(2)(b), (d) (LEXIS through chapter 9 of the 2021 Reg. Sess.) (jury findings are not required for upward departure if “[t]he defendant’s prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter”).

83. See, e.g., *State v. McFee*, 721 N.W.2d 607, 619 (Minn. 2006) (allowing juvenile adjudications); *State v. Harris*, 118 P.3d 236, 246 (Or. 2005) (en banc) (“[W]e hold that the use of prior juvenile adjudications as sentencing factors in Oregon does not violate the jury trial right guaranteed by the Sixth Amendment.”); *State v. Weber*, 149 P.3d 646, 648 (Wash. 2006) (en banc) (holding that prior juvenile adjudications fall under “prior conviction” exception); see also RICHARD S. FRASE, JULIAN V. ROBERTS, RHYS HESTER & KELLY LYN MITCHELL, CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK 48–49 (2015).

84. North Carolina insists on proof beyond a reasonable doubt under *Blakely* for supervision or custodial status as an enhancement factor, see, e.g., *State v. Everette*, 361 N.C. 646, 651–54, 652 S.E.2d 241, 244–45 (2007); *State v. Wissink*, 361 N.C. 418, 419, 645 S.E.2d 761, 761 (2007) (per curiam), as does Oregon, see, e.g., *State v. Gallino*, 206 P.3d 204, 205 (Or. 2009); *State v. Bray*, 160 P.3d 983, 989 n.1, 990 (Or. 2007) (holding that “persistent involvement in similar offenses or repetitive assaults” requires a jury finding). *But see* *State v. Hinton*, 263 N.C. App. 532, 538–41, 823 S.E.2d 667, 672–74 (2019) (declining to decide whether *Blakely* bars judicial finding under N.C. GEN. STAT. § 15A-1340.16(b) that the defendant had a past judgment of a willful probation violation).

85. 2019 MINN. GUIDELINES AND COMMENTARY, *supra* note 82, § 2.B.1 & cmt. 2.B.201; *State v. Brooks*, 690 N.W.2d 160, 162–63 (Minn. Ct. App. 2004) (upholding use of “custody status” in criminal history score as within the exception for prior convictions); *State v. Jones*, 149 P.3d 636, 640 (Wash. 2006) (en banc) (holding that facts “intimately related” to the conviction, including whether the offense was committed while on release, fall within the exception for prior convictions); see also

larger if it included every sentence in which a higher range depended upon a finding that the offense was committed on release.

4. Other *Blakely* Exemptions

Additional *Blakely* carveouts divide these states. In a split decision, Minnesota's Supreme Court interpreted *Blakely* to allow a judge to determine whether the facts proven to a jury or admitted by the defendant constitute "particular cruelty,"⁸⁶ while Oregon, Kansas, and Washington submit similar aggravating factors to juries.⁸⁷ States may also report sentences that the U.S. Supreme Court has specifically *excluded* from *Blakely* protections as upward departures. For example, some consecutive sentences are considered upward departures carrying a right to a jury factfinding in Minnesota and Washington, despite the U.S. Supreme Court's holding in *Oregon v. Ice*,⁸⁸ which rejected that rule under the U.S. Constitution.⁸⁹

WASH. STATE CASELOAD FORECAST COUNCIL, 2018 WASH. STATE ADULT SENTENCING GUIDELINES MANUAL 52, 57 (2018) (including in the "offender score" the time between prior offenses); *Jones*, 149 P.3d at 638 (analyzing the commission of an offense while on supervision); *State v. Brinkley*, 369 P.3d 157, 160 (Wash. Ct. App. 2016) (outlining the timing of convictions). Courts in other states without presumptive sentencing guidelines are divided over this question as well, see authority collected in LAFAVE ET AL., *supra* note 13, § 26.4(i) n.248.

86. *State v. Rourke*, 773 N.W.2d 913, 921–22 (Minn. 2009) ("*Blakely* does not require a district court to submit the aggravating factor of particular cruelty to a jury . . ."). The dissent explained why a jury must find this aggravating factor like any other and noted that Washington had drafted jury instructions for its similar aggravating factor. *Id.* at 925–29 (Anderson, J., dissenting); see also William W. Berry III & Carissa Byrne Hessick, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 512 (2019) ("[T]he *Blakely* Court characterized the finding of 'deliberate cruelty' as an 'aggravating fact,' and it is difficult to see how Minnesota's 'particular cruelty' factor is any different."). The other holding in *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009), that presumptive sentencing guidelines are not subject to vagueness challenges, is also controversial. See *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (distinguishing *advisory* guidelines, which are not subject to vagueness challenges, from statutes that fix the range of permissible punishment, which are).

87. See KAN. STAT. ANN. § 21-6815(b), (c)(2)(B) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021) (covering "excessive brutality"); OR. ADMIN. R. 213-008-0002(1)(b)(J) (Westlaw through rules filed through Mar. 23, 2021) ("The degree of harm or loss [involved] . . . was significantly greater than typical for such an offense."); WASH. REV. CODE ANN. § 9.94A.535(3)(a) (LEXIS through chapter 9 of the 2021 Reg. Sess.). Professors William Berry III and Carissa Hessick have argued that even the "substantial and compelling" decision reserved for the judge should require a jury finding. See Berry & Hessick, *supra* note 86, at 514–17.

88. 555 U.S. 160 (2009).

89. *Id.* at 164, 172; see MINN. SENT'G GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § 2.F (2020) [hereinafter 2020 MINN. GUIDELINES AND COMMENTARY]; *State v. Ice*, 204 P.3d 1290, 1290 (Or. 2009) (per curiam); WASH. REV. CODE ANN. § 9.94A.535 (LEXIS through chapter 9 of the 2021 Reg. Sess.). These are not common, and over the eight-year period, only 122 cases with consecutive departures lacked either an upward dispositional or upward durational departure. See *infra* note 111 and accompanying text (displaying Table 6).

With no need to comply with *Blakely*, consecutive sentences may provide an attractive substitute for an upward departure. See FRASE, JUST SENTENCING, *supra* note 4, at 177–80, 198–201; Stemen & Wilhelm, *supra* note 16, at 8.

These varying interpretations of the Constitution's commands can have a dramatic effect on the volume of sentences that might carry a right to a jury factfinding beyond a reasonable doubt for an aggravating fact.

* * *

Despite worries that it would be prohibitively expensive to provide the right to a jury trial for aggravating facts,⁹⁰ the overall number of cases carrying this right makes up a small subset of felony sentences. And yes, in Kansas—exhibit A for the claim that the costs of *Blakely* are “small and manageable”—the number of cases subject to the *Blakely* rule, as that rule is interpreted by Kansas courts, is less than a couple dozen per year. This is indeed a miniscule portion of the well over 10,000 felony sentences in Kansas annually.⁹¹ But that tiny number appears to be at least partially the result of uniquely narrow interpretations of constitutional mandates, as well as choices concerning the scope and design of the presumptive sentencing guidelines and sentencing laws, that are unlike those of other states and the MPC model. Other states, too, have adopted controversial, if not arbitrary, policies that have shrunk the number of upward departures subject to *Blakely*. In sum, the rate of upward departures that might require proof beyond a reasonable doubt before a jury is not inevitably as low as the rates reported by these states. Instead, that rate—and the concept of upward departure itself—can be manipulated. Any jurisdiction considering adopting presumptive sentencing should be aware of the potential impact of these choices.

III. BARGAINING OVER UPWARD DEPARTURES: TOOLS TO ENGINEER STIPULATED SENTENCES AND LEVERAGE PLEAS

This part examines the function of upward departures in bargaining. Section III.A examines bargaining patterns in guilty plea cases with upward departures, how often upward departures are not contested, and the reasons that defendants and judges agree to them. Section III.B presents the claim by supporters of presumptive sentencing guidelines that compared to mandatory minimum sentences, upward departures transfer less sentencing power away from judges to prosecutors.⁹² Section III.C examines this claim using unique data from Minnesota.

90. See *supra* note 18 and accompanying text.

91. See *supra* notes 46, 68 and accompanying text (displaying Tables 1 & 3).

92. See *infra* notes 149–68 and accompanying text.

A. *Uncontested Upward Departures—A Tool To Engineer Stipulated Sentences*

Reports from state sentencing commissions in Washington and Minnesota⁹³ and interviews of practitioners and judges in Oregon and North Carolina⁹⁴ suggested that almost all upward-departure sentences were not contested by the defendant. Data provided from Minnesota, Washington, and Kansas, and court records in Oregon, Kansas, and Minnesota confirmed this. After documenting the low incidence of cases in which a defendant disputes an upward departure, I turn to the reasons that defendants agree to them so often.

1. The Extent of Agreement

All but a small percentage of those convicted of a crime in the United States plead guilty; trials are the exception. This appears to be true for cases involving upward-departure sentences as well. In Washington, more than eighty-six percent of defendants receiving upward-departure sentences pled guilty. In the four other presumptive-guidelines states examined here, defendants who receive upward-departure sentences went to trial at a rate that is only slightly higher or even lower than the trial rate for felony defendants generally.⁹⁵ See Table 4. Oregon's low trial rate for cases with upward-departure sentences⁹⁶ could be explained by the exclusion of most serious felonies from Oregon's guidelines⁹⁷ and the prevailing use of upward departures as bargaining tools to *avoid* more severe sentences, discussed below.

93. See MINN. 2018 SENTENCING PRACTICES, *supra* note 53, at 22 (“[T]hese departure statistics should be reviewed with an understanding that, when the court pronounces a particular sentence, there is commonly agreement or acceptance among the other actors that the sentence is appropriate. Only a small percent of cases (1%–2%) result in an appeal of the sentence”); see also WASH. COMM’N, 2019 REVIEW, *supra* note 30, at 5 (“[M]ost sentencing decisions are presented to the judge as an agreed disposition. In 90+% of felony sentencings (a figure essentially the same across the country), the judge hears both prosecution and defense ask for the same sentence. In Washington, that is almost always a period of months of incarceration within the standard range set by the SRA.”).

94. These interviews were conducted in 2016 for a different project. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 338–55 nn.65–183, 361–92 nn.218–388 (2016) [hereinafter King & Wright, *Judicial Participation*].

95. To check if the higher trial rate for departure sentences might reflect a different crime-type mix, I compared trial rate by crime type for North Carolina and Kansas, the only two states where that information was available. In those two states, with the exception of drug crimes, the trial rates for upward-departure cases were higher than trial rates among all felonies of the same crime type.

96. See *infra* note 99.

97. See *supra* text accompanying notes 48–51.

Table 4. Trial Rates, Total Adult Felony and Upward-Departure Cases Compared⁹⁸

	Trial Rate: Adult Felony Cases	Trial Rate: Upward-Departure Cases Only
KS [^]	3.2	4.3
MN	3.0	4.2
NC	2.2	4.0
OR	n/a ⁹⁹	2.4
WA	5.3	13.2

[^] KS felony cases include only guideline (“grid”) cases.

The trial rates for the *aggravating facts* that a state must prove before the judge may impose these upward-departure sentences are even lower than the trial rates for conviction reported in Table 4. This is because defendants convicted at trial often waive the right to a jury trial of the aggravating fact and opt for a bench trial instead or simply admit the aggravating fact.¹⁰⁰ For example, in Minnesota, roughly one in four defendants receiving an upward-departure sentence after being convicted at trial did not contest that sentence.¹⁰¹

Analysis of sentencing information provided by the states confirmed that most of the upward departures were imposed with the agreement of the

98. Kansas, North Carolina, and Washington figures are from data provided by each state’s sentencing commissions. The figures for the trial rate for adult felony cases in Minnesota are calculated from data from the Minnesota Sentencing Guidelines Commission. MINN. SENT’G GUIDELINES COMM’N, 2014 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS (2015); MINN. SENT’G GUIDELINES COMM’N, 2015 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS (2016); MINN. SENT’G GUIDELINES COMM’N, 2016 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS (2017); MINN. SENT’G GUIDELINES COMMISSION, 2017 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2017 (2018). The figures for the Minnesota trial rate for upward-departure cases only are calculated from data provided by the Minnesota Sentencing Guidelines Commission.

99. Information on the trial rate for all felony cases in Oregon in 2016 and 2017 was not available. However, if the rates were similar to other years, it appears that the trial rate for upward-departure cases is *lower* than the trial rate for all felonies, unlike the other states. See OR. JUD. DEP’T, STATISTICAL REPORT RELATING TO THE CIRCUIT COURTS OF THE STATE OF OREGON 83 (2011), https://www.courts.oregon.gov/about/Documents/2011_CircuitCourtCaseStatistics.pdf [https://perma.cc/5UUD-KDXP] (reporting a trial rate of all felony terminations as 4.4% in 2011); OR. JUD. DEP’T, CASES TRIED ANALYSIS - MANNER OF DISPOSITION 1 (2018), <https://www.courts.oregon.gov/about/Documents/2018CasesTriedAnalysis-MannerofDisposition.pdf> [https://perma.cc/29VU-2R24] (reporting a trial rate of 3.3% in 2018); OR. JUD. DEP’T, CASES TRIED ANALYSIS - MANNER OF DISPOSITION 1 (2019), <https://www.courts.oregon.gov/about/Documents/2019CasesTriedAnalysis-MannerofDisposition.pdf> [https://perma.cc/3ASW-8K9T] (reporting a trial rate of 4.6% in 2019).

100. See *infra* notes 210, 216 and accompanying text (discussing waiver).

101. See *infra* note 212 and accompanying text.

defendant, either as part of a plea agreement or because the defendant did not contest the issue following their conviction at trial. Although it was not possible to confirm whether or not the defendant agreed to the departure sentence in many cases, among the discernable cases reported below in Table 5, it appears that most of these upward departures were not contested.¹⁰² In the sections that follow, I detail some of the reasons why defendants choose not to contest upward departures.

Table 5. Percentage of Upward-Departures Cases Where Information Clearly Indicated That the Defendant Agreed to the Departure as Part of a Plea Agreement, Stipulation, or Request¹⁰³

	Percentage of Upward Departures Clearly Agreed to
KS [^]	69.2
MN	74.9
OR	51.0
WA	78.3

[^] Kansas reporting percentage of upward *durational* departures only, while other states reporting percentage of all upward departures

2. Why Defendants Agree to Upward Departures

In theory, upward departures are supposed to be limited to cases in which “the defendant’s conduct [in the offense of conviction] was significantly more . . . serious than that typically involved in the commission of the crime in question.”¹⁰⁴ Instead, this examination of the data and dockets available reveals that upward departures are frequently imposed not to punish culpable behavior

102. Table 5 probably *understates* the extent of uncontested departures quite a bit. The lack of notices in nine out of ten upward-departure cases settled by a plea in Minnesota, *see infra* Section III.C, suggests that, in all those cases, the defendant had waived notice and agreed to that sentence as part of a plea bargain. Rates of agreement were higher for plea cases with mixed departures (upward as well as downward) than for plea cases with upward departures only. In Oregon, too, open pleas without a plea agreement as to sentence are reportedly rare. *See* 2019 SAC GRANT REPORT, *supra* note 46, at 1 & n.2 (stating that, regarding cases concluding with at least one guilty plea, “[w]ith rare exception [the guilty plea] represents a plea deal”).

103. Figures are from data provided by the sentencing commissions in each state, all for the years from 2010 to 2017, except Oregon, with data from only 2016 to 2017. Figures exclude plea cases where it was not clear from the docket sheet whether the defendant had agreed to the departure or the judge determined it. In Oregon, this was a very large portion—forty-seven percent of guilty plea cases coded.

104. *State v. Broten*, 343 N.W.2d 38, 41 (Minn. 1984); *see also State v. Cardenas*, 914 P.2d 57, 61 (Wash. 1996) (noting that egregious conduct beyond that typical of the crime on a defendant’s part may justify an exceptional sentence); MODEL PENAL CODE: SENT’G § 9.04 cmt. d (AM. L. INST., forthcoming 2021) (on file with author). For a thorough analysis of the debate about reserving departures for circumstances related to proportionality of punishment rather than utilitarian reasons, *see* MODEL PENAL CODE: SENT’G §§ 1.02(2)(a)(i), 9.05 cmt. e, 10.03 cmt. e (AM. L. INST., forthcoming 2021) (on file with author); Frase, *Forty Years*, *supra* note 14, at 111–12.

or more dangerous offenders, but because an upward departure is the most convenient way to reach a sentence—often a more lenient outcome—that the parties prefer.

Before turning to the findings that support this claim, an explanation of the information on which it is based may be helpful. In Kansas, Minnesota, North Carolina, and Oregon, the judge is supposed to place the specific basis for upward departure on the record—a plea agreement or stipulation to the upward departure is not itself a sufficient reason for upward departure.¹⁰⁵ (Washington requires only that the judge find a stipulated sentence be “consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.”)¹⁰⁶ Fortunately, information about the reasons for upward departures was available for every state but North Carolina.¹⁰⁷ Even so, specific reasons other than the defendant’s stipulation, request, or agreement were not available in every case; in fifty to eighty percent of upward-departure cases, depending on the state, neither the docket sheet nor sentencing data provided any reason for the upward departure other than stipulation or plea agreement.¹⁰⁸ The requirement of a separate reason must be difficult to enforce in cases with uncontested upward departures, which will likely never be appealed.¹⁰⁹

a. Opting for Incarceration

In a surprising number of cases, defendants preferred incarceration to probation, agreeing to or requesting an upward dispositional departure to an

105. KAN. STAT. ANN. § 21-6817(a)(4) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); *State v. Shull*, 381 P.3d 499, 505–06 (Kan. Ct. App. 2016); 2020 MINN. GUIDELINES AND COMMENTARY, *supra* note 89, § 2.D.1.c & cmt. 2.D.104 (“When a plea agreement involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain its reasons for accepting the negotiation.”); *State v. Misquadace*, 644 N.W.2d 65, 71–72 (Minn. 2002) (holding that a plea agreement standing alone is not a sufficient basis for an upward departure); 2014 N.C. STRUCTURED SENTENCING MANUAL, *supra* note 40, at 20; N.C. GEN. STAT. § 15A-1340.16(c) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.); OR. ADMIN. R. 213-008-0001 (Westlaw current with rules filed through February 16, 2021); WASH. REV. CODE ANN. § 9.94A.535 (LEXIS through chapter 9 of the 2021 Reg. Sess.). Indeed, in Oregon, upward departure cases require two different reasons when sentencing to both a dispositional and durational departure. *State v. Ferrell*, 933 P.2d 973, 975–76 (Or. Ct. App. 1997) (noting that the sentencing court must give distinct “substantial and compelling reasons” for the additional durational departure).

106. WASH. REV. CODE ANN. § 9.94A.535(2)(a) (LEXIS through chapter 9 of the 2021 Reg. Sess.).

107. Reasons for upward-departure sentences were available from the state sentencing commissions in Kansas, Minnesota, and Washington, and from notations on docket sheets in Kansas and Oregon.

108. This does not mean one was not provided in the record, only that it did not appear in either the data provided by the relevant state’s sentencing commission or in the docket sheets available.

109. *See infra* notes 132–35 and accompanying text.

incarceration sentence. As explained earlier,¹¹⁰ such defendants prefer a sentence of time served rather than a new probation term, are (or will be) serving time on another charge anyway, or wish to avoid onerous conditions of probation. In all three of the states that distinguished between upward dispositional and upward durational departures, a large proportion of upward dispositional departures appeared to reflect this situation. More than eighty percent of upward departures in Kansas were dispositional, and in Oregon and Minnesota, two-thirds were dispositional, even though in Minnesota the Minnesota Sentencing Guidelines Commission stopped counting requests for incarceration as upward departures in 2015. See Table 6.

Table 6. Type of Upward Departure—Including Combinations¹¹¹

	Upward Dispositional Departures				Upward Durational Departures					
	up dis no dur	up dis down dur	total	up dis % all up dep	no dis up dur	down dis up dur	total	up both	total any up dur	total any up depart
KS	503	161	664	83.1	122	0	122	13	135	799
MN	2888	815	3705	65.9	1274	256	1530	213	1793	5620
OR	3064	42	3106	62.8	709	1087	1796	41	1837	4946

A closer look at these cases is informative. In Oregon, almost all (ninety-seven percent) of the upward dispositional departures to incarceration from probation were the result of pleas, and among cases in which the defendant's position on the aggravating factor could be determined,¹¹² ninety-nine percent agreed to the upward departure.¹¹³ They were almost entirely short jail sentences of six months or less.¹¹⁴ Seventy percent were convictions for drug

110. *See supra* notes 69–72 and accompanying text (discussing requests for incarceration rather than probation in Minnesota).

111. Figures are calculated from the data provided by the state sentencing commissions in Kansas and Minnesota from 2010 to 2017 and in Oregon from 2016 to 2017. The totals reported for Minnesota upward dispositional departures include two cases with an upward consecutive departure as well; the total for upward durational departures includes fifty cases with an upward consecutive departure also; the total for any upward departures includes 122 cases in which the only upward departure was a consecutive departure.

112. In Oregon, information about whether the defendant agreed to or contested the aggravating factor, and the reasons for departure, was gleaned from docket sheets and appellate documents. *See supra* note 33 and accompanying text.

113. Oregon law used to include the right to reject probation in favor of incarceration, *State v. Carmickle*, 762 P.2d 290, 297 (Or. 1988), but that was changed by statute, OR. REV. STAT. ANN. § 137.010(4) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.).

114. Ninety-three percent were jail; ninety-one percent had sentences of six months or less. The short jail terms suggest most of these were time-served sentences exchanged for the plea.

crimes. A small number of cases involved upward dispositional departures to prison from presumptive jail, listing as reasons prison-exclusive programming that was not available in jail or that the defendant was already serving another term in prison. About one percent of upward dispositional departures were combined with a downward *durational* departure. Similar patterns appeared in Kansas¹¹⁵ and Minnesota.¹¹⁶

This pervasive use of upward dispositional departures to obtain a sentence more *favorable* to the defendant muddles the meaning of upward departures. In these cases, an upward-departure sentence does not indicate that the offense or offender was extraordinarily bad. Certainly, some of them could have been. But most of these cases suggest something entirely different—that pretrial detention policies and not the presumptive sentencing guidelines are setting the sentence at whatever time the defendant has already served while awaiting disposition; that defendants consider supervised probation to be worse than incarceration for one reason or another; or that if certain programming or treatment was available while on probation or in jail, some defendants would not be in prison.

If upward dispositional departures are not achieving the desired goal of singling out the worst offenses or offenders, one option is to eliminate them entirely by including an incarceration option in every presumptive-sentencing range, as Washington does.¹¹⁷ Alternatively, if preserving presumptive probation is helpful in reducing the use of incarceration overall, reforms that reduce pretrial detention, eliminate onerous terms of probation, and provide more comprehensive programming options outside of prison could reduce this routine use of upward dispositional departures.

b. Opting for Probation Instead of Incarceration, with a Longer Term if Revoked

Unique to Oregon and Minnesota were upward *durational* departures combined with downward dispositional departures to probation (also referred

115. In Kansas, almost all upward dispositional departures were from presumptive probation up to incarceration. In twenty-nine percent of these cases, the reason for the departure was not clear, but among the remaining cases, fifty-eight percent noted that the defendant had agreed to the departure (twenty-six percent of these noted that the defendant had requested it, and twelve percent referenced either “time served” or that the defendant was already serving a concurrent sentence). Only thirteen percent of the upward dispositional departures to incarceration noted a reason that appeared to be one the defendant might have contested, including being detained in jail rather than placed on probation for immigration enforcement (indicated by “ICE hold” or “for deportation” notations).

116. In Minnesota, the upward dispositional departure sentences were to prison from probation (as opposed to prison from jail), most with terms of just over a year. Of these, ninety-nine percent were plea convictions, and fifty-five percent of these were upward departures requested by the defendant, a small number of which were to obtain treatment or programming. A larger portion than that in Oregon involved a *downward durational departure* as well—twenty-two percent.

117. See WASH. 2018 MANUAL, *supra* note 6, § 4.

to as “down dis / up dur departures” in Table 6). In Oregon, as Table 6 reports, this represented twenty-two percent of all upward-departure cases. Oregon practitioners and judges explained in interviews for an earlier project that the parties in these cases were avoiding the mandatory minimum sentences for property offenses that apply under Measure 57 (as the only path to a downward departure in Measure 57 cases is a stipulation by both parties).¹¹⁸ Prosecutors and judges had an extra incentive to do this in presumptive-prison cases in some counties participating in the Justice Reinvestment Initiative, which provided financial rewards for reduced reliance on imprisonment.¹¹⁹ In exchange for the prosecutor’s agreement to waive the mandatory minimum in favor of probation, optimistic defendants agreed to serve a longer term of incarceration in the event that their probation was revoked.¹²⁰

Data analysis was consistent with this account. Ninety-nine percent of these upward durational / downward dispositional departures were guilty pleas, with uncontested aggravating factors in ninety-seven percent of the cases in which that information was available.¹²¹ Moreover, in contrast to the drug-heavy convictions seen in upward dispositional departures to jail, two-thirds of these deals for longer terms of probation rather than incarceration were for property offenses.¹²²

In Minnesota, too, similar plea bargains are unexceptional. As of 2020, of the eighteen percent of offenders on probation for more than five years, most

118. See OR. REV. STAT. ANN. § 137.717(6) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.) (mandating that Measure 57’s terms were required “*unless the parties stipulate otherwise* or the court finds” that all of four enumerated mitigating factors are present (emphasis added)); see also Act of July 25, 2013, ch. 649, §§ 5–16, 2013 OR. LAWS 1, 3–8 (codified in scattered sections of OR. REV. STAT. ANN.) (including the proposed amendments in Measure 57).

119. See King & Wright, *Judicial Participation*, *supra* note 94, at 351–54 (discussing the Justice Reinvestment Initiative and its mechanisms and results). *But cf.* George Ebo Browne, *A Pre- and Post-Implementation Assessment of Kansas’ HB 2170 Statute*, 30 FED. SENT’G REP. 108, 112 (2017) (stating that in Kansas “the use of JRI prison sanctions is perceived to have contributed to a higher number of offenders in prison”).

120. See King & Wright, *Judicial Participation*, *supra* note 94, at 351–55. Relatedly, an Oregon judge noted that “[prosecutors] often ask us to go outside the guidelines, the local practice here is to stipulate to a grid block that is not necessarily the defendant’s actual grid block. The DAs favorite thing has been for some time now, they’ll stipulate to a grid block that is much higher than the Defendant’s actual grid block, but the client was willing to do this on the condition that there is a departure downward from the presumptive sentence to probation. If he violates while on probation, he goes to prison for that higher sentence The defendants all think they can do it. The DA knows that he’s not going to and will get that prison sentence. We revoke probation on so many of these.” NANCY J. KING & RONALD F. WRIGHT, *MANAGERIAL JUDGING AND JUDICIAL PLEA NEGOTIATIONS: FURTHER EVIDENCE 21* (2017) [hereinafter KING & WRIGHT, *MANAGERIAL JUDGING*], <https://ssrn.com/abstract=2972294> [<https://perma.cc/5WE5-QEVK>] (reporting additional quotations from field interviews for *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, see *supra* note 94).

121. This could be determined in seventy-two percent of guilty plea cases of this type.

122. Only four percent had a drug crime as the most serious offense.

had opted for “a plea agreement in which the offender received a second chance: no presumptive imprisonment in exchange for a longer length of probation supervision.”¹²³ Data revealed that five percent of all upward-departure sentences in the state involved a deal combining a downward dispositional departure to probation and an upward durational departure on the stayed prison sentence.¹²⁴ Rather than an option for judges to provide atypically punitive sentences to atypically culpable defendants, upward departures in these cases are tools prosecutors use for striking bargains with defendants who need not be incarcerated.

c. Swapping Upward Departures for Lesser Charges; Avoiding Mandatory Minimum Sentences

Defendants also agreed to upward-departure sentences in return for charge concessions from the prosecutor in the form of either fewer counts or a lesser charge.¹²⁵ This arrangement allows the defendant to avoid a higher presumptive range, a mandatory minimum sentence (by pleading to attempt, for example, to avoid a minimum sentence for the completed crime¹²⁶), or an undesirable collateral consequence for the charge the prosecutor agrees not to pursue (when it qualifies as a “strike” for a recidivist statute, for example, or would lead to deportation or sex offender registration).¹²⁷ A practitioner in Oregon explained this was common, reporting that they would “pick the correct sentence and engineer backwards.”¹²⁸

123. MINN. 2020 REPORT, *supra* note 55, at 115–16.

124. *See supra* note 111 and accompanying text (displaying Table 6).

125. For the years 2016 to 2017, a report found charge bargains to lesser offenses occurred in thirty-five percent of crimes-against-persons cases but less than twenty percent for other crimes. *See* 2019 SAC GRANT REPORT, *supra* note 46, at 6 fig. 4.1.4; *see also* Shawn D. Bushway & Anne M. Piehl, *Measuring and Explaining Charge Bargaining*, 23 J. QUANTITATIVE CRIMINOLOGY 105, 122 (2007) (finding, in a study of charge bargaining and sentencing, that in Washington, reduced judicial discretion shifted to charge reductions rather than sentence reductions); Richard S. Frase, *The Apprendi-Blakely Cases: Sentencing Reform Counter-Revolution*, 6 CRIMINOLOGY & PUB. POL’Y 403, 425 (2007) (predicting that *Blakely* may increase charge bargaining).

126. *See* OR. CRIM. JUST. COMM’N, LONGITUDINAL STUDY OF THE APPLICATION OF MEASURE 11 AND MANDATORY MINIMUMS IN OREGON 32 (2011) [hereinafter OR. CRIM. JUST. COMM’N, LONGITUDINAL M11 STUDY] (finding that “after the passage of M11 the plea down process changed and resulted in many more convictions for M11 attempts,” which are sentenced under the guidelines at a lower seriousness level); *see also* Darryl K. Brown, *Can Prosecutors Temper the Criminal Code by Bringing Factually Baseless Charges and by Charging Nonexistent Crimes?*, MARQUETTE LAW., Fall 2020, at 32, 33–36 (discussing “factually baseless pleas” that “provide a somewhat lower sentencing range than is available under the original charge”).

127. *See, e.g.*, Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 878–79 (2019) (noting judges accept fictional pleas “to avoid trials” but also to avoid deportation of the defendant).

128. King & Wright, *Judicial Participation*, *supra* note 94, at 374 & n.284 (documenting the observations of Oregon defense attorneys); *see also id.* at 353 n.163 (noting a judge who stated that assault might be settled as attempt to get the parties’ desired sentence); KING & WRIGHT, *MANAGERIAL JUDGING*, *supra* note 120, at 21 (noting Oregon defense attorneys who reported stipulating to upward departures in return for charge concessions).

As discussed earlier, depending upon your perspective, the prosecutor's ability to manipulate charges to control the sentence is either the most serious threat there is to the coherence of presumptive sentencing guidelines¹²⁹ or the most important power the prosecutor has to dispense leniency and avoid the undesirable consequences of mandatory sentencing laws. Either way, charge bargaining is inevitable, and the option of trading upward-departure sentences for lesser charges provides even more options for the prosecution.

3. Why Judges Routinely Accept Stipulated Upward Departures

The examples above show how upward departures are used by the parties for reasons unrelated to the purposes they are supposed to serve. In this section, I briefly address the obvious question: Why are judges going along with this?

There is no doubt that they do. In Oregon, for example, docket sheets suggested that judges were willing to facilitate upward departures when agreed to by the parties even when the facts in the case did not necessarily support the sentence or the sentencing-guideline range. Some docket notations candidly indicated that the sentence ignored the "actual" guidelines sentence, with the parties stipulating to (and the judge approving) a sentencing range other than the one authorized by the guidelines before departing upward.¹³⁰

The reasons trial judges do not second guess these upward-departure agreements are the same reasons that judges everywhere defer to plea agreements.¹³¹ There is little incentive for judges to object. And they do not

129. The U.S. Sentencing Commission adopted "relevant conduct" to reduce the effect that charging manipulation by the prosecutor would have on punishment. *See, e.g.*, Ruback & Wroblewski, *supra* note 23, at 749 ("[R]eal offense elements . . . were incorporated into the guidelines as a way to see through the prosecutorial charging decision to the actual offense the defendant committed. Because prosecutors can, and often do, manipulate the number of charges against a defendant as a way to pressure him or her into agreeing to a plea bargain, the guidelines developed rules for reducing unfairness that might result from manipulating the number of charges against a defendant."). The state sentencing commissions in both Oregon and Washington also condemn mandatory minimum statutes for ceding judicial sentencing authority to prosecutors. *See* OR. CRIM. JUST. COMM'N, LONGITUDINAL M11 STUDY, *supra* note 126, at 44 ("M11 has combined in the prosecutorial function both the charging and the sentencing decision . . . [and] drove more of the sentencing decisions to the plea negotiation If the offender did not accept the proffered plea agreement, the prosecutor terminated negotiations and sought conviction at trial, and if a M11 conviction was obtained the decision making on the sentence was taken out of the judge's hands."); WASH. COMM'N, 2019 REVIEW, *supra* note 30, at 5 ("The SRA took discretion away from the judges, leaving the prosecutors standing alone in most cases as the only player with the duty and the authority — and the power — to fashion a just result.").

130. Among the reasons for departure noted were the following: "false grid block"; "[a]ctual grid-block is a 6-C, parties stipulate to a 6-E and an upward dispositional departure to 366 days in the Oregon Department of Corrections"; and "[a]ctual grid-block is a 7-H, parties stipulate to a 6-D grid-block and an upward dispositional departure and 13 months DOC." On the coding of docket sheets from Oregon, see *supra* note 33.

131. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 971–72 (2009) (reviewing why judges are unable to regulate factual representations affecting

have to worry about being reversed. Oregon law *bars* appeal of a departure on the ground that it was incorrect or not supported if the sentence was stipulated.¹³² Although Kansas, Minnesota, North Carolina, and Washington permit parties to seek review of even a stipulated sentence for procedural error,¹³³ appellate courts will not review the sentence itself if the appellant agreed to it.¹³⁴ Not only do judges lack incentives to question the parties' agreements, but there are also strong incentives to accept whatever the parties propose, including preserving a favorable reputation for disposing of cases quickly.¹³⁵

Even if some judges were inclined to check each stipulated sentence or departure to ensure it was warranted and had a factual basis, they lack the means to do so in some states. Presentence reports that might provide a basis for judges to question the parties' factual stipulations are authorized in each of the five states¹³⁶ but practically unavailable in at least two. In Oregon, presentence

sentencing, including difficulty and cost, the belief that it is "not . . . their job to intervene actively in plea bargaining," and judges' "strong self-interest in encouraging pleas" to avoid burdening their courtrooms with trials); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 300–01 (2005); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2028 (2006).

132. OR. REV. STAT. ANN. §§ 138.105(9), 138.115(7) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.) ("The appellate court has no authority to review any part of a sentence resulting from a stipulated sentencing agreement between the state and the defendant.").

133. *See, e.g.*, KAN. STAT. ANN. § 21-6820(e) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); *Spann v. State*, 704 N.W.2d 486, 494–95 (Minn. 2005) (affirming a right to appeal even after entering a guilty plea); *State v. Watkins*, 939 P.2d 1243, 1244 (Wash. Ct. App. 1997) ("While a defendant normally cannot challenge a presumptive standard range sentence, the defendant can challenge the procedure by which a sentence within the standard range was imposed." (citing *State v. Ammons*, 713 P.2d 719, 724 (Wash. 1986))); *see also* N.C. GEN. STAT. § 15A-1444(a2), (e) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.) (providing for review by petition for writ of certiorari to the intermediate appellate court); WASH. REV. CODE ANN. § 9.94A.585(7) (LEXIS through chapter 9 of the 2021 Reg. Sess.) (allowing Washington State Department of Corrections to challenge an illegal sentence when the parties do not).

134. KAN. STAT. ANN. § 21-6820(c)(2) (Westlaw); *State v. Cooper*, 394 P.3d 1194, 1196 (Kan. Ct. App. 2017) (concluding that an appellate court shall not review a departure sentence resulting from an agreement between the state and the defendant when the sentencing court approves it on the record and there is no claim that the sentence is illegal); *see also* Kevin R. Reitz, *Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile To Offer England and Wales?*, in SENTENCING GUIDELINES: EXPLORING THE ENGLISH MODEL 182, 194 (Andrew Ashworth & Julian V. Roberts eds., 2013) ("Upward departures in Minnesota are reversed now and then, but in the absence of legal error they are generally treated with deference by the appellate courts."). Even the MPCs prohibits appellate review of a sentence when it was "recommended" by the party appealing, unless it is unconstitutional or outside the statutory range for the offense of conviction. MODEL PENAL CODE: SENT'G § 10.10(4) (AM. L. INST., forthcoming 2021) (on file with author). Moreover, fact bargaining by attorneys receives spotty disciplinary attention at best. *See, e.g.*, Brent E. Newton, *Recurring Ethical Issues Related to Federal Sentencing*, 43 J. LEGAL PROF. 35, 41 (2018) (noting that fact bargaining is not unethical in all jurisdictions or contexts).

135. *See* King & Wright, *Judicial Participation*, *supra* note 94, at 359–64.

136. KAN. STAT. ANN. § 21-6813 (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); MINN. STAT. § 609.115 (2020); N.C. GEN. STAT. § 15A-1332

reports could provide a different version of the facts than what the parties offer, but they are apparently uncommon except in sex offenses.¹³⁷ In Washington, since the 2008 recession, presentence reports are reportedly used only for offenders convicted of sex crimes or who may be mentally ill.¹³⁸ The willingness to defer to stipulated facts delegates what would otherwise be judicial sentencing power to the prosecutor.

4. Easy for Prosecutors To Establish a Factual Basis for an Upward Departure

Another reason so many defendants stipulate to aggravating facts for upward departures may be that they decide contesting an alleged aggravating fact would be futile. Establishing a factual basis for an upward departure takes little effort in these states because it requires only one finding to open the aggravated range and because many of the most common reasons used for upward departure are simple to prove.

(LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. §§ 137.077, 144.791 (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.); WASH. REV. CODE ANN. § 9.94A.500 (LEXIS through chapter 9 of the 2021 Reg. Sess.); WASH. SUPER. CT. R. CRIM. P. 7.1 (LEXIS through rules effective through Apr. 1, 2021). The MPCs also provides that a presentence report must be produced “in any felony case in which incarceration or probation in excess of time served is an option being considered by the court.” MODEL PENAL CODE: SENT’G § 10.05(1) & cmt. b (AM. L. INST., forthcoming 2021) (on file with author). For information generally about presentence reports, see William H. Pryor Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 FED. PROB. 13, 15–16, 15 n.25 (2017).

137. See King & Wright, *Judicial Participation*, *supra* note 94, at 378 & nn.307, 310 (providing interviews with Oregon practitioners discussing the use of presentence reports in the state); KING & WRIGHT, *MANAGERIAL JUDGING*, *supra* note 120, at 28 (collecting input from an Oregon judge, prosecutor, and defense attorneys); see also OR. REV. STAT. ANN. § 144.791(2) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.) (discussing mandatory presentence reports for felony sex offenses).

138. WASH. COMM’N, 2019 REVIEW, *supra* note 30, at 5 (“The SRA formalized [the stipulated sentence] by calling for the parties to draft a plea agreement and to submit that agreement to the court prior to sentencing. The judge then determines whether the plea agreement is in the ‘interests of justice.’ If the judge finds that it is, the disposition can proceed. Theoretically, a judge could find the agreement not just and reject it. However, under current practice, we give a judge no tools beyond the representations of the parties to make this determination.”); *id.* at 5, 15–18 (concluding that presumptive sentencing guidelines “took discretion away from the judges, leaving the prosecutors standing alone in most cases as the only player with the duty and the authority—and the power—to fashion a just result,” and including among recommendations to increase judicial discretion, reduce the prosecutor’s ability to control the sentence, and increased access to presentence investigations); Drew, *supra* note 40 (noting that felony presentence investigations are prepared by the DOC, not the superior court itself, and that “[i]n the past, [pre-sentence investigations] were requested frequently, but as budgets were affected by the recession, requests were limited to those who have been convicted of a sex offense or who may be mentally ill” (quoting WASH. STATE SENT’G GUIDELINES COMM’N, PRESENTENCE INVESTIGATION REPORTS PROPOSAL 1 (2019))); see also WASH. SENT’G GUIDELINES COMM’N, *BLAKELY* REPORT, *supra* note 41, at 12 (“Judges point out that in several large counties judges do not have the time or information necessary to determine whether a plea agreement is ‘in the interest of justice’ . . . prior to the acceptance of the guilty plea. Thus, in those counties, judges are unable, as a practical matter, to exercise their discretion to reject a plea agreement.”).

On the first point, compared to tried cases, plea-convicted cases were more likely to involve only a single upward-departure factor.¹³⁹ For a guilty plea, with a sentence relatively safe from appellate review, any substantial and compelling reason to support an upward departure would do. By contrast, in tried cases, appeal is much more likely and there is enough developing case law on what findings count as substantial and compelling that prosecutors have good reason to seek multiple aggravated findings as insurance against reversal.¹⁴⁰

On the second point, each state offers several easy to prove, frictionless options to depart upward.¹⁴¹ For example, proving a crime was committed while the defendant was under supervision of some sort, if a state does not already consider this within the exception for prior convictions, simply requires proving the date of the offense and supervision status at that time. The popular aggravators “persistent criminality” and “rapid recidivism” rely primarily on criminal history.¹⁴² Other easily established upward-departure factors include the age or status of a victim, abuse of trust (easy to prove when the defendant is a parent or caretaker), multiple victims or incidents per victim, or that the crime occurred in the victim’s zone of privacy (home, car, or work).¹⁴³

139. For example, in Minnesota, sixty-five percent of plea cases had only one departure reason, compared to fifty-two percent of cases that went to trial. Only nine percent of plea cases had three departure reasons, compared to twenty-six percent of tried cases.

140. *E.g.*, *Hosley v. State*, No. 27-CR-05-73277, 2012 WL 1069901, at *2–6 (Minn. Ct. App. Apr. 2, 2012) (holding that even though one aggravating factor the trial court relied on was impermissible, the presence of other aggravating factors from the jury’s findings justified the upward departure in the defendant’s sentence); *State v. Coleman*, 216 P.3d 479, 484–87 (Wash. Ct. App. 2009) (sustaining an exceptional sentence in a first-degree robbery case based on a “presence of the victim” aggravator even though the court found the consideration of “invasion of privacy” was improper since it is inherent in the crime of conviction, thus finding harmless error); *see also State v. Ochoa*, No. 118,364, 2018 WL 5091856, at *12–15 (Kan. Ct. App. Oct. 19, 2018) (unpublished table decision) (resulting in the jury finding only one of three aggravating factors and that one was legally invalid).

141. A list of factors that would support an upward departure is provided in each jurisdiction, but only in Washington is that enumerated list exclusive. *See WASH. REV. CODE ANN.* § 9.94A.535(3) (LEXIS through chapter 9 of the 2021 Reg. Sess.). The other states permit reasons not on the list that meet the “substantial and compelling” requirement for departure. *See Sentencing Guidelines Resource Center*, *supra* note 19 (choose “In-Depth Jurisdiction Profiles”; then choose the relevant state’s jurisdiction profile; then choose “Departures and Adjustments to Recommended Sentences” (detailing whether that state’s list of upward-departure reasons is exclusive or not)).

142. *See, e.g.*, *State v. Schenewerk*, 174 P.3d 1117, 1118–19 (Or. Ct. App. 2007) (relying on criminal history to employ a “‘persistent involvement’ in similar offenses” enhancement); *State v. Beggio*, 134 P.3d 1109, 1110 (Or. Ct. App. 2006) (employing a “persistent criminality” departure). In Washington, courts may base an upward departure (“exceptional sentence”) on “rapid recidivism.” *E.g.*, *State v. Bogart*, No. 45787-0-I, 2001 WL 508370, at *3 (Wash. Ct. App. May 14, 2001) (involving a crime committed less than three months after release); *see also State v. Murray*, 416 P.3d 1225, 1229–30 (Wash. 2018) (holding that the rapid recidivism sentencing aggravator was not unconstitutionally vague).

143. *See, e.g.*, *State v. Fields*, No. CR-07-60, 2009 WL 982015, at *3 (Minn. Ct. App. Apr. 14, 2009) (upholding the use of the invasion-of-privacy aggravator where the defendant broke down the victim’s apartment door); *State v. Gainey*, 261 N.C. App. 538, 818 S.E.2d 201, No. COA17-1422, 2018 WL 4441296, at *1–2 (2018) (unpublished table decision) (upholding the use of the victim’s old age as

Additionally, several common mushy aggravators seem readily adaptable if needed. A departure can be justified by a finding that the defendant is dangerous, not “amenable to probation,”¹⁴⁴ demonstrates “lack of remorse,”¹⁴⁵ or caused more than typical harm or loss.¹⁴⁶ Indeed, that last reason would theoretically fit any case in which an upward departure is exchanged for a charge that describes acts less serious than the defendant’s. And as noted earlier, in Washington, an “interests of justice” finding insulates *any* stipulated departure from review.¹⁴⁷

To sum up, it appears that except for the small number of cases in which the defendant contests the aggravating factor and demands proof before a judge or jury, parties regularly use upward departures in ways not anticipated by the sentencing guidelines. If prosecutors are concerned that judges will balk at jointly engineered sentences, they need only shift their charging strategy to pursue their own sentencing preferences and secure sentences that judges have no power to reject. The drafters of the MPCs warned that allowing stipulation or agreement alone to justify departures “could undermine every systemwide policy built into a state’s guidelines, including correctional-resource management and the reduction of racial and ethnic disparities in sentencing.”¹⁴⁸ This closer look at cases with stipulated upward departures illustrates how that happens, as well as how difficult it would be to control.

B. *Upward Departures in Bargaining—The Policy Debate over Power*

This subsection and the next will examine the claim made by advocates of presumptive sentencing guidelines that, compared to mandatory minimum

an aggravating factor); *State v. Muhammad*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081835, at *6–7 (2015) (unpublished table decision) (upholding the use of the victims’ young age as an aggravating factor); *State v. Sullivan*, 104 P.3d 636, 638 (Or. Ct. App. 2005) (applying the multiple victims aggravating factor); *State v. Matthews*, No. 41189-0-II, 2013 WL 85326, at *3, *9–10 (Wash. Ct. App. Jan. 8, 2013) (discussing the-abuse-of-trust aggravator where a defendant was guilty of first-degree assault of a child but refusing to apply it simply for procedural reasons).

144. *State v. Green*, 172 P.3d 1213, 1219 (Kan. Ct. App. 2007) (“A sentencing court can rely on a jury’s finding that a defendant is not amenable to probation as a substantial and compelling reason to either increase the duration of a sentence or make a more restrictive disposition of a sentence or both.”); *see also State v. Fanning*, 208 P.3d 530, 532 (Or. Ct. App. 2009) (affirming the defendant’s conviction after finding he had avoided prior opportunities to rehabilitate himself); Departure Report at 2, *State v. Krueth*, No. KX-04-10480, 2006 WL 6549829 (Minn. Dist. Ct. Aug. 2, 2006) (listing as a common reason for upward departure that a defendant “[h]as failed on probation/unamenable to probation”).

145. *E.g.*, WASH. REV. CODE ANN. § 9.94A.535(3)(q) (LEXIS through chapter 9 of the 2021 Reg. Sess.).

146. *See State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (“Generally, the district court may impose an upward durational sentencing departure if the evidence shows that the defendant committed the offense in a particularly serious way.”).

147. *See supra* note 106 and accompanying text; WASH. REV. CODE ANN. § 9.94A.535(2)(a) (LEXIS); *In re Breedlove*, 979 P.2d 417, 424–25 (Wash. 1999).

148. MODEL PENAL CODE: SENT’G § 9.05 cmt. g (AM. L. INST., forthcoming 2021) (on file with author); *see also id.* § 10.03(5) & cmt. g.

sentences that follow from proof of an aggravating fact, an upward departure in a presumptive-guidelines system preserves more sentencing discretion for judges and shifts less sentencing power to prosecutors.¹⁴⁹ Are upward-departure sentences used like mandatory sentencing statutes, as “bludgeons” to coerce pleas?¹⁵⁰ Or do judges exercise discretion to undercut prosecutorial departure preferences, providing less bargaining leverage to prosecutors than mandatory sentencing provisions, which remove judicial discretion entirely?

To illustrate, assume a mandatory minimum statute provides that any defendant convicted of assault must be sentenced to at least eighteen months of incarceration if the victim of the assault was over seventy years old. Once the prosecutor charges and proves assault, then proves the victim was seventy-eight years old, the judge must impose eighteen months. This makes the prosecutor’s threat to seek the enhancement quite powerful. Now assume the same case, without the enhancement statute, in a presumptive-guidelines system where the presumptive range for assault (given the defendant’s criminal history) is capped at ten months’ incarceration, and a finding that the victim was seventy-eight years old would support an upward departure. This finding would *permit* a term of more than ten months but not *require* it. The judge would have discretion to find that the victim’s age, once established, was not a substantial and compelling reason for departing upward in the particular case (say, for example, if the victim was—and appeared—extremely fit).¹⁵¹ The prosecutor’s threat to seek an upward-departure sentence if the defendant insisted on trial would not

149. See *id.* § 6.11 cmts. *l–n*, reporters’ notes *b–c, l*; FRASE, JUST SENTENCING, *supra* note 4, at 45–48, 57–62.

150. Gold, *supra* note 36 (manuscript at 547); see, e.g., BARKOW, PRISONERS OF POLITICS, *supra* note 36, at 9, 54, 147 (asserting that lumping together binding sentencing guidelines with mandatory minimum statutes—without distinguishing between the two—leads to “unchecked abuses” and undermines the ability of judges to check prosecutorial overreach); Shawn D. Bushway & Anne M. Piehl, *Measuring and Explaining Charge Bargaining*, 23 J. QUANTITATIVE CRIMINOLOGY 105, 109–10 (2007) (discussing hypotheses about how prosecutors choose to charge in a presumptive-guidelines system). This has long been a criticism of the use of enhancements by federal prosecutors. E.g., Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 341 (2009) (criticizing federal prosecutors’ use of “sentencing enhancements” as leverage to extract pleas). The drafters of the MPCs worried about this too, warning that prosecutors’ ability to use such threats in bargaining “could place great pressure on defendants to plead guilty to charges that overstate their criminal behavior, and may coerce innocent defendants to ‘admit’ guilt.” MODEL PENAL CODE: SENT’G § 10.03 cmt. *g* (AM. L. INST., forthcoming 2021) (on file with author).

151. On the judge’s discretion to reject a departure despite a factual finding, see KAN. STAT. ANN. § 21-6817(b)(7) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); 2019 MINN. GUIDELINES AND COMMENTARY, *supra* note 82, § 2.D.1 & cmt. 2.D.102; N.C. GEN. STAT. § 15A-1340.16(a), (b) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. § 136.785(5) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.); *State v. Upton*, 125 P.3d 713, 718–19 (Or. 2005) (en banc) (“[I]t is the court, not the jury that makes the ultimate decision whether aggravating or mitigating facts justify a sentence beyond or below the presumptive range.”); WASH. REV. CODE ANN. § 9.94A.537(6) (LEXIS through chapter 9 of the 2021 Reg. Sess.); *State v. Sage*, 407 P.3d 359, 371 (Wash. Ct. App. 2017) (citing WASH. REV. CODE ANN. § 9.94A.537(6) (LEXIS)).

guarantee that a longer sentence would be imposed or how long it would be. Moreover, if a judge could initiate an upward departure even without the prosecutor's consent, the prosecutor's promise *not* to seek an upward departure after a guilty plea would be weaker leverage as well.

Whether the prosecutor enjoys less leverage with an upward-departure provision than a mandatory minimum statute depends upon whether judges in presumptive-guidelines systems are willing and able to exercise their discretion to upset the prosecution's predictions. If judges routinely rubber-stamp the upward departures that prosecutors seek and do not initiate upward departures that prosecutors decline, they relinquish the sentencing discretion that presumptive-guidelines systems supposedly protect. A look at how these issues are playing out in these presumptive-guidelines states is not encouraging for those hoping that the use of upward departures would regulate judicial sentencing discretion without shifting it wholesale to the prosecution.

Starting with the power to initiate upward departures that the prosecutor does not seek, only one of the five states grants judges this authority.¹⁵² Fifteen years ago, the Washington Sentencing Guidelines Commission listed its reasons for refusing judges this power: (1) judges "frequently do not have sufficient information to make an informed [decision]" before taking a guilty plea; (2) even if the judge did have sufficient information, and provided notice to the defendant so that they could withdraw his plea, "the result could have a considerable disruptive influence on the orderly processing of cases"; and (3) it "would improperly impinge upon the province of the prosecuting attorney," for just as judges may not increase the severity of charges, they may not increase the severity of the sentence beyond what is "alleged by the prosecutor."¹⁵³

Kansas permits judges to initiate upward departures by giving advance notice,¹⁵⁴ but available information suggests they rarely do. In only 2 of the 135

152. North Carolina requires the state to provide notice of any enumerated aggravating factor at least thirty days before trial or guilty plea and to include in the indictment any unenumerated basis for an aggravated sentence. N.C. GEN. STAT. § 15A-1340.16(a6) (LEXIS). Although a statute appears to provide this power in Minnesota, *see* MINN. STAT. § 631.20 (2020), reportedly the Minnesota Rules of Criminal Procedure regarding an aggravated sentence have been interpreted to preclude judges from initiating upward departures. *See* MINN. R. CRIM. P. 27.03 subdiv. 1(B)(3) (Westlaw through amendments received through Jan. 1, 2021); *see also* MINN. R. CRIM. P. 15.01 subdiv. 2(1) (Westlaw) (stating that a plea colloquy requires the defendant to "[u]nderstand[] that the *prosecutor* is seeking a sentence greater than the presumptive guideline sentence or an aggravated sentence." (emphasis added)).

153. WASH. SENT'G GUIDELINES COMM'N, *BLAKELY REPORT*, *supra* note 41, at 22–23.

154. KAN. STAT. ANN. § 21-6817(a)(3) (Westlaw) ("If the court decides to depart on its own volition, without a motion from the state or the defendant, the court shall notify all parties of its intent and allow reasonable time for either party to respond if requested. The notice shall state the type of departure intended by the court and the reasons and factors relied upon."); KAN. SENT'G COMM'N, *KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 2016*, at 91 (2016); *see also* MODEL PENAL CODE: SENT'G § 10.07(7) (AM. L. INST., forthcoming 2021) (on file with author) (allowing a

Kansas cases over the 8-year period in which an upward departure triggered a right to a jury factfinding beyond a reasonable doubt did docket sheets or appellate documents suggest that the judge initiated the upward departure. Some of the same reasons listed by the Washington Sentencing Guidelines Commission for denying judges this power may have led judges in Kansas not to use it. The end effect on the bargaining power of the prosecutors is the same—without judges willing to impose upward departures when prosecutors decline to seek them, a prosecutor’s promise *not* to pursue a departure in return for a guilty plea is just as convincing as a promise not to pursue a charge carrying a mandatory minimum sentence.¹⁵⁵

C. *Upward Departures as Leverage for Pleas in Minnesota*

It is more difficult to test empirically whether a prosecutor’s promise to seek an upward departure if the defendant refuses a plea offer is as powerful an incentive in bargaining as a promise to seek a mandatory minimum sentence. It would require examining cases where prosecutors threatened to seek an upward departure but that departure was *not* imposed. State sentencing commissions do not have these data; state sentencing commissions collect information about actual, not threatened, sentences.

Remarkably, however, Minnesota’s *courts* have for years collected data on presentence events concerning upward departures and provided case information for all adult felony convictions from 2010 to 2017 that included one or more *Blakely*-related “events,” including whether a notice to seek an upward departure had been filed.¹⁵⁶

Combining data on these roughly 2,800 noticed-but-not-imposed cases with data on Minnesota’s 5,620 cases where an upward departure had been imposed revealed two important patterns in bargaining.

First, in only three percent of cases convicted by plea *with* upward-departure sentences did the prosecutor file a notice to seek an upward departure.¹⁵⁷ This makes sense if parties use upward-departure sentences

court to raise aggravating fact issues sua sponte so long as the court “allow[s] the parties reasonable time to prepare for the proceeding”).

155. *E.g.*, *State v. Terning*, 460 P.3d 382, 384 (Kan. Ct. App. 2020) (“The morning the case was set for trial, [the defendant] entered into a plea agreement: [he] would plead no contest to the aggravated kidnapping and rape charges; the State would withdraw its upward-departure motion . . .”).

156. After adopting rules and procedures for aggravated sentences following *Blakely*, see MINN. STAT. § 244.10 subdiv. 5 (2020), Minnesota’s judicial branch included in its data collection for each case information about if and when: (1) a prosecutor filed a notice of intent to seek an upward departure, (2) the judge found (or did not find) evidence to support an aggravated departure at the Omnibus hearing, (3) a judge ordered a bifurcated or unified trial at the Omnibus hearing, or (4) the defendant waived trial on an aggravated factor. A second request for the same variables for cases *with* upward departures imposed revealed no additional *Blakely* “events” in those cases.

157. *See infra* note 189.

primarily at the negotiation stage, to engineer their desired outcomes, as described earlier. If the agreed-upon sentence includes an upward departure, the requirement that notice be filed in such cases could simply be waived.

Second and even more important is what the data reveal about cases in which the prosecution did file a notice to seek an upward-departure sentence. In only 10.5% of such cases was an upward-departure sentence imposed. This makes sense if the primary function of providing early notice of the upward departure is to secure a plea bargain that *avoids* that departure. Upward departures have this in common with mandatory minimum sentences, which prosecutors also use primarily as leverage to secure a trial waiver.¹⁵⁸ Like charges carrying mandatory minimum sentences, most upward-departure sentences appear to be dropped once a plea agreement is reached.¹⁵⁹

Reasons other than bargaining leverage seem less likely to explain why nine times out of ten the prosecutor's formal intent to seek an upward departure did not produce a felony conviction with an upward-departure sentence. Starting with plea-convicted cases, judicial rejection of the parties' *stipulation* to an upward departure in a plea-bargained case is not likely to account for a large number of cases, for reasons discussed earlier.¹⁶⁰ In some of these cases prosecutors may have secured guilty pleas to misdemeanors after noticing their intent to seek an upward departure for a felony charge,¹⁶¹ which would explain their absence in the dataset of felony cases with upward departures provided by

158. See *infra* note 169 and accompanying text.

159. See, e.g., OR. CRIM. JUST. COMM'N, LONGITUDINAL M11 STUDY, *supra* note 126, at 41 ("From 1995-2008, only 28 percent of offenders indicted for a M11 offense were convicted of the most serious offense for which a grand jury returned an indictment . . . [T]he effect of the law was to push tough choices about what the sentence should be in an individual case to the executive branch."); Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Minimum Sentences, Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 440 (2007) (finding "significant support" for the hypothesis that mandatory-eligible offenders with negotiated plea agreements will be less likely to receive mandatory minimums than comparable ones convicted by trial in Pennsylvania); Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT'G REP. 309, 312 (2019); *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants To Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#> [<https://perma.cc/MX63-4UWG>] [hereinafter *An Offer You Can't Refuse*]; Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), <https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html> [<https://perma.cc/26RZ-68VC> (dark archive)].

160. See *supra* notes 131-38 and accompanying text. Based on dismissal rates for felony charges in large urban counties nationally, a judge's pretrial dismissal, for a reason other than a plea bargain, of the felony charge on which the prosecutor sought to depart before the defendant pled guilty to a different felony would account for *at most* twenty-five percent of the cases. BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 24 tbl.21 (2013).

161. Nationally, about twelve percent of felony charges are resolved as misdemeanors, almost all after a guilty plea. REAVES, *supra* note 160, at 22.

the Minnesota Sentencing Guidelines Commission. But that would only strengthen the conclusion that the threat of upward-departure sentences is primarily used as leverage in bargaining.

Turning to the *tried* felony cases in Minnesota where notice to seek an aggravated sentence was filed but no upward-departure sentence was imposed,¹⁶² I attempted to determine for each case why that happened. Did the judge deny the prosecutor a requested upward departure, or did the upward-departure sentence fail to materialize for some other reason? Given the routine use of easy-to-establish aggravating facts,¹⁶³ judges probably did not often find that there was insufficient evidence that an aggravating fact existed. Nor were they likely to have rejected a fact—especially one found by a jury—as insufficiently substantial or compelling to justify an aggravated sentence.¹⁶⁴ Yet based on the eighty-one tried cases with adequate information to explain the absence of an upward-departure sentence the prosecutor had noticed, I found that, in fourteen of those cases, the judge had declined to impose an upward-departure sentence *after* an aggravated fact was established.¹⁶⁵ If the same pattern was present in the cases that were missing information,¹⁶⁶ it would suggest that once an aggravated fact is proven at trial, the odds that a judge will decline an upward departure the prosecutor seeks are about one in eight.¹⁶⁷ This is admittedly speculative, but if it approximates what defendants believe, defendants in Minnesota may proceed to trial with more hope of avoiding an

162. Using “jury trial held” or “court trial held” variables for each of the 198 cases where notice had been filed but no data from the Minnesota Sentencing Guidelines Commission received, I reviewed the docket sheet and any appellate opinion available (seventy-five percent of these tried cases were appealed, mostly conviction-only challenges) and searched news reports. Six were guilty pleas, not trials; three were consolidated, duplicating other cases; and nine others actually did have upward-departure sentences but were not in the data sent from the Minnesota Sentencing Guidelines Commission. The cases were spread between thirty-four counties.

163. *See supra* Section III.A.4.

164. In Washington, “the jury’s finding in itself provides the trial court with a substantial and compelling reason to impose such a sentence.” *State v. Perry*, 431 P.3d 543, 549 (Wash. Ct. App. 2018).

165. In half of these rejection cases, the jury found the aggravating fact, and in the other seven the judge had. In some of these rejection cases, judges opted for top-of-range sentences or consecutive sentences authorized without upward departure under section 609.035(6) of the Minnesota Statutes. *See* MINN. STAT. § 609.035 subd. 6 (2020).

The other sixty-seven cases where there was no upward departure despite the prosecutor’s pursuit of one were cases in which the judge could not have imposed an upward departure: eleven murder convictions to mandatory life-without-parole, twelve cases with misdemeanor convictions only, three cases where the judge rejected the aggravating factor *before* trial, three where the jury acquitted the defendant of the felony associated with the upward departure, thirty-seven cases in which the aggravated fact was never submitted to the factfinder for various other reasons, and just one where the jury considered and rejected the aggravated fact.

166. Unfortunately, for only forty-five percent (eighty-one) of these cases was it possible to determine from available information if an aggravating factor was even considered by the judge or jury.

167. This is assuming that in thirty-one (seventeen percent) of all 180 cases the judge declined to impose an upward-departure sentence despite a finding, compared to 234 cases that went to trial and ended in departure sentences.

upward departure than the zero percent chance of avoiding a mandatory minimum sentence upon proof of a triggering fact. At least in Minnesota, where judges have occasionally exercised their discretion to reject upward departures after trial, upward departures are a somewhat less potent “trial penalty.”

These unique data from Minnesota also suggest that prosecutors use the notice of intent to seek an upward departure primarily as leverage to negotiate a plea bargain that does not include that upward departure.¹⁶⁸ This use of upward-departure notices resembles how prosecutors use charges carrying mandatory minimum sentences in bargaining: most are threatened, then dropped by the prosecutor, and the defendant need not fear imposition by the judge once a plea agreement is reached.¹⁶⁹ Only in the small percentage of cases that go to trial is there reason to credit the claim that judges retain more power over departures in a presumptive-guidelines system than they do under mandatory minimum sentencing statutes.

* * *

Part II presented the various policy choices and legal rulings that define the parameters of cases subject to the procedural requirements of *Blakely*—a cautionary tale for those states considering designing their own presumptive-guidelines system. The patterns revealed in Part III suggest that departures do “tend to cluster in predictable ways,” allowing state sentencing commissions to accurately predict the resources needed to accommodate policy changes, as the MPCs asserts.¹⁷⁰ But it is less clear, at least as to upward departures, that the MPCs is correct that under presumptive sentencing guidelines, “judicial sentencing decisions within the superstructure of guidelines are the main determinants of a state’s prison policy.”¹⁷¹ Rather, it appears to be the sentencing decisions of *prosecutors*, through charging and bargaining, that determine these predictable patterns.

In four of the five states, judges have no power to seek a departure that the prosecutor declines to seek, and in Kansas, judges use that power rarely. And when a prosecutor or both parties do seek an upward-departure sentence, judges in several states lack the tools or incentives they would need to reject it. This leaves prosecutors free to use departures like they use mandatory minimum and sentencing-enhancement statutes—as leverage to secure pleas.

168. Additionally, prosecutors use the notice of intent to discourage other actions. See *State v. McGinley*, No. 119,781, 2019 WL 3850605, at *9 (Kan. Ct. App. Aug. 16, 2019) (per curiam) (unpublished table decision) (“[T]he State’s purpose in advising McGinley of its intent to withdraw its latest plea offer and consider moving for an upward departure if McGinley proceeded to discharge his attorney was to prevent delaying the trial which was only three days away.”).

169. See *supra* notes 152, 159 and accompanying text.

170. MODEL PENAL CODE: SENT’G § 8.07 cmt. a (AM. L. INST., forthcoming 2021) (on file with author).

171. *Id.* (emphasis added).

Further, the findings from some states suggest that the parties use upward departures in ways that are unrelated or even contrary to presumptive sentencing guidelines' goals of proportionality, uniformity, and transparency.¹⁷² Prosecutors need not consider these goals when negotiating, and defense counsel are bound to advance client goals, not state-sentencing policy. Instead of restricting upward departures to cases that are "outside the realm of an ordinary case within the class of cases defined in the guidelines,"¹⁷³ a significant portion of upward departures routinely facilitate more *leniency* to defendants than they may otherwise receive had there been no upward departure available.¹⁷⁴

Finally, it is important to consider how the bargaining patterns revealed here have the potential to distort sentencing policy. As Kelly Lyn Mitchell, Executive Director of the Robina Institute of Criminal Law and Criminal Justice, Chair of the Minnesota Sentencing Guidelines Commission, and former President of the National Association of Sentencing Commissions, has explained, one of the two fundamental reasons for a sentencing commission to collect and report departure data is "so that it can serve as a feedback loop for the commission and state legislature."¹⁷⁵ It exposes "patterns and trends in sentencing practices over time," that might in turn reveal "offenses for which the courts regularly impose departures, and such information is a signal that the criminal justice system is dissatisfied with the recommended sentences under the guidelines, or the laws for which the sentences are recommended, or both."¹⁷⁶ To the extent policymakers and courts rely on departure data when identifying the "typical" sentence appropriate for a given charge, or to evaluate departure reasons, these negotiated resolutions may distort those decisions. Pleas to lesser offenses with upward departures to avoid a higher charge, "false grid blocks" (fictitious presumptive ranges),¹⁷⁷ and stipulated aggravating facts skew the empirical picture. They undermine what state sentencing commissions tout as one of their most valuable attributes: accurate data needed for evidence-

172. *E.g.*, *State v. Barthman*, 938 N.W.2d 257, 269–70 (Minn. 2020) ("The purpose of the Minnesota Sentencing Guidelines 'is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history To maintain uniformity and proportionality, departures from the presumptive guidelines sentence are discouraged.'" (citation omitted) (quoting *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008))).

173. *See* MODEL PENAL CODE: SENT'G §§ 10.01(2)(a), 10.07 cmt. h (AM. L. INST., forthcoming 2021) (on file with author); *see also* *State v. Hayden*, 449 P.3d 445, 447 (Kan. Ct. App. 2019) ("[A] sentencing departure must be supported by substantial and compelling reasons justifying a deviation from the presumptive guidelines sentence 'Compelling' means that the court is forced, by the facts of the case, to leave the status quo or go what is beyond ordinary.").

174. *See supra* Section III.A.2.

175. Mitchell, *supra* note 19, at 35.

176. *Id.*

177. *See supra* notes 120, 130 and accompanying text.

based sentencing policy. Charge and sentence bargaining and the fictions they perpetuate are ubiquitous and certainly not limited to presumptive-guidelines systems.¹⁷⁸ Indeed they might be even more prevalent in states *without* presumptive sentencing guidelines. Nevertheless, understanding the extent and nature of bargaining that produces sentencing data better equips consumers of that information to interpret it.

IV. NOTICE, WAIVER, BIFURCATION, AND RETRIAL: THE PROCEDURAL CONSEQUENCES OF LESS-THAN-FULL-ELEMENT STATUS

Four additional aspects of the adjudication of upward departures in presumptive-guidelines states deserve attention, each related to the refusal to treat aggravating facts as elements instead of sentencing factors: (1) the provision of notice to the defendant of any aggravating factor that would warrant an elevated sentence minimum or maximum, (2) waiver of the right to demand that factor be proven to a jury beyond a reasonable doubt, (3) bifurcation—separate consideration by the factfinder of the aggravating factor only after a finding of guilt on the other elements of the offense, and (4) the handling of aggravating factors after remand from a successful appeal. In some of these states, the procedural protections regarding notice, waiver, and post-appeal adjudication are not as exacting as they would be if the fact authorizing a more severe penalty was treated as an element of the crime for all purposes. This more relaxed approach has potential advantages for states seeking to tie higher punishment ranges to the presence of aggravating facts beyond those defined as part of the offense. But those advantages are also contingent upon the continued legality of these practices.

A. *Notice*

Ordinarily in these states, if the legislature had defined a lesser and greater offense so that guilt of the greater offense depended upon the existence of a particular fact, then that fact, as an element of the greater offense, would be included in the charging instrument so that the defendant would know which charges they were facing.¹⁷⁹ None of the five presumptive-guidelines states

178. See, e.g., Johnson, *supra* note 127, at 897, 899–900 (collecting fictional pleas in multiple jurisdictions and noting how they “slant the data about what sorts of crimes are being committed and by whom”); Brown, *supra* note 126, at 36–37.

179. See *State v. Serstock*, 402 N.W.2d 514, 518 (Minn. 1987) (“[T]he indictment must contain the elements of the offense charged.”); *State v. Oldroyd*, 271 N.C. App. 544, 545, 843 S.E.2d 478, 479 (2020) (“Indictments must state all essential and necessary elements of an offense in order to bestow the trial court with jurisdiction.”); *State v. Haji*, 462 P.3d 1240, 1255 (Or. 2020) (“[T]o show that a crime has been committed, it is essential for a grand jury indictment to include the facts supporting the elements of the crime”); *State v. McCarty*, 998 P.2d 296, 299 (Wash. 2000) (en banc) (“It is a well-settled rule that a charging document satisfies . . . constitutional principles only if it states all the essential elements of the crime charged, both statutory and nonstatutory.”); *State v. Brett*, 892

require the state to include any aggravating fact needed for an upward-departure sentence in the charges. Instead, each state requires the prosecution to provide notice before trial or plea.¹⁸⁰ In Kansas, however, the court can decide on its own to depart upward *after* conviction, so long as it provides reasonable time for the parties to prepare before the sentencing hearing.¹⁸¹ The MPCs, too, provides that a prosecutor, with good cause, could seek a departure *after* the defendant has been convicted.¹⁸²

P.2d 29, 39 (Wash. 1995) (en banc) (recognizing that Washington's constitution, as well as the U.S. Constitution, "require an information to include all statutory and common law elements of the crimes charged"). *But see* State v. Dunn, 375 P.3d 332, 359–60 (Kan. 2016) ("A charging document's failure to include an element of a crime under the defining Kansas statute does not . . . necessarily meet the statute-defined threshold for failure to charge a crime because the facts alleged, rather than the legal elements regurgitated, determine whether the charge is sufficient under the statute defining the crime.").

For the other fact-based, range-raising devices—mandatory minimum and enhancement statutes—sometimes states insist they be included in the charge, sometimes not. In Kansas, for example, the sentence enhancements based on specified factfinding sometimes state that the factfinder must determine the triggering fact, in which case the fact is included in the charging instrument and submitted to the jury along with the other elements. Other enhancements or mandatory minimum facts are found separately in a special verdict, after a general verdict on the other elements. In Minnesota, facts triggering mandatory minimums, such as possession of a firearm, need not be included in the charge. *But see* State v. Hugdahl, 458 P.3d 760, 763 (Wash. 2020) ("Sentencing enhancements must be alleged in the information because they increase the sentence beyond the prescribed statutory maximum.").

180. See KAN. STAT. ANN. § 21-6817(b)(1) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 25, 2021) (requiring a motion to seek an upward durational departure sentence not less than thirty days prior to the date of trial); MINN. STAT. § 244.10 subdiv. 5 (2020) (stating that a prosecutor must provide "reasonable notice" of intent to seek aggravated sentence); MINN. R. CRIM. P. 7.03 (Westlaw) (explaining that notice of grounds and factual basis supporting aggravated sentence must be provided at least seven days before Omnibus hearing or later if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant); MINN. R. CRIM. P. 15.01 subdiv. 2 (Westlaw through amendments received through Jan. 1, 2021) (requiring a judge to advise a defendant of an upward departure before pleading guilty); State v. Sawatzky, 125 P.3d 722, 727 (Or. 2005) (rejecting the need to include enhancement factors in the indictment); see also WASH. REV. CODE ANN. § 9.94A.537(1) (LEXIS through chapter 9 of the 2021 Reg. Sess.) ("At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range."); State v. Edwards, 261 N.C. App. 459, 472, 820 S.E.2d 862, 872 (2018) (explaining that the statute requires written notice of intent to prove aggravating factors at least thirty days before trial or plea). There is one exception. North Carolina requires that the prosecutor include in the charging instrument any upward-departure factors *not enumerated in the statute*. N.C. GEN. STAT. § 15A-1340.16(a4), (a6) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.) (explaining that any nonenumerated aggravating factor must be included in an indictment or other charging instrument, but for factors enumerated in the statute, the state need only provide written notice at least thirty days before trial or the entry of a guilty or no contest plea).

181. KAN. STAT. ANN. § 21-6817(a) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 25, 2021) ("If the court decides to depart on its own volition, without a motion from the state or the defendant, the court shall notify all parties of its intent and allow reasonable time for either party to respond if requested.").

182. See MODEL PENAL CODE: SENT'G § 10.07 cmt. c (AM. L. INST., forthcoming 2021) (on file with author) (explaining that "§ 10.07 does not treat jury-sentencing facts as elements of offenses")

By treating aggravating facts differently than other elements for purposes of notice, these states are running some risk that the Supreme Court may later find that approach violates a defendant's constitutional right to notice of the charge.¹⁸³ The Court might reject the premise that a fact can be an element for some purposes but not for others,¹⁸⁴ and conclude that belated notice of this element comes too late when not provided until after conviction.¹⁸⁵ A state is on shaky ground if it relies on legislative intent to treat the fact as a sentencing factor rather than an element¹⁸⁶ after the Court has expressly rejected that rationale.¹⁸⁷

Speculation about the long-term viability of this approach aside, it is clear that treating a departure factor as something less than an element for purposes of notice is helpful to the state. It obviates the need to include an allegation of the departure factor in the initial charge or in the elements to be screened by preliminary hearing or grand jury. The Washington Supreme Court, for example, explained that "treating aggravators as the functional equivalent of essential elements that must be pleaded in the charging document is harmful to the public interest because it wastes valuable judicial resources and imposes too heavy a burden on the criminal justice system."¹⁸⁸

because requiring these allegations in the charging instrument would "impose heavy new burdens on prosecutors"). The MPCs "suggests 20 days before trial as a feasible deadline for all parties in most cases" but explains that where "the government may become aware of important sentencing considerations shortly before trial, during the trial, or shortly afterward," courts may "permit notice of jury-sentencing facts later than normally envisioned," so long as the defendant is allowed "reasonable time to prepare for the proceeding at which the existence of a jury-sentencing fact will be determined." *Id.* (emphasis added).

183. See generally LAFAVE ET AL., *supra* note 13, § 19.2(c) (discussing the Sixth Amendment's notice requirement).

184. MODEL PENAL CODE: SENT'G § 10.07 cmt. c (AM. L. INST., forthcoming 2021) (on file with author) ("The Supreme Court has held that jury-sentencing facts are the 'functional equivalent' of elements of offenses for purposes of the Sixth Amendment jury-trial guarantee, but the Court has never held that they are elements of offenses for other purposes.").

185. See LAFAVE ET AL., *supra* note 13, § 19.3 (collecting cases discussing whether the essential elements requirement is based in the Sixth Amendment). States are not bound by the Fifth Amendment's Grand Jury Clause, which does require grand jury screening of every element. *Hurtado v. California*, 110 U.S. 516, 534–35 (1884); see also *State v. Marshall*, 334 P.3d 866, 875 (Kan. Ct. App. 2014) (finding that the notice provisions of section 21-6817 of the Kansas Statutes comport with the Sixth Amendment as they "require[] the State to provide notice that it intends to seek an upward sentencing departure and to provide information to the court regarding 'the alleged fact or factors that may increase the penalty' no less than 30 days prior to trial, or 7 days from the arraignment if the trial is to take place in less than 30 days").

186. See, e.g., *State v. Reinke*, 309 P.3d 1059, 1062, 1073 (Or. 2013) (holding that under state and federal constitutions, the legislature defines the elements of the offense that must be pled in an indictment and, as a matter of legislative intent, a crime does not include sentence enhancement facts).

187. See *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004).

188. *State v. Siers*, 274 P.3d 358, 363–64 (Wash. 2012) (holding that neither the state nor federal constitution requires aggravators to be alleged in an information, and that notice prior to trial was sufficient).

The information about notice collected from available data, docket sheets, and appellate documents in Minnesota, Kansas, and Oregon underscores what a drastic change it would be to require that the state allege upward departure factors in the charging document. A motion or other formal notice alleging an aggravating fact was often missing entirely—particularly in cases resolved by plea. In ninety-five percent of cases in which upward departures were imposed in Minnesota, prosecutors never filed a notice of the intent to seek such a departure with the required factual allegations.¹⁸⁹ In Oregon, where an upward departure is requested by motion, these motions were filed in only an estimated thirteen percent of upward-departure cases.¹⁹⁰ In Kansas, fifty-five percent of the 114 upward durational departure cases that were resolved by plea had notices docketed,¹⁹¹ but notices were often filed the same day as the plea agreement when the departure was part of the deal. The lack of prior notice in so many cases with upward-departure sentences is consistent with the bargaining patterns noted earlier. If most upward departures are imposed at the request of the defendant or exchanged for a charge or sentencing concession from the state, the possibility of an upward departure may not even surface until negotiations take shape, such that any notice requirements would be routinely waived.

Treating every aggravating factor as an element of a greater offense might require the state to secure an amended charge before a defendant could admit the factor if a simple waiver was not available.¹⁹² Or it might prompt prosecutors to include allegations of aggravating factors in charging documents for more cases, a development that may further increase the pressure to plead guilty for some defendants in order to avoid the departure. Alleging every aggravating factor in the charges may also require abandoning some potential factors that may not be clear at the outset of a case, such as lack of remorse or failing to abide by conditions of pretrial release.

B. *Waiver*

A second consequence of treating an aggravating factor as something less than an element is that it may be easier for a prosecutor to secure a defendant's

189. A felony case receiving an upward-departure sentence was nine times more likely to have had notice if it went to trial—thirty-six percent of the upward-departure cases with conviction by trial had notice compared to only four percent of the pleas, and only three percent of the plea cases where the defendant agreed to the upward-departure sentence.

190. This rate varied between counties. For example, among counties with more than twenty upward-departure cases coded, *see supra* note 33 (regarding coding of Oregon cases), the rate at which a motion or notice was filed ranged from zero to twenty-two percent. In Oregon, half or more of the trial cases had motions, compared to less than twenty percent of the plea-convicted cases.

191. Notice was evident in a higher percentage of the jury-tried cases—sixteen of the nineteen upward durational departure cases that went to trial.

192. *See, e.g.*, MINN. R. CRIM. P. 15.08 (Westlaw through amendments received through Jan. 1, 2021).

waiver of trial on that factor than it is to secure a knowing and voluntary waiver of trial on the elements of the underlying offense. For the elements of the underlying offense, guilty plea colloquies between the judge and the defendant are scripted by court rule and case law to ensure that the record confirms defendant's understanding of the charge, sentence, and rights waived.¹⁹³ In Minnesota, Kansas, and North Carolina, a defendant must complete a separate colloquy, similar to a guilty plea colloquy, to waive trial on a factor supporting an upward-departure sentence.¹⁹⁴ Yet courts in Washington and Oregon have upheld waivers of trial on aggravating facts despite the absence of a formal guilty plea colloquy like that required for the other elements of an offense.¹⁹⁵ This means that upward departures may provide more flexibility to the prosecution than other fact-based, range-raising options that must be included in a single guilty plea colloquy.

C. *Bifurcation*

The assumption in these states that the aggravating factor supporting an upward departure is not an element of the conviction has led to not only a bifurcated and less formal plea process, but also a bifurcated trial process. This, too, differs from the procedure that would apply if these aggravating factors were treated as elements.

Typically, separate jury consideration of an aggravating element that separates a lesser offense from a greater offense is limited to particularly

193. See generally LAFAVE ET AL., *supra* note 13, § 21.4.

194. MINN. R. CRIM. P. 15.01 (Westlaw) (setting out advisements for waiving trial on aggravating sentence that mirror advisements for waiving trial); *State v. Bennett*, 347 P.3d 229, 235 (Kan. Ct. App. 2015) (holding that because waiver was not in accordance with section 21-6817(b)(4) of the Kansas Statutes, a judicial factfinding for upward departure was invalid when the defendant was never advised on the record of her right to have the aggravating factors determined by a unanimous jury beyond a reasonable doubt, and did not waive that right, either orally or in writing); N.C. GEN. STAT. § 15A-1022.1(c) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.). *But see* *State v. Everette*, 361 N.C. 646, 655–56, 652 S.E.2d 241, 246–48 (2007) (“[Although] North Carolina’s Blakely Act now require[s] the trial court to address defendants personally, advise them that they are entitled to a jury trial on any aggravating factors, and ensure that an admission is the result of an informed choice. . . . [D]efense counsel’s admissions to the existence of an aggravating factor constitute Blakely-compliant admissions upon which an aggravated sentence may be imposed.” (emphasis added)); *State v. Satterwhite*, 262 N.C. App. 374, 820 S.E.2d 135, No. COA18-249, 2018 WL 5796371, at *4 (unpublished table decision) (2018) (advising, “strongly,” that courts follow the colloquy).

195. See *State v. Lafferty*, 247 P.3d 1266, 1276–78 (Or. Ct. App. 2011) (noting that enhancement facts must be tried to the jury during the guilt phase unless the court defers trial of such facts to the sentencing phase or the defendant “makes a written waiver of the right to a jury trial on the enhancement fact” and either “[a]dmits to the enhancement fact” or “[e]lects to have the enhancement fact tried to the court”); see also *State v. Trebilcock*, 341 P.3d 1004, 1010–11 (Wash. Ct. App. 2014); WASH. REV. CODE ANN. § 9.94A.537(3) (LEXIS through chapter 6 of the 2021 Reg. Sess.) (noting defendant’s stipulation is sufficient).

prejudicial elements, such as those involving criminal history.¹⁹⁶ Lesser and greater offenses separated by a single element—such as different degrees of a crime like theft, assault, or homicide—are submitted to the jury together when the defendant contests the aggravating element.¹⁹⁷ Courts do not ask juries to find whether the defendant is guilty of the lesser offense, and then—only later, at a separate proceeding or in a special verdict—ask the jury to find whether the prosecution has met its burden of proof on the element required for the greater offense. Instead, the defendant is entitled to a general verdict of guilt or innocence on each charge.¹⁹⁸

States that adopted presumptive sentencing guidelines before *Blakely* did not anticipate that facts needed for upward departures would be adjudicated as elements of greater offenses. Rather, the determination of aggravating factors for upward departures was to take place at the sentencing phase, following a finding of guilt of the underlying offense and the preparation of a presentencing report.¹⁹⁹ When *Blakely* was announced, the prospect of sequencing separate jury trials, instructions, or verdicts for upward-departure factors was not welcome.²⁰⁰ Bifurcation could take additional time, require new jury instructions, complicate voir dire, and create additional litigation. Indeed, the *Blakely* dissenters warned of this added burden.²⁰¹

Recognizing that some aggravating factors might be prejudicial to a jury's consideration of guilt on the underlying offense,²⁰² all five states examined here

196. See, e.g., Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to Apprendi*, 67 SMU L. REV. 577, 586–87 (2014).

197. See, e.g., *State v. Miller*, 427 P.3d 907, 930 (Kan. 2018) (rejecting defendant's challenge to judge's refusal to bifurcate murder trial, so that in the "first phase, the jury would determine whether the State had proved, beyond a reasonable doubt, that [the victim's] death was a homicide" and, at a second trial, "determine the degree of homicide that had been committed").

198. *United States v. Gaudin*, 515 U.S. 506, 513–14 (1995). Some jurisdictions do require judges to instruct juries to decide guilt or innocence of the highest charge before moving to the lesser charge, in part to avoid "uncertainty about whether retrial of the greater offense would be barred by the Double Jeopardy Clause." See LAFAVE ET AL., *supra* note 13, § 24.8(d) & nn.54–58 (discussing acquittal-first jurisdictions); Jay M. Zitter, Annotation, *When Should Jury's Deliberation Proceed from Charged Offense to Lesser-Included Offense*, 26 A.L.R.5th 603, § 3 (1995) (discussing acquittal-first instructions). But I am not aware of any jurisdictions that require the jury to deliver its verdict on the lesser charge before considering the greater charge.

199. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 299–300 (2004) (describing Washington's approach before announcing the decision).

200. See, e.g., *supra* note 18 and accompanying text.

201. *Blakely*, 542 U.S. at 336 (Breyer, J., dissenting) (warning of the costs of bifurcation); see also *Oregon v. Ice*, 555 U.S. 160, 172 (2009) (declining to extend *Apprendi* to the factfinding required for consecutive sentences, noting that otherwise, "bifurcated or trifurcated trials might often prove necessary" and stating, "We will not so burden the Nation's trial courts absent any genuine affront to *Apprendi's* instruction"); *id.* at 177 (Scalia, J., dissenting) (characterizing the Court's warning of bifurcated and trifurcated trials as "another *déjà vu* and *déjà rejeté*; we have watched it parade past before, in several of our *Apprendi*-related opinions, and have not saluted").

202. See, e.g., J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 304. For example, consider *State v. Warren*, 98 P.3d 1129, 1132,

authorized bifurcated jury trials for upward departures²⁰³ as well as special verdicts.²⁰⁴ A defendant could also waive their right to a trial on the aggravating fact altogether after being convicted of the underlying offense,²⁰⁵ or waive the jury trial and opt for a bench trial on the aggravating factor.²⁰⁶ Perpetuating this approach, the MPCs terms these “jury-sentencing facts,” and posits that the jury will “return a special verdict on a question of fact during *sentencing* proceedings.”²⁰⁷

Just how frequent and burdensome has bifurcation been in these presumptive-guidelines states? Justice Breyer, dissenting in *Blakely*, observed that the majority’s holding appeared to count on plea bargaining to ensure that the burden was workable, as “more than 90% of defendants will not go to trial even once, much less insist on two or more trials.”²⁰⁸ His prediction was close. In four of the five states, more than ninety-six percent of defendants with

1135 (Or. Ct. App. 2004) (agreeing with defendant’s argument that he had a right to a jury determination of the dangerous-offender aggravator based on a fact not pled in the indictment and proved to the jury beyond a reasonable doubt, namely, the fact that he was “suffering from a ‘severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another’” (quoting OR. REV. STAT. ANN. § 161.725(1)(a) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Leg. Assemb.))), and *State v. Angilda*, No. 106,226, 2013 WL 1234188, at *8–11 (Kan. Ct. App. Mar. 22, 2013) (per curiam) (describing a bifurcated trial where the jury found the defendant presented a risk of future dangerousness). Unfortunately, information was too incomplete to reliably determine if bifurcated cases were associated with departure reasons that may have been considered prejudicial at a unitary trial.

203. *See, e.g.*, MINN. R. CRIM. P. 11.04 subdiv. 2(b) (Westlaw through amendments received through Jan. 1, 2021) (stating that bifurcation is required “if the evidence supporting an aggravated sentence includes evidence otherwise inadmissible at the guilt phase of the trial or if that evidence would unfairly prejudice the defendant in the guilt phase”); KAN. STAT. ANN. § 21-6817(b)(1)–(2), (4) (Westlaw through laws enacted during the 2021 Reg. Sess. of the Kan. Leg. effective on Apr. 1, 2021); MINN. STAT. § 244.10, subdiv. 5(c) (2020); N.C. GEN. STAT. § 15A-1340.16(a1) (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. § 136.770(1), (4) (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.); WASH. REV. CODE ANN. § 9.94A.537(4) (LEXIS through chapter 9 of the 2021 Reg. Sess.).

204. KAN. STAT. ANN. § 21-6817(b)(7) (Westlaw); MINN. STAT. § 244.10, subdiv. 5(b); MINN. R. CRIM. P. 11.04, subdiv. (2) (Westlaw); WASH. REV. CODE ANN. § 9.94A.537(3) (LEXIS).

205. *E.g.*, N.C. GEN. STAT. § 15A-1022.1 (LEXIS through Sess. Laws 2021-6 of the 2021 Reg. Sess. of the Gen. Assemb.) (“A defendant may admit to the existence of an aggravating factor or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) before or after the trial of the underlying felony.”).

206. *See State v. Hayden*, 364 P.3d 962, 966 (Kan. Ct. App. 2015) (discussing amended statute that since 2011 has read, “If the jury at the upward durational departure sentence proceeding has been waived, the upward durational departure sentence proceeding shall be conducted by the court” (quoting KAN. STAT. ANN. § 21-6817(b)(4) (Westlaw))). In North Carolina, however, where the state constitution was only recently amended to allow bench trials, the statute regulating trials of aggravating factors continues to say that if contested by the defendant, “only a jury may determine if an aggravating factor is present in an offense.” N.C. GEN. STAT. § 15A-1340.16(a1) (LEXIS).

207. MODEL PENAL CODE: SENT’G §§ 6.02 cmt. b, 10.07 (AM. L. INST., forthcoming 2021) (on file with author) (emphasis added).

208. *Blakely v. Washington*, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting).

upward-departure sentences plead guilty.²⁰⁹ Based on available information from Oregon and Kansas, it appears that at least eighty percent of defendants who pled guilty also admitted the aggravating fact and opted not to have the judge determine the fact beyond a reasonable doubt.²¹⁰

For the small percentage of upward-departure cases that were *not* settled by plea, a different picture emerged. Some information about bifurcation practices could be found in the docket sheets and available appellate documents in Kansas, Oregon, and Minnesota.²¹¹ This limited information revealed that many defendants receiving an upward-departure sentence after being convicted at trial had admitted or stipulated to the aggravating fact—this included one in four of such defendants in Minnesota, for example.²¹² For defendants who contested the aggravating fact, bifurcated adjudication was quite common. In Kansas, eighty-nine percent of the upward-departure cases where juries returned guilty verdicts were bifurcated into separate phases.²¹³ In Minnesota, between thirty-five percent and sixty-four percent of jury trials in upward-departure cases were bifurcated.²¹⁴ In Oregon, roughly half of jury-tried cases with upward departures were bifurcated.²¹⁵ Notably, bifurcation did not always mean a separate *jury* decision; defendants often opted for the judge rather than

209. See *supra* note 98 and accompanying text (displaying Table 4).

210. In Kansas, the aggravating fact was admitted in 80.7% of cases, the fact was found at a bench trial after the plea in 4.4% of cases, and for the remaining 15% of cases this could not be determined. Among Oregon's cases of upward departure after a plea, of the 58% of cases where this could be determined, the defendant would usually—88% of the time—agree to the aggravating fact as well.

211. Minnesota data also included, of the roughly 2,800 cases with a notice to seek an upward departure but no departure imposed, 25 cases with a *pretrial* finding supporting a bifurcated trial and 4 with a *pretrial* finding regarding a unified trial. (Judges need only make such findings *pretrial* if the Omnibus hearing at which they must be made is not waived by the defendant. MINN. R. CRIM. P. 11.01, 11.04 subdiv. 2 (Westlaw through amendments received through Jan. 1, 2021).) Because these novel “*Blakely* events” may have been docketed over the years with less consistency, I gathered what information I could from docket sheets and appellate documents as well.

212. Admissions or stipulations to the aggravating fact appeared in twenty percent of the jury trials and six percent of the bench trials.

213. In eight years, there were eighteen jury trial convictions where the defendant was sentenced to an upward durational departure (the only type of departure that carries a right to a jury finding in that state), and sixteen of those were bifurcated jury proceedings. One of the sixteen jury-conviction cases involved a bench finding on the aggravating factor; the rest were jury findings. Of the other two jury-conviction cases that were not bifurcated, one was a unified jury trial, the other involved a sentence agreed to by the defendant after the jury's guilty verdict. There was only one case with an upward durational departure sentence that followed a bench trial conviction in Kansas.

214. In fifteen percent of jury-tried convictions there was a bench trial on the aggravating factor, while twenty percent had separate jury phases with separate evidence, instructions, or deliberations. Another twenty-nine percent had special verdicts on the aggravating factor which may or may not have been delivered after separate instructions and deliberation. See also MINN. DIST. JUDGES ASS'N COMM. ON CRIM. JURY INSTR. GUIDES, 10 MINNESOTA PRACTICE SERIES: MINNESOTA JURY INSTRUCTION GUIDES § 3.04 (6th ed. 2020) (“After you return your verdict, there may be additional issues for you to address and decide. I will instruct you further at that time.”).

215. Oregon's cases with upward-departure sentences included an estimated seventy-eight jury trials and forty-two bench trials during the two-year period examined.

the jury to determine the aggravating fact.²¹⁶ In sum, the bifurcated jury proceedings for upward departures predicted after *Blakely* have become a regular feature of these presumptive-guidelines systems, but only for the small set of defendants who opt for a jury trial and insist on contesting the aggravating fact before a jury as well.

D. *Remand and Retrial of Aggravating Factors*

There are two additional differences between current practice in these states and the procedure that would apply if aggravating factors triggering upward-departure sentences were considered elements for all purposes. Those differences concern the retrial of aggravating facts or allegations of new aggravating facts after remand.

Ordinarily, an appellate court that finds a *sentencing* error could simply remand for resentencing, and the trial court need not retry the underlying conviction. In these five states, courts continue to order retrial of the aggravating fact alone, treating that fact as a sentencing factor.²¹⁷ Yet, this procedure would not be allowed if these range-raising factors were truly elements, as the U.S. Supreme Court has suggested.²¹⁸

Assume, for example, that a defendant convicted of armed robbery appeals their conviction, alleging a procedural error regarding the “armed” element that separates the lesser offense of robbery from the greater offense of armed robbery, based on a bad jury instruction or evidentiary error. Upon finding a procedural error regarding that element, an appellate court would have three options. It could (1) find the error was harmless,²¹⁹ (2) remand for the trial court to order resentencing on the lesser offense without that aggravating element, or (3) remand the case for retrial of the entire offense (armed robbery). Allowing the prosecutor a second bite at just the “armed” element while preventing the defendant from contesting the other elements would not be an option. Retrying the aggravating element alone would deprive the defendant of their right to a general verdict.²²⁰ And it would violate the defendant’s double jeopardy rights to retry all the elements but instruct the jury to find the elements other than the weapon element as established by the prior trial, thus directing a verdict of guilty on those elements.²²¹ The same limitations should apply if states actually

216. *See supra* notes 214–15 and accompanying text.

217. *See, e.g.*, *State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008).

218. *See supra* notes 28, 63–64 and accompanying text.

219. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 4 (1999) (holding that a judge’s failure to instruct the jury on an element can be harmless error).

220. LAFAVE ET AL., *supra* note 13, § 26.4(i) & nn.260–264.50 (collecting authority).

221. *Id.*; *see also id.* § 17.4(a) (collecting authority); *Simpson v. Florida*, 403 U.S. 384, 386 (1971) (“[H]ad the second trial never occurred, the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night.”); *State v. Stiefel*, 256

treated the aggravating factor separating the presumptive punishment from a departure punishment as an element of the offense. Instead, these states appear to assume this fact that raises the sentencing range is just a sentencing factor.

Similarly, treating an aggravating factor as an element would jeopardize several state court decisions holding that a prosecutor's decision to *add* an upward-departure allegation after remand is not the same as a prosecutor's decision to add a higher charge.²²² In *Blackledge v. Perry*,²²³ the Supreme Court held that adding a higher charge after remand raises a presumption of vindictiveness, in violation of due process.²²⁴ If the aggravating factor was truly an element of a greater offense, prosecutors who respond to a successful appeal by seeking an upward departure on remand would have to comply with the same due process restrictions they would face if they responded by raising the charge.²²⁵

* * *

This part turned from negotiated dispositions to contested cases and focused on the differences between procedures used to adjudicate ordinary-offense elements and procedures these five states use to adjudicate aggravating factors for upward-departure sentences. By continuing to treat factfinding for upward departures as a matter of sentencing and not guilt, prosecutors in at least some of the states examined here benefit from several procedural shortcuts unavailable for adjudicating ordinary offense elements. These shortcuts include omitting allegations of facts needed for the higher sentence from the charging instrument, avoiding screening those allegations for probable cause at a preliminary hearing or indictment, reducing the formality of and separating waivers of trial, reserving a second chance to prove the facts for an aggravated sentence on remand without retrying the other elements of the offense, and

So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (holding that such a procedure “would be impermissible, of course, under due process considerations which assure an accused a jury trial on all issues relating to each element of a given criminal charge”). For example, take the case *State v. Davis*, 335 P.3d 1266 (Or. Ct. App. 2014), which held that the State's issue preclusion instruction removed an element from the jury's consideration in violation of defendant's right to a jury trial when, after remand, the jury was told “[b]oth sides have had full and fair opportunity to litigate whether or not the defendant was the driver. And the jury made the determination, they did their work just like you. And so we must accept the fact that the defendant is the driver when we evaluate this case.” *Id.* at 1275.

222. See *State v. Brown*, 440 P.3d 962, 971 (Wash. 2019) (“Unlike cases where the prosecution chooses to add charges after a defendant exercises his right of appeal and succeeds, this case involves a sentencing recommendation . . . [W]e decline to extend the *Blackledge* presumption in this context.”); see also *State v. Sierra*, 399 P.3d 987, 990 (Or. 2017) (rejecting Due Process Clause and Double Jeopardy Clause challenges when the State alleged after remand, and the jury found, four significant enhancement factors that had not been alleged or found during the original trial).

223. 417 U.S. 21 (1974).

224. *Id.* at 28–29 (finding a presumption of vindictiveness upon the addition of a higher charge after the defendant's first appeal).

225. See generally LAFAVE ET AL., *supra* note 13, § 13.5(a) (discussing vindictive charging).

adding more serious charges after a defendant's successful appeal without certain constitutional limits.²²⁶

It is possible that the Court's future application of its *Apprendi* doctrine may rule out some of these practices, making it more costly to use upward-departure sentences in presumptive-guidelines systems. If that happens, hopefully states will not substitute even heavier reliance upon criminal history to calibrate sentences, as Kansas has done.²²⁷ Because courts presently exempt the fact of prior conviction from *Blakely*'s protections, such a move may be tempting. However, as Professors Richard Frase and Julian Roberts have documented, even if using criminal history is a cheap and easy option for parsing penalties in the short run, research reveals that it could exacerbate racial disparities and undermine crime-reduction efforts in the long run.²²⁸

CONCLUSION

This study of how presumptive-guidelines states have handled compliance with *Blakely* revealed several surprising practices. Some are at odds with theoretical explanations for presumptive sentencing guidelines,²²⁹ and others are inconsistent with the U.S. Supreme Court's characterization of range-raising facts as elements.²³⁰ But it is important not to leap to conclusions about the relative value of presumptive guidelines compared to other sentencing systems based on these limited findings. A concerning practice that is common under presumptive sentencing guidelines (say, plea agreements that trade a higher sentence for a lesser, less accurate, charge) may be even more prevalent in states without presumptive sentencing guidelines. It is also possible that any costs or concerns raised by the way states process cases with upward-departure sentences²³¹ are outweighed by the potential benefits of presumptive sentencing, particularly if research demonstrates that presumptive sentencing

226. The second-class status of aggravating facts arguably has one potential benefit for the defendant, too: judges may be more open to bifurcating trials when evidence of the aggravating fact would not normally be part of the proof of other elements, allowing a defendant to seek a jury verdict on other elements before exposing jurors to aggravating factors that may otherwise create prejudice.

227. See KANSAS 2018 MANUAL, *supra* note 43, at 27–35 (listing sentence enhancements based on criminal history); see also Baron-Evans & Stith, *supra* note 30, at 1715 (describing proposal to permit upward departures based on criminal history but not on other grounds).

228. FRASE & ROBERTS, *supra* note 30, at 77–83, 133–51 (collecting research on the lack of crime reduction and the disproportionate impact on minority defendants).

229. See *supra* Section III.A.

230. See *supra* Part IV.

231. The study was limited to the relatively small fraction of cases with upward-departure sentences; downward departures are much more common. See Richard S. Frase & Kelly Lyn Mitchell, *Why Are Minnesota's Prison Populations Continuing To Rise in an Era of Decarceration?*, 30 FED. SENT'G REP. 114, 117 (2017) (noting between 2011 and 2015 nine times as many downward as upward durational departures in Minnesota); STATE OF WASH. CASELOAD FORECAST COUNCIL, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2017, at ix (2018) (showing that 23% of exceptional sentences increased the term of confinement above the range; 60.3% reduced below).

guidelines can help a state implement alternative responses to crime, shrink racial inequality, and reduce overreliance on criminal history, incarceration, and counterproductive terms and conditions of community release.

With those caveats in mind, the findings suggest three potentially useful lessons. First, the power to seek or promise not to seek upward departures in these presumptive-guidelines systems enhances prosecutorial power to manipulate punishment and secure plea agreements. At least when judges lack the tools, authority, or incentive to disrupt stipulated agreements, prosecutors control not only the charge, but also whether a defendant will receive an upward-departure sentence for that charge if convicted. With no need to limit upward departures to cases a judge would agree warrant exceptionally severe penalties, upward departures are available for routine use in bargaining—sought with the expectation that they will be dropped as part of a deal, handy whenever defendants prefer incarceration to probation, traded for lesser or different charges, or layered with downward departures to reach an outcome both sides can live with.²³² This Article is not the place to tackle the regulation of charging and sentencing bargaining—others, including the drafters of the MPCs, have tried.²³³ It is enough to note that the findings illustrate how plea bargaining, the black hole that consumes and exploits almost every effort to regulate punishment, has absorbed upward departures in these presumptive-guidelines states.

The findings here also reinforce the need to be careful about what sentencing information means, especially in presumptive-guidelines jurisdictions where sentencing data often directs policy decisions. When all but a small percentage of convictions and sentences are the product of negotiation, and neither trial nor appellate judges enforce factual-basis requirements or question stipulations,²³⁴ those convictions and sentences lose reliability as records of fact. At most, they mark the charge and sentence factors that the prosecutor and the defendant would agree to. An upward-departure sentence

232. See *supra* Section III.A.

233. MODEL PENAL CODE: SENT'G 25–26 (AM. L. INST., forthcoming 2021) (on file with author) (listing provisions that would regulate deferred-prosecution agreements, authorize deferred adjudication without a prosecutor's agreement, provide that deferred adjudication “not be conditioned on a guilty plea,” allow a court to consider offenders’ “substantial assistance” to the government as a mitigating factor at sentencing without government agreement, invalidate certain waivers of appeal, provide appellate relief for disproportionately severe sentences, ban the use of acquitted conduct, and more). Washington, for example, tried optional prosecutorial guidelines, which, unsurprisingly, many local offices have opted not to follow. See WASH. COMM'N, 2019 REVIEW, *supra* note 30, at 11 (reporting these guidelines “are routinely followed in some prosecutor's offices more than others” and mentioning an “[u]neven application of some enhancements, most of which are essentially mandatory minimums”); see also Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1022–25 (2005) (discussing attempts by sentencing commissions to regulate charging and bargaining).

234. See *supra* Section III.A.

does not reliably indicate an unusually severe offense or culpable offender. Rather, the prosecutor may have decided to seek a departure for a reason that has nothing to do with how serious the defendant's crime or criminal record truly was. For example, a surge in the numbers of upward-departure sentences for attempted crimes does not demonstrate that the presumptive sentences for attempt are too low and need upward adjustment or that police have improved their ability to intercept crime before offenses have been completed. Instead, upward departures combined with substituting attempt for a completed crime may have been the easiest way for the parties to avoid a higher, perhaps mandatory minimum, sentence for the completed crime.²³⁵

Finally, this project exposes how states with presumptive sentencing guidelines have navigated uncertainty about the scope of the *Apprendi* doctrine and resisted its expansion.²³⁶ Even before this past Term's novel application of *Apprendi* to the revocation of release,²³⁷ multiple questions already divided these states. Do upward dispositional departures from probation or durational departures from a presumptive-probation term implicate the *Blakely* rule?²³⁸ Which facts *related to* prior convictions, if any, are exempt under the exception for prior convictions?²³⁹ Is an aggravating factor authorizing a more severe range of punishment an "element" for purposes other than the right to a jury finding beyond a reasonable doubt, such as notice, waiver, or double jeopardy?²⁴⁰ Any jurisdiction that is considering presumptive sentencing guidelines must anticipate these constitutional issues, along with the many policy issues involved in designing a presumptive-guidelines system.

235. See *supra* notes 125–28 and accompanying text.

236. See *supra* Section II.C.1.

237. See *United States v. Haymond*, 139 S. Ct. 2369, 2379–80 (2019). See generally Kate Stith, *Apprendi's Two Constitutional Rights*, 99 N.C. L. REV. 1299 (2021) (discussing *Haymond*).

238. See *supra* Section II.C.2.

239. See *supra* Section II.C.3.

240. See *supra* Part IV.

