

# **The importance of perspective, data, and leaving well enough alone**

**U.S. Sentencing Commission Hearing  
November 17, 2004**

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Judge Hinojosa and members of the Commission, thank you for the invitation to present my views about federal sentencing in the wake of the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and the anticipated rulings in *United States v. Booker* and *United States v. Fanfan*. It is both a pleasure and an honor to have an opportunity to share my thoughts at this historic moment in the evolution of sentencing law and policy.

For the record, I am a Professor of Law at The Ohio State University Moritz College of Law and a Managing Editor of the *Federal Sentencing Reporter*. In addition, as you may know, I have been operating a website — *Sentencing Law and Policy*, <http://sentencing.typepad.com/> — which has played a role in the on-going public dialogue about the meaning and impact of the *Blakely* decision. In the course of developing the site, I have received hundreds of articles and briefs and thousands of e-mails concerning *Blakely* issues and developments; this correspondence has led me to the view that nobody has a complete understanding of what is really happening in the wake of *Blakely*, while everyone has a skewed perspective on what should be happening in the wake of *Blakely*. Thus, as this Commission contemplates its role and tasks in the weeks and months ahead — and particularly as this Commission contemplates how best to interact with and advise Congress concerning the current state and future direction of the federal sentencing system — I wish to spotlight the importance of perspective, data and leaving well enough alone.

## **The importance of perspective**

The *Blakely* decision has obviously created tremendous uncertainty and confusion concerning the law and procedures of federal sentencing. But the nature and extent of the harm resulting from *Blakely*'s impact on the federal system is itself uncertain. For those feeling most burdened by the disruptions caused by *Blakely* — primarily, I suspect, most federal prosecutors and some court personnel — the harms of the post-*Blakely* uncertainty and confusion likely seem considerable and dramatic. But I surmise that for others involved in and impacted by the federal sentencing system, the effects of *Blakely* seem manageable and perhaps even beneficial. Moreover, as members of this Commission surely appreciate, the varied assessments of *Blakely* come from judges, lawyers and commentators who had varied views about the soundness of the federal sentencing guidelines before *Blakely*. This Commission should be mindful that those who lament the *Blakely* disruptions most vocally may be those who viewed the pre-*Blakely* world of federal sentencing most positively, while those more sanguine about *Blakely* disruptions may be those who viewed the pre-*Blakely* world of federal sentencing most critically.

Putting this point more colorfully, I have come to think of *Blakely* like the elephant in the parable of the Blind Men and the Elephant: it seems that everyone has a different (and likely incomplete) view of *Blakely* and its aftermath depending on his or her professional position and personal perspective. This Commission should appreciate that everyone examining and assessing the federal sentencing system may be at least partially blind, and that perceptions of the guidelines, past and present, may be greatly influenced by viewing the system from a particular vantage point.

I stress these realities not to impugn anyone's beliefs or advice about post-*Blakely*

developments, but rather to suggest these realities inform the work of this Commission in two important ways. *First*, insights about the importance of perspective suggest that the Commission seek information and input about the impact of *Blakely* from a broad array of individuals and institutions. These hearings are, of course, an integral part of such an information gathering project, and the Commission's work monitoring court reactions to *Blakely* is another critical part of this project. However, the Commission should consider dynamically all the stakeholders in the federal sentencing system and all who may have unique perspectives on the *Blakely* decision and its aftermath. Federal judges are a diverse group, and the caselaw already suggests district judges may have much different views on *Blakely* than do circuit judges. Similarly, due to differences in caseloads and the mix of offenders, judges in urban areas or in border districts likely see a "*Blakely*-ized" world much differently than judges in other regions. And the diverse array of federal prosecutors and defense attorneys, probation officers and court clerks, victims and defendants involved in or impacted by the federal guidelines likely also have diverse perspectives on the current state and potential future of federal sentencing. The Commission should actively encourage input from as many different individuals and institutions as possible — perhaps by holding a series of hearings across the nation in the coming months — while taking stock of the impact of *Blakely*, *Booker* and *Fanfan* and charting a course for future sentencing reforms.

*Second*, insights about the importance of perspective suggest that this Commission has a unique and critical role in the examination and analysis of the federal sentencing system in the wake of *Blakely*. This Commission is the only body which has the information and ability to take a comprehensive and balanced view of the entire federal sentencing landscape in the aftermath of *Blakely*. Representatives from the Department of Justice and from the defense bar necessarily have a

partisan view of both the pre-*Blakely* and post-*Blakely* state of federal sentencing. Individual judges are not partisan, but they cannot take a bird's eye view of the system as can this Commission. Because of the unique advantages of its perspective, the Commission should take a leading role in the public dialogue concerning the current state and the future direction of the federal sentencing system. These hearings suggest the Commission is prepared to take on this role, but hearings are just the start. As suggested below, I particularly encourage the Commission to take an active role in fostering public dialogue concerning the federal sentencing system through (1) greater public dissemination and promotion of sentencing data, and (2) vocal advocacy of a cautious and data-driven approach to any and all federal sentencing reform efforts.

### **The importance of data**

Since *Blakely* was decided on June 24, 2004, the federal courts have essentially been engaged in a remarkable five-month experiment with an uncertain new world of federal sentencing. In at least two circuits, the Seventh Circuit and the Ninth Circuit, this experiment has required sentencing courts to accommodate the apparent demands of *Blakely* within the existing federal guidelines structure. In these circuits and others (including even those circuits that have deemed *Blakely* inapplicable to the federal guidelines), courts and litigants appear to be devising a wide array of what might be called *Blakely* coping mechanisms. Some courts have established special plea and trial procedures, some courts have been announcing alternative sentences, some courts have experimented with sentencing juries.

I have received anecdotal reports from judges and others which suggest that at least some federal criminal cases are proceeding in a relatively orderly fashion as some courts seek to comply

with the apparent dictates of *Blakely*. And even in circuits in which *Blakely* has been deemed inapplicable to the federal guidelines, there is evidence of actors accommodating the apparent demands of *Blakely* through the filing of superceding indictments and through experimentation with jury fact-finding of sentencing factors (such as in the recently concluded Enron Nigerian barge trial in Houston<sup>1</sup>). And yet, many federal sentencing participants and observers have asserted that trying to accommodate the demands of *Blakely* within the current guideline structure would be inconceivable and that a massive re-working of the federal guidelines is an absolute necessity if *Blakely* is deemed applicable to the federal system.

In short, there is a basis for believing that at least some courts are coping reasonably well with the demands of *Blakely* (which would not be that surprising given that a significant percentage of federal cases apparently do not involve “*Blakely* factors” and given that historically the vast majority of federal convictions have been secured through guilty pleas). But there is also a basis for fearing that *Blakely* has plunged the federal criminal justice system into a state of crisis and that divergent sentencing practices in different circuits (and even in different courtrooms in the same building) have dramatically undermined the goals of sentencing reform.

It seems that the only certainty may be that nobody is entirely certain how the federal sentencing system is currently coping *Blakely*. Though persons working within the system may have anecdotal impressions of the post-*Blakely* world, to date we have not seen any comprehensive public accounting of the results of the on-going experiment with the new *Blakely*-impacted world of federal sentencing. The period of federal sentencing experimentation has now extended many months, and there ought to be a considerable amount of data emerging from the federal sentencing courts. Indeed,

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<sup>1</sup> See Mary Flood, *Jury Says Enron Sham Cost \$13 Million*, HOUSTON CHRONICLE, Nov. 9, 2004.

by my count based on historical Commission data, as many as 30,000 federal sentences should have been imposed nationwide since *Blakely* was decided in late June, and roughly 7,000 sentences should have been imposed in the Seventh and Ninth Circuits alone. Press reports and other evidence suggest that a considerable number of sentencings have been put on hold. However, I have seen no data or even a reasonable estimate of how many sentencings have gone forward and how many have been postponed awaiting a decision in *Booker* and *Fanfan* either nationwide or particularly in those circuits in which *Blakely* has been deemed applicable to the federal sentencing guidelines.

Whether and exactly how the federal criminal justice system is functioning (or not functioning) — especially in those circuits accommodating the apparent demands of *Blakely* within the existing sentencing structure — is an extraordinarily important consideration as Congress, this Commission and others contemplate possible changes to federal sentencing laws and practices.<sup>2</sup> If the extant data suggest that federal sentencings have been subject to only limited *Blakely* disruptions, then the need for a “quick fix” becomes less urgent. But if the data suggest that *Blakely* has rendered the federal sentencing system profoundly dysfunctional, the need for some fix, any fix, becomes considerably more pressing. Moreover, the impact of *Blakely* ought not be gauged simply on the basis of whether criminal cases are moving through the federal system. In light of the statement of Congress’s goals as articulated in the Sentencing Reform Act of 1984, the ultimate concern must be whether and how the purposes of punishment specified in 18 U.S.C. § 3553(a)(2)<sup>3</sup> are being

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<sup>2</sup> United States Attorney William Mercer recently wrote that “[a]ccurate and complete data on federal sentences are important to the work of policymakers, those with roles in the federal criminal justice system, and scholars.” William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FEDERAL SENTENCING REPORTER 43, 43 (2003). Though he was writing before the decision in *Blakely*, Mr. Mercer’s insights are perhaps even more essential at a time of so much uncertainty and confusion in the federal sentencing system. Cf. Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FEDERAL SENTENCING REPORTER 1, 4 (2003) (“Data is necessary for reasoned, just and humane sentencing policies and practices.”).

significantly undermined — or perhaps are being better served — in the wake of *Blakely*.

In short, it would be enormously valuable for the Commission, as soon as possible, to assemble and make publicly available any and all information and data analysis concerning the post-*Blakely* realities of federal sentencing. This data could be assembled in a formal report to Congress or more informally through a series of research memoranda. An examination and assessment of data emerging from the Seventh and Ninth Circuits would be especially informative, although a complete report on post-*Blakely* developments and court practices nationwide would of course also be extremely beneficial. Though producing a comprehensive report in a short time-frame may prove challenging, the Commission could produce and publish its data and analyses in stages.<sup>4</sup>

An immediate Commission analysis and public report of the state of federal sentencing since *Blakely* would have profound benefits for members of Congress, other policy-makers and public interest groups actively contemplating the future of federal sentencing. In the absence of accurate and timely data, Congress and other official policy-makers may be forced to rely on anecdotal accounts of the operation of the federal sentencing system which, for reasons suggested above, may not be fully reflective of all pertinent developments and realities. Moreover, I know of at least four major public policy groups or task forces that are considering proposals for reform of the federal sentencing system

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<sup>3</sup> As the Commission knows, 18 U.S.C. § 3553(a)(2) provides that federal sentences should be crafted “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” And, of course, 28 U.S.C. § 991(b)(1)(A) provides that a chief purpose of the Commission is to “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).”

<sup>4</sup> Notably, the Minnesota Sentencing Guidelines Commission produced two enormously insightful and data-rich reports about the state of sentencing in Minnesota within months of the *Blakely* decision. Upon the direction of the Minnesota Governor, the Minnesota Sentencing Guidelines Commission produced a short-term report less than six weeks after *Blakely* was handed down and a long-term report less than eight weeks later. Though these reports focused on pre-*Blakely* case data, the reports still provided an enormously valuable window through which to view the need for, and nature of, possible reforms to Minnesota’s sentencing system.

in light of *Blakely*; the work of these entities would be invaluable informed by the immediate public dissemination of whatever data the Commission has already assembled and by analyses published in the near future.

Relatedly, it is my understanding that the Commission is nearing the completion of its long-in-development “Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate.” Though I assume that all of the data and analysis to appear in that report predate the Supreme Court’s decision in *Blakely*, the information and conclusions from the Commission’s comprehensive pre-*Blakely* assessment of the operation and efficacies of the federal sentencing guidelines would also be of enormous value to members of Congress, other policy-makers and public interest groups contemplating the future direction of federal sentencing reforms. The Commission should also make this report, or at least any completed portions thereof, publically available as soon as possible.

### **The importance of leaving well enough alone (at least right now)**

It has been wise, in my view, for Congress and this Commission to hold off on serious consideration of serious changes to the federal sentencing system while the Supreme Court considers *Booker* and *Fanfan*. Until the Supreme Court rules in *Booker* and *Fanfan* to clarify the legal meaning and impact of *Blakely* for the federal sentencing system, any effort to dramatically alter the structure or operation of the federal sentencing system would necessarily be treacherous and fraught with uncertainty. However, I want to close my comments by urging this Commission to appreciate that, even after Supreme Court rules in *Booker* and *Fanfan* to clarify the legal meaning and impact of *Blakely* for the federal sentencing system, any effort to dramatically alter the structure or operation of the federal sentencing system will likely still be treacherous and fraught with uncertainty.

Once a decision is handed down in *Booker* and *Fanfan*, especially if it includes strongly worded opinions (such as we saw in *Blakely*) forecasting the demise of the federal sentencing guidelines, I suspect there will be enormous pressure for Congress and this Commission to do something and to do something fast. Especially given the Justice Department's expressed concerns about the prospect of "sentencing windfalls" for defendants, if *Booker* and *Fanfan* apply *Blakely* to the federal system it may become hard to resist the idea that immediate and major Congressional or Commission action is an absolutely necessity.

However, I wish to recall an important point made by Commissioners John Steer and Judge William Sessions in their Joint Prepared Testimony to the Senate Judiciary Committee in July as part of the Judiciary Committee's hearing on "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines." In their testimony, Commissioner Steer and Judge Sessions said:

[I]f Congress determines that legislation is appropriate, it should be the goal of any legislation to address problem areas as definitively as possible without burdening the system with a host of new issues that have to be litigated.

Because I agree so strongly with this sentiment, I believe this Commission ought to start with a strong presumption against any dramatic or major structural changes to the federal sentencing guidelines no matter what the Supreme Court holds in *Booker* and *Fanfan*. Though it is difficult to anticipate what sort of reform needs and framework may result from the Court's decision, I believe a cautious and carefully planned process of modulated incremental changes (informed in part by the goal of simplifying key aspects of the overall guideline structure) will likely be the soundest course for future federal sentencing reforms whatever the nature of the Court's specific ruling in *Booker* and *Fanfan*.

Two key legal considerations and one key policy consideration drive what I might call my "go slow and incrementally" advice. *First*, I believe it will be extremely difficult to make major structural

changes to the federal sentencing guidelines with any constitutional certainty unless the Supreme Court reaches out in *Booker* and *Fanfan* to address and clarify a host of critical issues not formally before the Court. Of particular concern, I fear that *Booker* and *Fanfan* will not definitively resolve the continued validity of either *Harris v. United States*, 536 U.S. 545 (2002), which currently allows judges to find facts that establish minimum sentences, or *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which currently allows judges to find “prior conviction” facts that enhance sentences.<sup>5</sup> Moreover, though many are understandably inclined to believe that *Williams v. New York*, 337 U.S. 241 (1949), which sanctions discretionary sentencing schemes, remains good law, I do not think the constitutionality of *Williams* should be blithely assumed in the wake of *Blakely*. I believe that it may not be feasible, and that it certainly would not be wise, to legislate major changes to the federal sentencing system in light of so much constitutional uncertainty (especially when most of the leading reform proposals clearly depend upon the continued validity of arguably shaky precedents).

*Second*, even if the Supreme Court were to sufficiently clarify the constitutional terrain in *Booker* and *Fanfan* to permit making major guideline changes with some constitutional confidence, Ex Post Facto doctrines entail that any Congressional or Commission action now would only have prospective application and would have no ameliorative impact on the confusion and uncertainty that surrounds currently pending cases in the federal system. Relatedly, I suspect there would be a host of complicated, challenging and possibly unforeseen transition issues that would accompany any major structural changes to the federal sentencing guidelines. Beyond issues relating to the uncertain

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<sup>5</sup> In addition, I fear that a host of other seemingly smaller, but still very important issues relating to *Blakely*'s scope — issues such as *Blakely*'s applicability to judicial fact-finding to support consecutive sentencing, the ambit of the “prior conviction” exception, and *Blakely*'s impact on non-imprisonment punishments — will remain unresolved after *Booker* and *Fanfan*.

continued validity of *Harris*, *Almendarez-Torres* and even *Williams*, I think any major structural modification of the current system (especially if it includes a sunset provision) risks sowing greater confusion and uncertainty — and lots and lots of litigation — about applicable federal sentencing laws and practices.

*Third*, beyond these legal concerns and complications, I suspect that the political will for major sentencing reform can only support one significant overhaul of the federal sentencing system in the immediate future (in part because of the transition concerns expressed above). Thus, it would be especially essential for any major reform proposal to “get it right” the first time, whereas smaller incremental reforms can evolve and adapt to new developments and insights as we learn more about the post-*Blakely* legal landscape. Given the recent experience with the passage of the PROTECT Act, I fear that any major reform effort, especially if hurried in the immediate aftermath of a decision in *Booker* and *Fanfan*, may not be fully informed by sound and cautious data analysis drawing upon the wisdom of all the different federal sentencing constituencies. The history of federal sentencing after the passage of the Sentencing Reform Act of 1984 — which was itself the product of nearly a decade of Congressional consideration and debate — has sometimes revealed a problematic tendency toward rushed and imbalanced solutions to perceived problems. This Commission can and should be a vocal advocate of a cautious and data-driven approach to any future federal sentencing reforms.

Thus, even anticipating a major ruling in *Booker* and *Fanfan* that could impact major parts of the current federal guidelines system, I think this Commission should plan for a process of making cautious and carefully modulated incremental changes to the existing guidelines structure. As intimated above, I believe such incremental reform should particularly seek to simplify components of the overall guideline structure (which would aid jury fact-finding of sentence-enhancing facts,

should that become necessary). Incremental reform could and should also seek to address any problems with the existing guidelines that the Commission has identified through its fifteen-year study.

I am hopeful that the Supreme Court in *Booker* and *Fanfan* will clarify its ruling in *Blakely* in a manner that prevents the decision from becoming unnecessarily destructive to the project and goals of modern sentencing reform. In an article entitled “Conceptualizing *Blakely*” forthcoming in the December issue of the *Federal Sentencing Reporter*, I contend that *Blakely* can and should be understood to mean that all facts and only those facts relating to offense conduct (and not facts relating to offender characteristics) which enhance criminal punishments are subject to the jury trial right. In that article, which I have attached as an appendix to this testimony, I explain the Constitutional basis for, and positive consequences of, recognizing an essential offense/offender distinction at the heart of the jury trial right. More generally, I believe an offense/offender distinction, in addition providing a conceptually sound way to define and limit *Blakely*’s account of the jury trial right, provides a useful guidepost for considering a range of other issues of sentencing policy and practice. Though I believe this Commission’s work may be usefully informed by an attentiveness to the offense/offender distinction, extended discussion of these matters may be a bit premature while we still await a ruling in *Booker* and *Fanfan*.

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Thank you once again for this opportunity to speak to this Commission at this important time. I look forward to the opportunity to answer any questions you might have.

# Conceptualizing *Blakely*

The Supreme Court's decision in *Blakely v. Washington*<sup>1</sup> has generated impassioned judicial and academic criticisms, perhaps because the "earthquake" ruling<sup>2</sup> seems to announce a destructive rule in search of a sound principle. Read broadly, the jury trial rule articulated in *Blakely* might be thought to cast constitutional doubt on any and all judicial fact-finding at sentencing. Yet judicial fact-finding at sentencing has a long history, and such fact-finding has been an integral component of modern sentencing reforms and seems critical to the operation of guideline sentencing. The caustic reaction to *Blakely* reflects the fact that the decision has sowed confusion about constitutionally permissible sentencing procedures — and risks impeding the continued development of sound sentencing reforms — without stating a clear principle to justify the disruption it has caused.

But extreme concerns about *Blakely* are the result, in my view, of a failure to appreciate the decision's core principle, as well as from the Supreme Court's failure to articulate the proper limits of that principle. I see a fundamental — and fundamentally sound — principle at work in *Blakely*, and I believe the *Blakely* rule, once properly conceptualized and defined, is neither radical nor necessarily destructive to the project and goals of modern sentencing reforms.

## I. The *Blakely* Principle

The fundamental and sound principle at work in the *Blakely* line of cases, as well as the principle's proper limit, could be better understood and appreciated if the Supreme Court linked its rulings to the constitutional text it purports to be applying. The jury trial right at issue in the *Blakely* line of cases actually appears twice in the U.S. Constitution. Section 2 of Article III provides: "The trial of all crimes, except in cases of impeachment, shall be by jury." And the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In addition to highlighting the favored status of the jury trial right, the language of these provisions can and should be read together to help chart the proper metes and bounds of the right itself.

The Constitution frames the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused." This language connotes that the jury trial right attaches to all *offense conduct* for which the state seeks to impose criminal punishment, but the language

also connotes that the jury trial right does not attach to any *offender characteristics* which the state may deem relevant to criminal punishment. That is, all facts and only those facts relating to offense conduct which the law makes the basis for criminal punishment are subject to the jury trial right; such facts are in effect the essential parts of those "crimes" which the state wishes to be able to allege against "the accused" in a "criminal prosecution."<sup>3</sup>

The jury trial right should be understood to concern *offense conduct* and not *offender characteristics* because the state defines "crimes" and accuses and prosecutes based on what persons do and not based on who they are. When the law ties punishment consequences to specific conduct — such as the amount of money or drugs involved in the offense,<sup>4</sup> or whether and how the defendant used a weapon,<sup>5</sup> or whether the offense caused bodily harm to a victim<sup>6</sup> — the state has defined what specific conduct it believes merits criminal sanction. The jury trial right in turn guarantees that a defendant can demand that a jury determine whether the defendant in fact did that specific conduct the state seeks to punish.

However, once offense conduct has been properly established — either through a jury trial or a defendant's admission — a judge may properly consider whether and to what extent offender characteristics may justify more or less punishment in response to that conduct. When the law ties punishment consequences to aspects of a person's past and character — such a defendant's criminal history or his employment record or his age — the state is not defining what conduct it believes merits criminal sanction, but rather is instructing judges how to view and assess an offender at sentencing. A state should be able to structure through statutes or guidelines precisely how a judge considers offender characteristics without implicating the jury trial right.

In short, an essential offense/offender distinction should inform the jury trial right.<sup>7</sup> This offense/offender distinction, in addition to being suggested by the text of the Constitution, resonates with and is buttressed by the distinctive institutional competencies of juries and judges, and the distinctive judicial ambit of trials and sentencings. Trials are about establishing the specific offense conduct that the state believes merits criminal punishment; sentencing is about assessing both the offense and the offender to impose a just and effective punishment. Juries can reasonably be expected to determine all offense conduct at a (pre-sentencing) trial, and the state



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**DRAFT IN PROGRESS**

forthcoming 17 FEDERAL SENTENCING REPORTER — (Dec. 2004)

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can reasonably be required to prove to a jury at trial all the specific offense conduct for which the state seeks to impose punishment. But judges are better positioned to consider (potentially prejudicial) offender characteristics at a (post-trial) sentencing, and the state should be permitted to proffer information concerning an offender's life and circumstances directly to a judge to assist punishment determinations.

In short, we "give intelligible content to the right of jury trial" by concluding that juries must find all the "facts of the *crime* the State *actually* seeks to punish."<sup>8</sup> The state is certainly permitted to provide for jury consideration of offender characteristics, but the Constitution's jury trial right does not demand as much.<sup>9</sup>

## II. The Implications and Challenges of *Blakely's* Principle

Understanding *Blakely* and the jury trial right through the offense/offender distinction helps provide an account of the Supreme Court's recent sentencing jurisprudence. The offense/offender distinction also has important implications, and raises challenging questions, concerning the reach and application of the jury trial right.

### A. The Source and Content of Sentencing Law

The *Blakely* principle propounded here does not concern itself with the source of the law that defines punishment consequences, but it does concern itself with the content of that law. Whether a jurisdiction's sentencing law is a statutory enactment or an administrative code or even a judicial creation, the *Blakely* principle is implicated, and the jury trial right triggered, however and whenever the law expressly imposes criminal punishment on the basis of offense conduct. No matter who defines the offense conduct to be punished, if and when the law provides that certain offense conduct will have certain punishment consequences, the law has triggered the jury trial right by defining a "crime" that is the basis for a "criminal prosecution" of "the accused."

But the authorization of punishment based on certain findings does not always trigger the jury trial right. If the law is concerned not with offense conduct but rather with offender characteristics, then the law is not defining a "crime" and the jury trial right is not implicated. Rather, when punishment rules are linked to offender characteristics, the law is simply instructing a judge how to view and assess an offender at sentencing. Consequently, the Constitution's jury trial right does not preclude a judge from making alone those findings concerning offender characteristics that the law deems relevant to sentencing determinations.

### B. The Status and Scope of the "Prior Conviction" Exception

Understanding the *Blakely* principle aided by the offense/offender distinction suggests that the Supreme Court's decision in *Almendarez-Torres v. United States*<sup>10</sup>

is constitutionally sound. That decision, as subsequently defined, is the source of the "prior conviction" exception to the *Appendi/Blakely* rule, and some commentators have asserted that this exception is an illogical and inappropriate gap in the Supreme Court's recent sentencing jurisprudence.<sup>11</sup> But considered against the constitutional text and the offense/offender distinction suggested here, the *Almendarez-Torres* decision appears on firm constitutional ground.

Prior convictions clearly are the consummate *offender characteristic*: to have a prior conviction is not in and of itself a "crime" and the state cannot bring an "accusation" and pursue a "criminal prosecution" based only on the fact that an offender has a criminal past. Because the fact of a prior conviction is an offender characteristic that is not generally an essential part of the "crimes" that the state seeks to punish, the jury trial right should not be constitutionally implicated even when prior conviction facts are the basis for specific punishment consequences at sentencing.<sup>12</sup> A focus on the distinctive institutional competencies of juries and judges reinforces this conclusion: requiring jury consideration of evidence of prior convictions at trial risks prejudicing a jury's consideration of the evidence presented concerning a defendant's alleged current criminal conduct;<sup>13</sup> a judge considering a wide array of facts and issues at sentencing is less likely to be inappropriately biased by evidence of prior convictions.

Of course, a state is permitted to provide for jury consideration of prior convictions (or any other offender characteristic). Indeed, a few states provide by statute for jury consideration of the existence of prior convictions in the application of habitual offender laws.<sup>14</sup> States are always free to provide more procedure and procedural protections to a defendant than the Constitution demands; provisions requiring jury consideration of offender characteristics are thus constitutionally permissible (and may also be wise as a matter of policy).<sup>15</sup> But, critically, the Constitution's jury trial right does not demand that offender characteristics, such as a defendant's prior convictions, be proven to a jury because such characteristics are not parts of "crimes."

In the wake of *Appendi* and *Blakely*, many lower courts have understandably struggled over how broadly to apply the "prior conviction" exception. Though some sentencing laws link enhanced punishment to the basic fact of a prior conviction, many jurisdictions have more elaborate criminal history rules that focus on, for example, whether the defendant committed a current offense while on probation or parole or whether the defendant's prior criminal conduct is of a certain character.<sup>16</sup> Lower courts have been divided on whether the "prior conviction" exception applies only to the basic fact of a prior conviction or rather extends more broadly to matters related to prior convictions that involve additional criminal history facts or findings.<sup>17</sup>

Helpfully, understanding the *Blakely* principle aided by the offense/offender distinction suggests that the "prior

conviction” exception ought to be given a broad reading. As explained above, the “prior conviction” exception is not a unique, *sui generis*, unsound gap in an all-encompassing *Appendi/Blakely* principle. Rather the *Appendi/Blakely* principle is properly applied only to offense conduct, and thus enhancements based on varied criminal history factors ought not trigger the jury trial right when these enhancements concern only offender characteristics. To return to the lingo of the constitutional text, a defendant’s status on probation or the nature of his criminal past is not itself properly considered part of a “crime” that the state must allege against “the accused” in a “criminal prosecution.” And to return to a focus on distinctive institutional competencies, evidence of a defendant’s status on probation or the nature of his criminal past risks prejudicing a defendant if and when such evidence is placed before juries at trial rather than presented only to judges at sentencing. In short, the Constitution’s jury trial right should be understood to allow an array of criminal history issues to be matters of purely judicial concern.

### C. The Sometimes Fuzzy Nature of the Offense/Offender Distinction

The offense/offender distinction has the benefit of being simple in concept, but it can present challenges in application. Certain facts made essential to punishment by modern sentencing laws clearly involve “pure” offense conduct — e.g., the amount of drugs involved in an offense, whether a gun was used, whether a victim suffered bodily injury. And certain facts made essential to punishment by modern sentencing laws clearly involve “pure” offender characteristics — e.g., the defendant’s criminal history, the defendant’s employment record, the defendant’s age. But not all facts often considered and made by law integral to sentencing determinations are easily categorized in this dichotomy: some matters deemed important to sentencing seem to involve a mix of offense conduct and offender characteristics.

Consider, for example, whether the offender obstructed justice during the prosecution of the offense, or whether the offender’s involvement in a criminal street gang suggests a serious risk of future dangerousness. These sorts of considerations have long been thought pertinent to just and effective sentencing, yet they are not easily placed within the offense/offender dichotomy. We might reasonably and appropriately describe these sentencing considerations (and perhaps many others) as mixed issues of offense and offender.

The historical importance at sentencing of so-called mixed offense/offender issues is not surprising, since our punishment practices have always sought to be responsive to both the nature of the offense and the character of the offender. However, mixed offense/offender issues create challenges for the *Blakely* principle because neither the constitutional text nor distinctive jury/judge competencies readily indicate how these mixed issues should be treated procedurally. One could reasonably claim that facts relat-

ing to the defendant’s obstructive behavior or street gang involvement are so linked to offense conduct that they should be classified as part of the defendant’s “crimes” which are the basis for a “prosecution” of “the accused” and thus ought to require jury consideration. But perhaps an equally compelling claim could be made that a defendant’s economic motive or obstructive behavior or street gang involvement are more properly considered offender characteristics that are not really part of the defendant’s “crimes” and thus are not essential jury issues.

Because neither the constitutional text defining the jury trial right nor the distinctive institutional competencies of juried and judges provide a ready road map for treatment of mixed offense/offender issues, a decision as to whether mixed offense/offender issues should trigger the jury trial right ultimately turns on a more basic normative judgment about whether the jury trial right should be given a broad or narrow reach. Those who have a robust view of the importance and value of juries reasonably could and likely would contend that all mixed offense/offender issues trigger the jury trial right and that only “pure” offender characteristic facts should be left to a judge.<sup>18</sup> Conversely, those who believe judges can and should play a robust role in criminal justice administration reasonably could and likely would contend that the Constitution allows mixed offense/offender issues to be resolved by a judge and that only “pure” offense conduct facts trigger the jury trial right.<sup>19</sup>

My own normative judgment — which is greatly influenced by other constitutional values and a belief in the need for flexibility in the development of sentencing reforms — is that the jury trial right should be given a relatively narrow scope in this context. Recall that legislatures through statutory provisions can, and perhaps often will, provide for jury consideration of so-called mixed offense/offender issues; the question here is whether the jury trial right should be interpreted broadly to *require* all jurisdictions to give mixed offense/offender issues to juries. In service to principles of separation of powers and federalism, I would resist broad constitutional interpretations that could unduly burden the efforts of federal and state legislatures and sentencing commissions trying to design fair and effective sentencing systems. Legislatures and sentencing commissions might reasonably conclude that issues such as a defendant’s economic motive or obstructive behavior or street gang involvement could prejudice a defendant if these matters were made jury issues; I am disinclined to interpret the jury trial right broadly in a way that would preclude such policy judgments. In other words, my own view is that the jury trial right should apply only to determinations of “pure” offense conduct.<sup>20</sup>

### D. The Power and Problems of the Offense/Offender Distinction

In my view, conceptualizing and defining the *Blakely* principle and the jury trial right through an offense/offender

distinction, in addition to its textual and institutional justifications, has considerable practical appeal. As noted by the *Blakely* dissenters and many commentators (and as further detailed in Part III *infra*), an extremely broad reading of *Blakely* and of the jury trial right would be extremely disruptive to existing sentencing systems built around judicial fact-finding, and would also create considerable challenges for effective revision of guideline sentencing structures. By placing a sound and sensible and “intelligible” limit on the reach of the *Blakely* principle and the jury trial right, the offense/offender distinction should provide legislatures and sentencing commissions with more administrative breathing room when seeking to (re-)design fair and effective sentencing systems. By requiring proof to a jury of all offense conduct, the jury would still be able to “function as circuitbreaker in the State’s machinery of justice.”<sup>21</sup> But by allowing proof to a judge of offender characteristics, states should still be able to effectively and efficiently structure at least some aspects of sentencing decision-making without always having to pay the “substantial constitutional tax” that accompanies the jury trial right.<sup>22</sup>

Notably, a number of lower courts have already started exploring an offense/offender distinction in an effort to limit the reach of *Blakely*.<sup>23</sup> And, interestingly, well before the entire *Blakely* line of cases, the state of Hawaii had developed an elaborate jurisprudence which, though not discussed in offense/offender terminology, centers on the same essential distinction for determining which sentencing-impacting facts must be alleged in an indictment and found by a jury.<sup>24</sup> These developments in lower courts serve testament to the power of the distinction to bring some order and a needed limit to the *Blakely* principle and the jury trial right.

However, these developments and the unavoidable fuzziness of the offense/offender distinction also serve testament to the problems of the distinction as a means to bring order to the *Blakely* principle and the jury trial right. As detailed throughout this Part, though the offense/offender distinction can and should clarify an analysis of the reach and application of the jury trial right in some cases, the distinction may well complicate an analysis of the reach and application of the jury trial right in other cases. Legislatures and sentencing commissions have an understandable and perhaps justifiable tendency to define punishment consequences in diverse, intricate, nuanced and interconnected ways that often will not facilitate easy offense/offender labeling. Consequently, an extensive jurisprudence may be needed to sort out exactly the precise reach and application of the jury trial right in particular sentencing systems (although this jurisprudence should not be any more cumbersome or complicated than the jurisprudences that surround the development and application of many other fundamental criminal justice rights).

### III. Other Conceptual Challenges Presented by *Blakely*

Though the offense/offender distinction helps explain the *Blakely* principle and its important limits, the distinction does not provide solutions to all the conceptual challenges presented by the *Blakely* decision. The opaque nature of the *Blakely* opinion, as well as the complicated realities of modern sentencing laws, has created an array of conceptual questions that are not addressed by the offense/offender distinction. Additional conceptual work will be needed to define the reach and limits of the jury trial right beyond the offense/offender distinction, although that distinction can perhaps help inform the debate over other conceptual issues.

#### A. The Unresolved Meaning of “Facts” and “Punishment”

Justice Scalia sums up the Supreme Court’s holding when stating near the end of the *Blakely* opinion that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”<sup>25</sup> Though providing a seemingly simple account of the *Blakely* principle, the realities of modern sentencing raise challenging conceptual questions about the meaning and scope of “facts” and “punishment” for purposes of defining the reach of the jury trial right.

Given the *Blakely* ruling’s emphasis on “fact” finding — and also given that questions of fact are traditionally considered the province of a jury, while questions of law are traditionally for judicial determination — one might see a fact/law distinction at heart of the *Blakely* principle and might conclude that such a distinction will become of great importance at sentencing in the wake of *Blakely*. Indeed, some lower courts have already held that, though *Blakely* requires juries to make punishment-enhancing findings of facts, judges can still make punishment-enhancing judgments of law.<sup>26</sup>

But historically there has been precious little development or even consideration of the distinction between questions of fact and questions of law at sentencing, and many modern sentencing issues involve value judgments which might best be viewed as mixed questions of sentencing fact and law. There are certainly issues of pure “fact” at sentencing (e.g., whether a gun was used) and issues of pure “law” at sentencing (e.g., what degree of felony applies to a particular offense). However, many sentencing laws require determinations that do not look like classic “fact” findings by calling upon a sentencing decision-maker to assess, for example, whether a particular sentence might “demean the seriousness of the offender’s conduct” or what behavior constitutes the “worst form of the offense.”<sup>27</sup> In the wake of *Blakely*, it is unclear whether these sorts of determinations — which do not involve findings of historical fact, but are akin to value judgments that judges have traditionally made exercising sentencing discretion — implicate the jury trial right. There is broad language in parts of the *Blakely* decision which suggest juries must now be involved in *all* punishment-enhancing

sentencing determinations, and yet the decision's overall emphasis on juries finding "facts" may support a contrary conclusion.

Similarly, just as the scope of *Blakely* "facts" is fuzzy because of the complicated realities of modern sentencing law, so too is the scope of *Blakely* "punishment." *Apprendi* and *Blakely* make clear that extending the maximum available term of imprisonment qualifies as "punishment" triggering the jury trial right, and yet *Harris v. United States*<sup>28</sup> suggests that mandating the minimum possible term of imprisonment does not qualify as "punishment" to trigger this right. Though many have already debated the conceptual logic of these respective holdings,<sup>29</sup> *Blakely* raises additional conceptual issues due to the diversity of sanctions employed in the modern criminal justice system. Terms of probation, orders to pay restitution, requirements to perform community service are all forms of "punishment" when imposed at the culmination of a criminal prosecution, but it is unclear exactly whether and when these and other non-incarcerative sentencing options trigger the *Blakely* rule and thus implicate the jury trial right.<sup>30</sup>

Moreover, in many jurisdictions, a judge may be required or expected to make certain findings to justify a term of imprisonment rather than a term of probation or to justify the imposition of consecutive sentences rather than concurrent sentences.<sup>31</sup> From a functional perspective, these determinations can indisputably enhance a defendant's actual "punishment," but from a formal perspective, these determinations may not take the defendant's sentence beyond "what state law authorized on the basis of the verdict alone."<sup>32</sup> After *Blakely*, it is unclear whether and when a jury rather than the judge may have to make required determinations for imposing consecutive sentences or for imposing imprisonment rather than probation.

The offense/offender distinction developed in Parts I and II above does not provide any obvious guidance on the meaning and scope of "facts" and "punishment" for purposes of defining the reach of the jury trial right. However, because the offense/offender distinction establishes an important limit on the *Blakely* principle, the consequences of a broad interpretation of "facts" and "punishment" in this context may not be too profound. If the *Blakely* principle is understood relatively narrowly to mean that a jury trial right is applicable *only* to "pure" offense conduct issues, then the broad applicability of the *Blakely* principle to a range of "facts" and "punishments" may not ultimately prove too disruptive to modern sentencing laws and practices.

#### **B. The Reach of Other Constitutional Provisions**

Though I have not previously emphasized the point, I have throughout this discussion been focused exclusively on the jury trial right. There may be a host of other constitutional provisions and concepts — including the other provisions of the Sixth Amendment, the Due Process Clause, the

Equal Protection Clause, the Eighth Amendment and structural considerations like separation of powers and federalism — which may help inform the *Blakely* principle and which should certainly play a significant role in any broad theory of constitutional regulation of sentencing laws and procedures.<sup>33</sup> Indeed, it is valuable to remember that the jury trial right does not itself directly address applicable burdens of proof or notice requirements or other related procedural issues. The requirements of a certain type of notice and of proof beyond a reasonable doubt in federal and state criminal prosecutions arise from interpretations of the Due Process Clause and other constitutional provisions. In other words, the jury trial right only concerns *who* makes certain determinations, it is not directly concerned with *how* these determinations are made.

Of course, the rulings in the *Blakely* line of cases have all directly or indirectly spoken to other matters of proof and procedure, although not with conceptual clarity.<sup>34</sup> Nevertheless, in this paper I am only trying to conceptualize and define the proper scope of the jury trial right. Though I contend that an offense/offender distinction is of central importance to determining what matters should go to a jury and what matters can go to a judge, I do not mean to claim the offense/offender distinction is central or even relevant to the interpretation of other constitutional provisions.<sup>35</sup> Indeed, I personally believe that the Due Process Clause requires effective notice and a high burden of proof for all matters — whether offense or offender, whether fact or law — which can have significant punishment consequences. Though a full articulation of this view of the Due Process Clause is beyond the scope of this paper, the key point is that one can embrace my articulation of the *Blakely* principle and the offense/offender distinction while still believing that other constitutional provisions regulate sentencing proof and procedure in a host of other consequential ways.

#### **IV. The Benefits of *Blakely* and the Evolution of Sentencing**

The *Blakely* decision clearly has engendered a robust national dialogue on sentencing law, policy, procedures and practices. From a practical perspective, such a dialogue is long overdue because federal and state prison populations have swelled over the last two decades, reaching record highs nearly every year. Moreover, from a conceptual perspective, such a dialogue is long overdue because modern sentencing philosophy has been transformed, but the appropriate structure and procedures of modern sentencing decision-making have not been seriously rethought.

In discussion and debate over *Blakely*, it is critical to remember that the "medical" rehabilitative philosophy of sentencing, which was completely dominant in criminal justice systems before modern reforms, was absolutely essential to justifying both broad judicial discretion and reliance on lax procedural rights at sentencing.<sup>36</sup> As Judge Nancy Gertner has astutely and effectively explained:

Under a sentencing system whose goal was rehabilitation, crime was seen as a “moral disease”; the system delegated its cure to “experts” like judges. Each offense carried a broad range of potential sentences; the judge had the discretion to pick any sentence within the range. In order to maximize the information available to the judge, and to minimize constraints on her discretion, sentencing procedures were less formal than trial procedures. No one challenged judges’ sentencing procedures as somehow undermining the Sixth Amendment’s right to a jury trial precisely because judge and jury had “specialized roles,” the jury as fact finder, the judge as the sentencing expert. However flawed a judge’s decision might be, it was not the case that he or she was usurping the jury’s role.

Twentieth century determinate sentencing regimes, however, changed the landscape and have appropriately raised Sixth Amendment concerns. In determinate regimes, facts found by the judge have fixed consequences — the judge finds x drug quantity, the result is y sentencing range. In this regard, the judge is “just” another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences. By rights, sentencing in a determinate regime should be closer to a bench trial on the issue of culpability than the relatively informal mix that characterized indeterminate sentencing. While the court may be more sophisticated — perhaps justifying more informal rules of evidence than is usually the case before juries — the significant sentencing consequences at stake mean that the standard of proof should remain high, the overall approach rigorous.<sup>37</sup>

In other words, since sentencing was long conceived — at least formally, if not in actuality — as an enterprise designed to help “cure” the sick defendant, the idea of significant procedural rights at sentencing almost did not make sense. Just as patients are not thought to need “procedural rights” when being treated by a doctor, defendants were not thought to need procedural rights when being sentenced by a judge. But, of course, it has been nearly a quarter century since the rehabilitative model of sentencing has held sway, and yet until *Apprendi* and *Blakely* came along, our sentencing structures still relied without much question on lax procedures for proving the truth of facts that could lead to extended sentences.

Whatever else one thinks about *Blakely*, the decision merits praise for encouraging conceptual reconsideration of sentencing law and procedure. Moreover, I believe efforts to understand and define the *Blakely* principle provides a needed impetus and helpful framework for more broadly reconceptualizing modern sentencing reforms. Indeed, the offense/offender distinction, in addition to helping to clarify the jury trial right, provides a useful guidepost for considering a range of other issues of sentencing policy and practice. The work of legislatures, sentencing commissions, prosecutors, defense attorneys, probation officers and parole boards can all be usefully informed by an attentiveness to the offense/offender

distinction. However, as this paper itself confirms, attentiveness to the offense/offender distinction is just the first step in the overall (and overdue) project of broadly reconceptualizing modern sentencing reforms.

## Notes

- <sup>1</sup> 124 S. Ct. 2531 (2004).
- <sup>2</sup> In previous works, I have analogized *Blakely* to an earthquake which has shaken the foundation of structured sentencing reforms. See Douglas A. Berman, *The Blakely Earthquake and its Aftershocks*, 16 FED. SENT. REP. 307 (2004); see also Douglas A. Berman et al., “Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System,” Written Testimony Submitted to the Senate Judiciary Committee (July 13, 2004). However, Justice Sandra Day O’Connor received a lot more press when she utilized the same metaphor to describe *Blakely*. See, e.g., *Senate, Judges Urge ‘Blakely’ Redux*, N.Y.L.J., July 26, 2004, at 2 (quoting Justice O’Connor’s earthquake comments at the Ninth Circuit’s annual conference in July).
- <sup>3</sup> In this discussion, I am intentionally avoiding using the term “element” because the term has no clear constitutional pedigree, but seems to carry much constitutional baggage.
- <sup>4</sup> See, e.g., U.S. Sentencing Guidelines § 2B1.1(b) (linking punishment levels to amount of loss) U.S. Sentencing Guidelines § 2D1.1(c) (linking punishment levels to drug quantities); ARIZ. REV. STAT. § 13-702(C)(3) (calling for consideration of “value of the property”); CAL. RULE 4.421(a)(10) (calling for consideration of whether “crime involved a large quantity of contraband”).
- <sup>5</sup> See, e.g., U.S. Sentencing Guidelines § 2B3.1(b)(2) (linking punishment levels to whether and how firearm or other dangerous weapon was used); CAL. RULE 4.421(a)(2) (calling for consideration of whether “defendant was armed with or used a weapon” in offense).
- <sup>6</sup> See, e.g., U.S. Sentencing Guidelines § 2B3.1(b)(3) (linking punishment levels to whether and how “any victim sustained bodily injury”); OHIO REV. CODE § 2929.12(B)(2) (calling for consideration of whether “victim of the offense suffered serious physical, psychological, or economic harm”).
- <sup>7</sup> Perhaps to be more faithful to the constitutional text, I should describe this key point in terms of a “crimes”/criminals distinction. But the offense/offender language seems to be a linguistically better way to capture the same substantive point.
- <sup>8</sup> *Blakely*, 124 S. Ct. at 2538-39 (first emphasis added).
- <sup>9</sup> As explained more fully *infra* p. 11, my discussion and conclusions here address *only* the Constitution’s jury trial right; other constitutional principles and provisions might impact whether and how a judge can make various findings at sentencing.
- <sup>10</sup> 523 U.S. 224 (1998).
- <sup>11</sup> See Colleen P. Murphy, *The Use of Prior Convictions after Apprendi*, 37 U.C. DAVIS L. REV. 973 (2004); Kyron Huigens & Danielle China, “Three Strikes” Laws and Apprendi’s *Irrational, Inequitable Exception for Recidivism*, 37 CRIM. L. BULL. 575 (2001).
- <sup>12</sup> In a few settings, such as felon-in-possession gun laws, otherwise lawful activity is made unlawful only if and when a defendant has a prior conviction. In these instances, a defendant’s status as a felon is an essential part of the crime the state seeks punish because it is that status which makes otherwise lawful conduct unlawful. In these settings, the jury trial right would be implicated in determining status as a felon and, to my knowledge, statutes generally treat felon status as a jury issue in these settings.

- <sup>13</sup> See *Almendarez-Torres*, 523 U.S. at 235 (“As this Court has long recognized, the introduction of evidence of a defendant’s prior crimes risks significant prejudice.”).
- <sup>14</sup> See, e.g., IND. CODE ANN. § 35-50-2-8.5(b); N.C. GEN. STAT. § 14-7.5; see also *People v. Epps*, 18 P.3d 2 (Cal. 2001) (holding that defendants have a limited statutory right to jury trial of prior conviction allegations under California law). See generally *Murphy*, *supra* note 11, at 992 n.155 (listing state statutes providing for jury consideration of some recidivism issues); *Huigens & China*, *supra* note 11, at 580–81 n.25 (detailing that most state do not require a jury finding of criminal history facts for application of recidivism enhancements).
- <sup>15</sup> Interestingly, it appears that a century ago, habitual offender laws typically did provide for jury consideration of prior convictions. See *Graham v. West Virginia*, 224 U.S. 616, 625 (1912) (noting that, in the application of habitual offender laws, “it is familiar practice to set forth in the indictment the fact of a prior conviction of another offense, and to submit to the jury the evidence upon that issue, together with that relating to the commission of the crime which the indictment charges”).
- <sup>16</sup> See, e.g., CAL. RULE 4.421(b)(4); OHIO REV. CODE § 2929.12(D)(1); see also Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing — Blakely v. Washington: Legal Considerations for State Sentencing Systems* 10 (Sept. 2004) [hereinafter Vera Institute, *Legal Considerations*] (discussing this issue).
- <sup>17</sup> See Vera Institute, *Legal Considerations*, *supra* note 16, at 10.
- <sup>18</sup> Of course, those who ascribe to an extremely robust view of the jury trial right might not accept the constitutional significance of the offense/offender distinction to assert that even “pure” offender characteristics trigger the jury trial right when the basis for specific punishment consequences. Some of the broad language in the *Blakely* decision — and particularly the indication that the jury trial right applies to “all facts legally essential to the punishment,” *Blakely*, 124 S. Ct. at 2543 (emphasis added) — suggests that the Court has not (yet) embraced an offense/offender distinction in its articulation of the jury trial right. Moreover, Justice Scalia’s dissenting opinion in *Almendarez-Torres* suggests that he may be especially unlikely to believe that the jury trial right should be informed by the offense/offender distinction. See *Almendarez-Torres*, 523 U.S. at 257–59 (Scalia, J., dissenting).
- <sup>19</sup> It would seem possible to develop a highly nuanced jurisprudence concerning when mixed offense/offender issues trigger the jury trial right — e.g., one might contend that such mixed issues trigger the jury trial right when they are closely linked to traditional *mens rea* considerations or when a certain quantum of punishment is involved. However, I think the development and results of any such jurisprudence will be driven principally by views on the basic normative question of how broad a reach the jury trial right should be given.
- <sup>20</sup> As hinted *supra* note 18, though my account of the jury trial right through the offense/offender distinction may harmonize the Supreme Court’s holdings in the *Blakely* line of cases, the *Blakely* decision’s broad language — and particularly the indication that the jury trial right applies to “all facts legally essential to the punishment,” *Blakely*, 124 S. Ct. at 2543 (emphasis added) — suggests that I may ultimately be advocating a re-conceptualization of the *Blakely* principle. Though I may well be trying to write revisionist history for the *Blakely* line of cases, I believe the Constitution’s text and spirit supports and justifies such an effort.
- <sup>21</sup> *Blakely*, 124 S. Ct. at 2539.
- <sup>22</sup> *Blakely*, 124 S. Ct. at 2546 (O’Connor, J., dissenting).
- <sup>23</sup> See *State v. Hanf*, 2004 WL 2340246 (Minn. App. Oct. 19, 2004); *New Jersey v. Abdullah*, 2004 WL 2281236 (N.J. Super. A.D. Oct. 12, 2004). *But see State v. Warren*, 2004 Ore. App. LEXIS 1305 (Or. App. Oct. 13, 2004) (rejecting an offense/offender reading of *Blakely*).
- <sup>24</sup> See *State v. Schroeder*, 880 P.2d 192, 199–204 (Haw. 1994) (distinguishing facts “intrinsic to the commission of the crime charged,” which must be alleged in an indictment and found by a jury, from facts “wholly extrinsic to the specific circumstances of the defendant’s offense,” which do not have to be alleged in an indictment or found by a jury).
- <sup>25</sup> *Blakely*, 124 S. Ct. at 2543 (emphasis in original).
- <sup>26</sup> See, e.g., *United States v. Trala*, 2004 U.S. App. LEXIS 22264 (3d Cir. Oct. 26, 2004) (explaining that “whether an offense is a ‘crime of violence or a controlled substance offense’ is a legal determination, which does not raise an issue of fact under *Blakely*”); *United States v. Swan*, 327 F. Supp. 2d 1068 (D. Neb. 2004) (concluding that a “determination of whether attempted robbery amounts to a crime of violence is a question of law” that does not implicate *Blakely*).
- <sup>27</sup> OHIO REVISED CODE § 2929.14(B) & (C); see also Vera Institute, *Legal Considerations*, *supra* note 10, at 4–5 (discussing the “uneasy nature of ‘facts’ under *Blakely*”).
- <sup>28</sup> 536 U.S. 545 (2002).
- <sup>29</sup> See e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Kyron Huigens, Harris, Ring, and the Future of Relevant Conduct Sentencing, 15 FED. SENT. REP. 88 (2002); see also *Harris v. United States*, 536 U.S. 545, 569 (2002) (Breyer, J., concurring in part and concurring the judgment) (“I cannot easily distinguish *Apprendi v. New Jersey*, 530 U.S. 466 (2000), from this case in terms of logic. For that reason, I cannot agree with the plurality’s opinion insofar as it finds such a distinction.”).
- <sup>30</sup> Cf. Vera Institute, *Legal Considerations*, *supra* note 10, at 7 (exploring the question: “What is a ‘sentence’ for *Blakely* purposes?”).
- <sup>31</sup> See *id.* at 8–9.
- <sup>32</sup> *Blakely*, 124 S. Ct. at 2538.
- <sup>33</sup> See generally Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT. REP. 1 (2004) (criticizing *Blakely*’s interpretation of the Sixth Amendment in the course of developing a comprehensive theory of constitutional limits on sentencing procedures and outcomes). Cf. *Ring v. Arizona*, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring) (explaining view that “jury sentencing in capital cases is mandated by the Eighth Amendment”).
- <sup>34</sup> See Vera Institute, *Legal Considerations*, *supra* note 10, at 6 (noting that “a discussion of the due process clause was conspicuously absent in the *Blakely* opinion”).
- <sup>35</sup> Cf. *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (concluding that the Fifth Amendment’s right against self-incrimination precludes a sentencing judge from “holding [a defendant’s] silence against her in determining the facts of the offense at the sentencing hearing,” while expressly not addressing whether a sentencing judge may constitutionally consider a defendant’s silence in a “determination of a lack of remorse, or upon acceptance of responsibility”) (emphasis added).
- <sup>36</sup> In 1949, the Supreme Court constitutionally approved this philosophical and procedural approach to sentencing in *Williams v. New York*, 337 U.S. 241 (1949), but we should never lose sight of how much *Williams* was a creature of its own distinct sentencing times. The *Williams* Court stressed that “[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence” and

spoke approvingly of the “prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.” *Id.* at 247–48. Thus, continued the Court, the Due Process Clause should not be read to require courts to “abandon their age-old practice of seeking information from out-of-court sources,” because “[t]o deprive sentencing

judges of this kind of information would undermine modern penological procedural policies” which rely upon judges having “the fullest information possible concerning the defendant’s life and characteristics.” *Id.* at 250–51.

<sup>37</sup> Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT. REP. 83, 83–85 (2002).

**STATEMENT OF OWNERSHIP,  
MANAGEMENT AND CIRCULATION, 10/7/04**

Title: *Federal Sentencing Reporter*. Pub. No. 1053-9867. Frequency: Quarterly. Four issues published annually. Subscription price: \$225.00 individuals, \$241.00 institutions. Location of office of publication: 2000 Center Street, Ste. 303, Berkeley, Alameda County, CA 94704-1223. Headquarters of publishers: 2120 Berkeley Way, Berkeley, CA 94720-5812. Publisher: University of California Press, 2120 Berkeley Way, Berkeley, CA 94720-5812. Editor: Doug Berman, Ohio State University College of Law, Drinko Hall, Columbus, OH 43210-1391. Owner: Vera Institute of Justice, c/o Nicholas R. Turner 233 Broadway, 12th Floor, New York, NY 10279. The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes have not changed during the preceding 12 months.

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