Reconceptualizing Sentencing

Douglas A. Berman
Douglas.Berman@chicagounbound.edu

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The transformation of the sentencing enterprise throughout the United States over the past three decades has been remarkable. The field of sentencing, once rightly accused of being "lawless," is now replete with law. Legislatures and sentencing commissions have replaced the discretionary indeterminate sentencing systems that had been dominant for nearly a century with an array of structured or guideline systems to govern sentencing decisionmaking. These modern sentencing developments constitute one of the most dynamic and important law reform stories in recent American legal history—a veritable sentencing revolution.
Yet the modern sentencing era has been marked by a failure to reconceptualize modern sentencing. The new sentencing laws, the United States Supreme Court's sentencing jurisprudence, and even the scholarly literature in the field, are all conceptually underdeveloped. The basic story of the sentencing revolution, especially in the federal system, has been frequently recounted, but the theories, structures, and procedures of modern sentencing decisionmaking have not been deeply examined.

Against this backdrop, it is not all that surprising that the Supreme Court's blockbuster rulings in Blakely v Washington and United States v Booker have generated puzzled reactions and some impassioned criticisms, even though the decisions reflect certain fundamentally sound conceptual principles. The drama that has surrounded the Blakely and Booker decisions—and their aftermath—ultimately reflects a collective failure to reconceptualize sentencing in the wake of the sentencing revolution. It also makes more urgent the task of reconceptualizing modern sentencing.

In this Article, I locate Blakely and Booker within a broader conceptual story of sentencing reform. This story begins by noting the modern evolution of sentencing principles and practices, and thereafter highlights how the sentencing revolution and the

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3 Though a small band of committed academics write regularly about sentencing issues, Professor Stephanos Bibas rightly has called sentencing "an academic backwater, divorced from criminal law and procedure." Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L J 1097, 1185 (2001). We have not seen in the academic literature, for example, a serious or robust law and economics dialogue, nor a serious or robust civic republican or federalism dialogue, nor a serious or robust Rawlsian or libertarian or feminist dialogue about modern sentencing reforms.

Recently, more than a few criminal law academics have lamented that criminal law teaching and scholarship about punishment theory has been stunted. See Kyron Huigens, On Commonplace Punishment Theory, 2005 U Chi Legal F 437; Tracey L. Meares, Neal Katyal, and Dan M. Kahan, Updating the Study of Punishment, 56 Stan L Rev 1171, 1172 (2004). These valid concerns dovetail with my points about sentencing's backwater status and may reflect more broadly how criminal law teaching and scholarship is still principally consumed with the issues raised and debated by the drafters of the Model Penal Code and the Justices of the Warren Court. Consider Douglas A. Berman, The Model Penal Code Second: Might "Film Schools" Be in Need of a Remake?, 1 Ohio St J Crim L 163 (2003) (lamenting that criminal law teaching and scholarship has not kept up with modern transformations in the field). Consider this telling bit of amateur empiricism: a search on Lexis in the law review database for the last ten years of "mens rea" and "Model Penal Code" produced more than twice as many articles as a search of "mens rea" and "Federal Sentencing Guidelines." I find it remarkable that the academic literature is still conceptually examining an imaginary code twice as much as the biggest sentencing system in the country.


5 124 S Ct 2531 (2005).
Supreme Court's modern sentencing jurisprudence have suffered from being conceptually underdeveloped. I conclude the story by proposing some ideas that may help bring greater conceptual order to a field that now seems so disorderly. The Blakely and Booker decisions mark, both literally and figuratively, a constitutional moment in the evolution of modern sentencing reform, and they offer policymakers, courts, and academics an important opportunity to engage seriously in the overdue task of reconceptualizing modern sentencing.

I. THE OLD CONCEPT OF SENTENCING AND ITS CONSTITUTIONAL BLESSING

Beginning in the late nineteenth century and throughout the first three-quarters of the twentieth century, a highly discretionary system was the dominant approach to sentencing. Trial judges in both federal and state systems had nearly unfettered discretion to impose upon defendants any sentence from within the broad statutory ranges provided for criminal offenses; parole officials likewise possessed unfettered discretion to decide precisely when offenders were to be allowed to leave prison.

Though lacking a fundamental legal structure, this model of sentencing was formally and fully conceptualized around the "rehabilitative ideal." Trial judges were afforded broad discretion in the imposition of sentencing terms, and parole officials exercised similar discretion concerning prison release dates, for a

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7 See, for example, Michael Tonry, Sentencing Matters 6 (Oxford 1995) ("Subject only to statutory maximums and occasional minimums, judges had authority to decide whether a convicted defendant was sentenced to probation (and with what conditions) or to jail or prison (and for what maximum term)."), Mistretta v United States, 488 US 361, 363 (1989) (discussing the "wide discretion" given to federal judges in ascribing sentences during this time).

8 See, for example, Victoria J. Palacios, Go and Sin No More: Rationality and Release Decisions by Parole Boards, 45 SC L Rev 567, 568 (1994) ("Traditionally, a parole board's unfettered discretion determined when an offender could leave prison. Within broad parameters set by the legislature, the authority of parole decision makers has been extensive and far-reaching.").

9 Consider Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 5–7 (Yale 1981) (discussing the "dominance" and "almost unchallenged sway of the rehabilitative ideal" in the United States until the 1970s); Francis A. Allen, Criminal Justice, Legal Value and the Rehabilitative Ideal, 50 J Crim L Criminol & Pol Sci 226 (1959) (describing how much of the thought and activity surrounding reforms in the criminal justice system during the first half of the twentieth century centered around the "rehabilitative ideal").
clear and defined purpose: to allow sentences to be tailored to the rehabilitation prospects and progress of each individual offender. The rehabilitative ideal often was conceived and discussed in medical terms, with offenders described as “sick” and punishments aspiring to “cure the patient.” Sentencing judges and parole officials were thought to have unique insights and expertise in deciding what sorts and lengths of punishments were necessary to best serve each criminal offender’s rehabilitation potential. Sentencing was conceived procedurally as a form of administrative decisionmaking in which sentencing experts, aided by complete information about offenders, and possessing unfettered discretion, were expected to craft individualized sentences “almost like a doctor or social worker exercising clinical judgment.”

In 1949, the United States Supreme Court constitutionally approved this philosophical and procedural approach to sentencing in *Williams v New York*. The trial judge in *Williams* sentenced to death a defendant convicted of first-degree murder, despite a jury recommendation of life imprisonment. The trial court relied upon information about the defendant’s illegal and unsavory activities that was not presented at trial, but rather appeared in a pre-sentence report. Rejecting a claim that Williams had a right to confront and cross-examine the witnesses against him, the Supreme Court emphasized that “[r]eformation and rehabilitation of offenders have become important goals of...”

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14 337 US 241 (1949).

15 Id at 242.

criminal jurisprudence."\(^{17}\) The Court spoke approvingly of judges and parole boards exercising broad discretion in order to further the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."\(^{18}\)

The *Williams* Court asserted that 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,"\(^{19}\) which rely upon judges having "the fullest information possible concerning the defendant's life and characteristics."\(^{20}\) According to the *Williams* Court, the value of "modern concepts individualizing punishments" meant that sentencing judges should "not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."\(^{21}\)

In other words, for the *Williams* Court, the rehabilitative ideal not only justified entrusting judges and parole officials with enormous sentencing discretion, but also called for sentencing judges (and presumably also parole officials) to be freed from any procedural rules that might limit the sound exercise of their discretion. Once guilt was established at a traditional trial, the sentencing experts should be able to gather all possible information from all possible sources in order to craft and administer rehabilitation-oriented punishments.

Critically, the *Williams* Court suggested that the rehabilitative ideal and its distinctive procedures offered benefits for offenders as well as for society. The Court stressed that "modern changes" justified by the rehabilitative model of sentencing "have not resulted in making the lot of offenders harder." Rather, explained the Court, "a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." The *Williams* Court claimed that "[t]his belief to a large extent has been justified."\(^{22}\)

\(^{17}\) *Williams*, 337 US at 248.
\(^{18}\) Id at 247.
\(^{19}\) Id at 249–50.
\(^{20}\) Id at 247.
\(^{21}\) *Williams*, 337 US at 247.
\(^{22}\) Id at 249.
Williams was decided before the United States Supreme Court began "revolutionizing" criminal procedure by interpreting the Constitution expansively to provide criminal defendants with an array of procedural rights. 

Nevertheless, throughout the 1960s and 1970s, as numerous pre-trial and trial rights were being established for defendants, the Supreme Court continued to cite Williams favorably and continued to suggest that sentencing proceedings should be far less procedurally regulated than traditional criminal trials. 

Though the Court secured defendants the right to an attorney at sentencing hearings, and suggested that defendants also had a right to discovery of evidence that could impact a sentence, the Court did not formally extend other Bill of Rights protections to the sentencing process.

In 1978, the Supreme Court had occasion in United States v Grayson to discuss at length the historical development of the rehabilitative ideal and its place in federal sentencing practices.
In a footnote, the *Grayson* Court observed that "[i]ncreasingly there are doubts concerning the validity of earlier, uncritical acceptance of the rehabilitation model."\(^{29}\) The *Grayson* Court nevertheless upheld a sentencing judge’s consideration of a defendant’s false testimony on the ground that the defendant’s testimony was "probative of his prospects for rehabilitation."\(^{30}\) Favorably citing *Williams*, the Court asserted that the "evolutionary history of sentencing . . . demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant’s whole person and personality."\(^{31}\) The *Grayson* Court thus reaffirmed its fealty to the rehabilitative ideal and asserted that at sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."\(^{32}\)

A year later in *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*,\(^{33}\) a case concerning due process rights in parole release determinations, the Supreme Court again extolled the sentencing goal of rehabilitation.\(^{34}\) The *Greenholtz* Court, after positively describing parole decisionmaking as "necessarily subjective in part and predictive in part" and involving a "discretionary assessment of a multiplicity of imponderables,"\(^{35}\) emphasized that it must "not overlook the ultimate purpose of parole which is a component of the long-range objective of rehabilitation."\(^{36}\) Rejecting offenders’ claims for greater procedural rights in parole release determinations, the Court asserted that parole decisionmaking should not be "encumbered by procedures that states regard as burdensome and unwarranted."\(^{37}\) The Court expressed concern about "encourag[ing] a continuing state of adversar[ial] relations between society and the inmate," which might undermine the "desirable objectives" of "rehabilitating

\(^{29}\) Id at 47 n 6.
\(^{30}\) Id at 52.
\(^{31}\) *Grayson*, 438 US at 53.
\(^{32}\) Id at 50 (quoting *United States v Tucker*, 404 US 443, 446 (1972)). See also *Roberts v United States*, 445 US 552, 556 (1980) (explicitly reaffirming the *Grayson* and *Tucker* Courts’ belief in the broad scope of a judge’s inquiry at sentencing).
\(^{34}\) Id at 13.
\(^{35}\) Id at 10, 13 (citing Sanford M. Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 Minn L Rev 803, 813 (1961)).
\(^{36}\) Id at 13.
convicted persons to be useful, law-abiding members of society." The *Greenholtz* Court thus endorsed not only the rehabilitative ideal, but also the broad discretion that it afforded sentencing authorities without providing defendants with any significant procedural rights.

II. THE CONCEPTUALLY UNDERDEVELOPED SENTENCING REVOLUTION

While the theory and procedures of the rehabilitative model of sentencing were being sanctioned in the United States Supreme Court, in other quarters they were being questioned. Through the 1960s and 1970s, criminal justice scholars grew concerned about the unpredictable and disparate sentences that highly discretionary sentencing systems could produce. Evidence suggested that broad judicial sentencing discretion resulted in substantial and undue differences in the lengths and types of sentences meted out to similar defendants. Some studies found that personal factors, such as an offender's race, gender, and socioeconomic status, impacted sentencing outcomes and accounted for certain disparities.

Driven by concerns about the disparities resulting from highly discretionary sentencing practices—which dovetailed with concerns about increasing crime rates and broad criticisms of the entire rehabilitative model of punishment and corrections—

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38 Id at 13-14.


41 See Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 3-34, 59-123 (Hill & Wang 1976) (discussing the failures of the rehabilitative model of sentencing and calling for new principles to govern decisions about how severely offenders should be punished); James Q. Wilson, *Thinking about Crime* 162-82 (Basic 1975) (exploring possible reforms in sentencing procedures to combat the failings of the rehabilitative model); Ernest van den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question* 3-72 (Basic 1975) (analyzing punishment as a social institution in need of change). Consider Allen, *The Decline of the Rehabilitative Ideal* at 7-20 (cited in note 9) (discussing the "wide and precipitous decline of penal rehabilitationism" as a foundational theory for the criminal justice system). Some of the pragmatic concerns about the rehabilitation
criminal justice experts and scholars proposed reforms to bring greater consistency and certainty to the sentencing enterprise.\textsuperscript{42} Led by the groundbreaking and highly influential work of Judge Marvin Frankel,\textsuperscript{43} many reformers came to propose or endorse some form of sentencing guidelines to govern sentence determinations.\textsuperscript{44} Reformers also suggested creating specialized commissions to develop these guidelines.\textsuperscript{45}

The calls for reform were soon heeded. Through the late 1970s and early 1980s, a few states adopted a form of sentencing guidelines when legislatures passed determinate sentencing statutes that abolished parole and created presumptive sentenc-


\textsuperscript{43} See note 1.

\textsuperscript{44} See note 42. See also Charles J. Ogletree, Jr., \textit{The Death of Discretion? Reflections on the Federal Sentencing Guidelines}, 101 Harv L Rev 1938, 1944 (1988) (noting the "general consensus [in the 1970s] ... among judges, lawyers, criminal justice experts, and scholars that sentencing guidelines were needed"); Stephen Breyer, \textit{The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest}, 17 Hofstra L Rev 1, 3 (1988) ("At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines.").

\textsuperscript{45} See Michael H. Tonry, \textit{The Sentencing Commission in Sentencing Reform}, 7 Hofstra L Rev 315, 323–24 (1978) (noting that "a politically insulated, independent commission with rulemaking authority" would be best suited to provide the necessary guidance to achieve uniformity and fairness in sentencing); National Conference of Commissioners on Uniform State Laws, \textit{Model Sentencing and Corrections Act} at 127–30 (cited in note 42) (proposing the creation of a sentencing commission to establish presumptive sentences for criminal offenses); O'Donnell, Churgin, and Curtis, \textit{Toward a Just and Effective Sentencing System} at 73–74 (cited in note 42) (proposing the creation of a "U.S. Commission on Sentencing and Corrections ... to formulate guidelines for structuring sentencing decisions and to revise these guidelines periodically"); \textit{Fair and Certain Punishment} at 25–26 (cited in note 42) (recommending that "the legislature establish a commission composed of representatives of the judiciary and other interested groups to undertake the drafting, establishment, and periodic review of a presumptive sentencing system").
ing ranges for various classes of offenses. Minnesota became the first state to adopt comprehensively the guidelines reform model in 1978, when the Minnesota legislature established the Minnesota Sentencing Guidelines Commission to develop sentencing guidelines. Pennsylvania and Washington followed suit by creating their own distinctive forms of sentencing commissions and guidelines in 1982 and 1983 respectively. The federal government soon thereafter joined this sentencing reform movement through the passage of the Sentencing Reform Act of 1984 ("SRA"), which created the United States Sentencing Commission to develop guidelines for federal sentencing. Throughout the next two decades, many more states adopted some form of structured sentencing. Though some states did so only through a few mandatory sentencing statutes, many states created sentencing commissions to develop comprehensive guidelines schemes.

46 See Michael H. Tonry, Sentencing Reform Impacts 77-85 (US Dept of Justice 1987) (detailing ten states’ adoption of determinate sentencing after they abolished parole); Bureau of Justice Assistance, National Assessment of Structured Sentencing 14-17 (US Dept of Justice 1996) (discussing the move in various jurisdictions to adopt determinate sentencing).


During the early 1980s, various systems of sentencing guidelines also emerged in Utah, Maryland, Florida, and Michigan, although permanent sentencing commissions were not established in these states until years later. See Richard S. Frase, Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective, 12 Fed Sent Rptr 69, 70 (2000) (summarizing the development of sentencing guidelines systems in different jurisdictions).


50 See id.

51 See Bureau of Justice Assistance, National Assessment of Structured Sentencing at 19-29 & Tables 3-3, 3-4 & 3-5 (cited in note 46) (detailing sentencing structures throughout United States as of February 1994); Frase, 12 Fed Sent Rptr at 69-72 (cited in note 48) (detailing and discussing the nearly two dozen jurisdictions that now have, or are actively considering, a sentencing system incorporating sentencing guidelines devised by a sentencing commission); Dale Parent, et al, Key Legislative Issues in Criminal Justice: Mandatory Sentencing 1, 1 (Natl Inst of Just 1997) (noting that “Iｂｙ 1994, all 50 States had enacted one or more mandatory sentencing laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders”).

52 Bureau of Justice Assistance, National Assessment of Structured Sentencing at
Though there is considerable variation in the form and impact of structured sentencing reforms, these developments can be viewed as a "sentencing revolution" that has altered criminal justice practices and outcomes as much as, if not more than, the "criminal procedure revolution" that the United States Supreme Court engineered in the 1960s and 1970s. And yet, while the sentencing reforms of the last three decades have brought an enormous amount of law to sentencing, this sentencing revolution has been both theoretically and procedurally underdeveloped.

The sentencing revolution has been theoretically underdeveloped because it largely has been a conceptual anti-movement. Many jurisdictions moved to structured sentencing systems and abolished the institution of parole not in express pursuit of a new sentencing theory, but rather as simply a rejection of the rehabilitative ideal that had been dominant for nearly a century. Though some early reform advocates urged replacing the rehabilitative ideal with a modernized retributivist philosophy (often termed a "just deserts" model), and though some policymakers called for mandatory sentencing terms in order to deter and incapacitate offenders, the only clear goals of the sentencing reforms in many jurisdictions were the repudiation of rehabilitation as the dominant theory of punishment and the elimination of sentencing disparities that resulted from discretionary sentencing practices.

The details of this theoretical story vary in different jurisdictions, but the conceptual struggles of the federal sentencing system are well-documented and revealing. Though in the Sentencing Reform Act Congress expressed a fundamental concern with principled sentencing, the SRA did not adopt a particular punishment philosophy; rather, its statutory statement of purposes

19-29 (cited in note 46).

53 See, for example, von Hirsch, The Sentencing Commission and Its Guidelines at 35–104 (cited in note 10); National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 3-101(1) and Comment (cited in note 42); Fogel, "... We Are the Living Proof..." at 204–36 (cited in note 42).

54 See Douglas A. Berman, A Common Law for This Age of Federal Sentencing: The Need and Opportunity for Judicial Lawmaking, 11 Stan L & Pol Rev 93, 97 (1999) ("Congress’ fundamental concern with principled sentencing was highlighted by the SRA’s repeated references to its basic statement of purposes, as well as by the Senate Report’s emphasis on the requirement that ‘each Federal offender be sentenced... in order to achieve the general purposes of sentencing.’"); Daniel J. Freed and Marc Miller, Taking "Purposes" Seriously: The Neglected Requirement of Guideline Sentencing, 3 Fed Sent Rptr 295, 295 (1991) ("In its 1984 charter for Federal sentencing, Congress made one principle clear: the ‘purposes of sentencing’ were to play a central role in formulating individual sentences and in drafting Commission guidelines.").
listed all of the traditional justifications of punishment.\textsuperscript{55} Except to state that a term of imprisonment is not an appropriate means to seek rehabilitation,\textsuperscript{56} Congress provided no express instructions concerning the specific application of sentencing purposes throughout the federal guidelines system.\textsuperscript{57} In turn, the United States Sentencing Commission, though making an initial effort to formulate guidelines premised on one particular theory of punishment,\textsuperscript{58} ultimately dodged these fundamental issues by relying primarily on the results of past judicial sentencing practices as the foundation for the initial federal sentencing guidelines.\textsuperscript{59}

\textsuperscript{55} The SRA’s supporting Senate Report explained that the SRA calls for the federal sentencing system to serve “the basic purposes of sentencing—deterrence, incapacitation, just punishment and rehabilitation.” S Rep No 98-225 at 41, 67 (1983), reprinted in 1984 USCCAN 3250. In full text, the statement of purposes set forth in 18 USC § 3553(a)(2) provides that federal sentences should be crafted:

\begin{enumerate}
  \item to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  \item to afford adequate deterrence to criminal conduct;
  \item to protect the public from further crimes of the defendant; and
  \item to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
\end{enumerate}


\textsuperscript{56} See 18 USC § 3582(a) (2000) (instructing courts to recognize that “imprisonment is not an appropriate means of promoting correction and rehabilitation”); 28 USC § 994(k) (2000) (instructing the Commission to “insure that the guidelines reflect the inappropriateness of imposing a term of imprisonment for the purpose of rehabilitating the defendant”).

\textsuperscript{57} See Kenneth R. Feinberg, \textit{The Federal Sentencing Guidelines and the Underlying Purposes of Sentencing}, 3 Fed Sent Rptr 326, 326–27 (1991) (discussing how Congress was “ambivalent” about clearly defining the role and priority of sentencing purposes and thus “largely fudged the issue in drafting the [SRA]”). Some courts and commentators have inaccurately asserted that the SRA rejected rehabilitation and adopted “just deserts” and/or deterrence in its prescription of sentencing purposes for the federal sentencing system. See Marc Miller, \textit{Purposes At Sentencing}, 66 S Cal L Rev 413, 420–37 (1992) (reviewing, and seeking to correct, many erroneous statements made by judges, probation officers, lawyers, and scholars concerning the SRA’s treatment of sentencing purposes).

\textsuperscript{58} See Breyer, 17 Hofstra L Rev at 15–18 (1988) (cited in note 44) (discussing how the United States Sentencing Commission considered adopting, but ultimately chose not to adopt, one specific philosophical approach to formulating the initial Guidelines); Stith and Cabranes, \textit{Fear of Judging} at 53–55 (cited in note 12) (detailing how the United States Sentencing Guidelines do not reflect a single philosophy of punishment because the Commission found it difficult to choose one philosophical approach over another).

\textsuperscript{59} See United States Sentencing Commission, \textit{Guidelines Manual}, Ch 1, Pt A, intro cmt (1987) (“USSG”) (“In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. . . . [The Commission’s initial set of guidelines] relied upon estimates of existing sentencing practices.”); Breyer, 17 Hofstra L Rev at 17–18 (cited in note 44) (“The numbers used and the punishments imposed [by the Guidelines] would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals.”).
And much to the chagrin of many commentators, through two decades of federal sentencing reform neither Congress nor the United States Sentencing Commission has expressly defined or fully articulated the central or primary purposes for federal sentencing.

The sentencing revolution was also underdeveloped procedurally because absent in all the sentencing lawmaking was any focused concern for sentencing procedures. In the development of laws and guidelines to govern substantive sentence decisions, policymakers devoted scant attention to regulating the processes through which judges obtain and assess the information that forms the basis for these decisions. Despite creating a significant body of substantive sentencing law, legislatures and commissions in most jurisdictions left largely unaddressed fundamental issues such as notice to parties, burdens of proof, appropriate factfinders, evidentiary rules, and hearing processes—even though these procedural matters play a central role in the actual application of general sentencing rules to specific cases.

The particulars of this procedural story also vary across jurisdictions, but again the experiences of the federal sentencing system are the most conspicuous and well-documented. The Sentencing Reform Act, though an elaborate piece of legislation, makes only brief mention of sentencing procedures. The United

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States Sentencing Commission recognized that “[r]eliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing,” but fewer than three pages of the initial federal sentencing guidelines expressly addressed the sentencing process. Through a few terse policy statements in these pages, the Commission called for the preparation and timely disclosure of pre-sentence reports, and urged judges to rely only on information with “sufficient indicia of reliability to support its probable accuracy.” But in sharp contrast to the other portions of the Federal Guidelines, which intricately delineated how to incorporate various substantive matters into the sentencing calculus, the Commission did not go beyond these vague exhortations to provide any detailed guidance to judges on issues like notice to parties, appropriate burdens of proof and factfinders, or applicable evidentiary rules and hearing procedures.

The comparable theoretical and procedural stories of structured sentencing reform in the states is more diverse and even more nuanced than the federal story briefly recounted above. Nevertheless, the broad outlines are the same: many states have rejected in various ways the highly discretionary rehabilitative model and have structured sentencing decisionmaking in order to reduce sentencing disparities. Despite bringing a lot of law to procedures at sentencing.”); Susan N. Herman, The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S Cal L Rev 289, 314 (1992) (“The Sentencing Reform Act does not mention procedure.”).

64 USSG § 6A1 cmt backgd.
65 See id at §§ 6A1.1-1.3.
66 See id at §§ 6A1.1-1.2. The Sentencing Commission delineates sentencing procedures in two brief sections: § 6A1.1, which details the process surrounding the preparation of the presentence report, and § 6A1.2, which details the sentencing process that takes place once the parties receive the report.
67 USSG § 6A1.3(a).
sentencing, however, state legislatures and commissions largely have failed to articulate a clear modern theory for sentencing, and also have failed to develop truly modern procedures for sentencing decisionmaking. Through new sentencing laws constraining judicial sentencing discretion and abolishing or reforming parole, the states directly or indirectly have repudiated or reformed many tenets and practices of the old rehabilitative sentencing concept. As in the federal system, however, the sentencing revolution in the states rejected the old conceptual sentencing model without developing a clear new one to take its place.

III. THE CONCEPTUALLY-TORTURED JURISPRUDENTIAL PATH TO BLAKELY AND BOOKER

Though federal and state legislatures and sentencing commissions adopted modern sentencing laws at a rapid pace, the sentencing revolution took quite some time to reach and impact the United States Supreme Court. Despite an obvious shift in sentencing philosophies and structures, and despite the fact that the Supreme Court's prior approval of limited procedural rights at sentencing had been justified on the basis of a now repudiated rehabilitation-oriented sentencing philosophy, the Supreme Court through the 1980s and 1990s continued to sanction an administrative model of sentencing decisionmaking in which

71 See, for example, Michael Vitiello and Clark Kelso, A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy, 38 Loyola LA L Rev 903, 917 (2004) (“Criminal sentencing in California is without a coherent penal theory [as] a result of multiple layers of criminal sentencing that have come about over almost thirty years of legislative changes to sentencing laws.”). Though many states now have legislative provisions articulating the purposes for state sentencing, these statutes often list a great many purposes and provide no guidance concerning how competing purposes should be considered or balanced. See, for example, Mont Code Ann § 46-18-101 (2003); Ohio Rev Code Ann § 2929.11 (West 1997); Tenn Code Ann § 40-35-102 (2004). See also Kevin Reitz, Model Penal Code: Sentencing 1, 71 (ALI 2003) (noting that most states take a “multiple choice” or “laundry list” approach” to sentencing purposes).

72 See, for example, Commonwealth v Hartz, 532 A2d 1139, 1157–58 (Pa Super 1987) (noting the failure of Pennsylvania guidelines to provide specified burden of proof for sentencing enhancement); People v Williams, 599 NE2d 913, 921 (Ill 1992) (noting the absence of language in the Illinois sentencing statute specifying burden of proof).

73 As early as 1981, Professor Frances Allen was already discussing the “wide and precipitous decline of penal rehabilitationism” as a foundational theory for the criminal justice system. Allen, The Decline of the Rehabilitative Ideal at 7 (cited in note 9).

74 See Part I.
defendants had very limited procedural rights. As detailed below, in a series of cases, the Supreme Court repeatedly reaffirmed its decision in *Williams* and repeatedly ruled that criminal sentencings were to be subject to far less procedural regulation than criminal trials. And the Court adhered to the old administrative procedural model for sentencing despite contentions by defendants and commentators that modern sentencing reforms had eliminated the philosophical foundation for that model.

But then, all of a sudden, almost as if a mysterious *fin-de-siècle* doctrinal lightswitch were flipped, the Supreme Court's sentencing jurisprudence abruptly changed course, and the Court started to express considerable concerns with administrative sentencing procedures. This new jurisprudence first surfaced in *Almendarez-Torres v United States*\(^{75}\) and *Jones v United States*,\(^{76}\) then formally shook the world of sentencing in 2000 with the Supreme Court's "watershed" ruling in *Apprendi v New Jersey*.\(^{77}\) This new jurisprudence recently has culminated with the "earthquake" decision in *Blakely*\(^{78}\) and the federal "after-shock" of *Booker*.

As Part IV details below, there are commendable aspects of the Supreme Court's new sentencing jurisprudence, though many commentators have understandably criticized the cases culminating in *Blakely* and *Booker* as suffering from a form of jurisprudential extremism and short-sightedness. These criticisms result in part from the fact that perhaps the only consistent hallmark of the Supreme Court's jurisprudence since the start of the sentencing revolution has been a lack of conceptual depth and nuance.

\(^{75}\) 523 US 224 (1998).
\(^{76}\) 526 US 227 (1999).
\(^{77}\) 530 US 466 (2000). Justice Sandra Day O'Connor, writing in dissent in *Apprendi*, is to be credited with using the term "watershed" to describe the majority's decision. Id at 524 (O'Connor dissenting) (asserting that the *Apprendi* decision "will surely be remembered as a watershed change in constitutional law").
A. An Initial Failure to Respond to the Revolution: *McMillan* and Federal Guidelines Cases

The Supreme Court's 1986 decision in *McMillan v Pennsylvania* was a key opening moment in the troubled evolution of the Court's modern sentencing jurisprudence. Litigated during the early development of structured sentencing reforms, *McMillan* involved a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act, which provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses.

The defendant in *McMillan* argued that the Constitution required treating the fact of firearm possession as an offense element with the traditional trial procedures of proof beyond a reasonable doubt and the right to a jury.

Significantly, the Pennsylvania Mandatory Minimum Sentencing Act at issue in *McMillan* clearly was not enacted in service to the rehabilitative ideal, and the focus of the Act was exclusively on the offense and not on the offender. As the Supreme Court of Pennsylvania explained in its consideration of McMillan's claims, the Pennsylvania legislature created the mandatory minimum provision "to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns." The United States Supreme Court in *McMillan* was thus called upon to examine a new type of punitive sentencing provision—one in which the philosophical justifications for the administrative procedures sanctioned in *Williams* were no longer present. The Court could not possibly contend or believe, as it reasonably did nearly forty years earlier in *Williams*, that limiting defendants' procedural rights in this new setting ultimately could help defendants "be less severely punished and restored sooner to complete freedom and useful citizenship." Nor could the Court contend or believe, as it had nearly ten years earlier in *Grayson*, that broad judicial

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80 See id at 81–82 and n 1 (quoting provisions and describing operation of Pennsylvania's Mandatory Minimum Sentencing Act).
81 Id at 84.
83 *Williams*, 337 US at 249.
sentencing power was necessary in this new context for consideration of "the defendant's whole person and personality."\textsuperscript{84}

The United States Supreme Court nevertheless turned back McMillan's challenges to Pennsylvania's Mandatory Minimum Sentencing Act in an opinion that largely echoed the \textit{Williams} decision without any revised justifications. The \textit{McMillan} Court, emphasizing that it is "normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,"\textsuperscript{85} rejected the claim that visible possession of a firearm must be treated procedurally as an element. The Court supported its ruling with the cursory assertion that Pennsylvania's statute "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."\textsuperscript{6} The Court even rebuffed McMillan's suggestion that the Due Process Clause required at least that visible firearm possession be proved by clear and convincing evidence. Here the Court cited \textit{Williams} for the proposition that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden at all," and suggested that it would be inappropriate to "constitutionaliz\[e\] burdens of proof at sentencing."\textsuperscript{87}

The \textit{McMillan} Court provided no substantive justification or explanation for why the administrative procedures that may have been sensible and were deemed constitutionally sufficient for an offender-oriented rehabilitative model of punishment in \textit{Williams} were still sensible and constitutionally sufficient for a new offense-focused sentencing law that sought to punish and deter. Coining the term "sentencing factor," the \textit{McMillan} Court simply asserted, without any conceptual discussion of sentencing

\textsuperscript{84} Grayson, 438 US at 53.

\textsuperscript{85} McMillan, 477 US at 85 (citation omitted). The \textit{McMillan} Court's discussion of these matters, and its emphasis on state authority to define crimes and attendant procedures, drew heavily on two cases from a decade earlier, \textit{Mullaney v Wilbur}, 421 US 684 (1975), and \textit{Patterson v New York}, 432 US 197 (1977), in which the Supreme Court struggled to define limits for how states could structure affirmative defenses in the application of criminal laws. According to the \textit{McMillan} court, the upshot of these cases was a rejection of "the claim that whenever a State links the 'severity of punishment' to the 'presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." \textit{McMillan}, 477 US at 84 (citation omitted). Consider Kate Stith, \textit{Crime and Punishment under the Constitution}, 2004 S Ct Rev 221, 226–29 (2004) (discussing holdings and the import of \textit{Mullaney} and \textit{Patterson} in the Supreme Court's sentencing jurisprudence); Joseph L. Hoffmann, \textit{Apprendi v. New Jersey: Back to the Future?}, 38 Am Crim L Rev 255, 269–72 (2001) (same).

\textsuperscript{86} McMillan, 477 US at 88.

\textsuperscript{87} Id at 91–92.
theories or procedures, that Pennsylvania's decision to dictate the "precise weight" at sentencing of firearm possession "has not transformed against its will a sentencing factor into an 'element' of some hypothetical 'offense.'"

The one conceptual principle evident in *McMillan* was the structural principle of federalism. The *McMillan* Court repeatedly stressed the importance of allowing state legislatures to devise approaches to sentencing without significant constitutional limitations. The Court asserted that it "should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties," and emphasized the importance of "tolerance for a spectrum of state procedures dealing with a common problem of law enforcement."

Unlike the majority in *McMillan*, Justice Stevens engaged conceptually the new realities of Pennsylvania's sentencing law in his dissent. Justice Stevens emphasized that Pennsylvania's statute "automatically mandates a punishment" for visible firearm possession, and argued that "a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties." Justice Stevens asserted that "[o]nce a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." Consequently, according to Justice Stevens, because the sentencing statute mandates lengthy incarceration for "conduct that the Pennsylvania Legislature obviously intended to prohibit," then "the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies."
Rendered in 1986, at a time when many legislatures and sentencing commissions were starting to explore and develop sentencing reforms, McMillan could have profoundly impacted, conceptually and practically, the shape and content of structured sentencing—if Justice Stevens’ views had carried the day, or if the Court’s opinion had suggested that the Constitution imposed some significant procedural requirements on the sentencing process. But with the McMillan Court instead stressing the importance of “tolerance for a spectrum of state procedures dealing with a common problem of law enforcement,” legislatures and sentencing commissions could, and typically did, neglect procedural matters when reforming the substance of sentencing decisionmaking through structured sentencing reforms.

In the wake of McMillan, as progressively more jurisdictions adopted forms of structured sentencing through guidelines systems or mandatory sentencing statutes, two significant trends emerged. State courts and lower federal courts, citing McMillan and Williams, regularly upheld against a range of constitutional challenges various structured sentencing systems that imposed punishment withoutaffording defendants at sentencing the traditional procedural protections of a criminal trial. But, at the same time, individual judges and academics, citing the unfairness of defendants’ being subject to fact-driven guidelines sentencing determinations without significant procedural rights, regularly lamented the continued adherence to McMillan and Williams.

95 See, for example, United States v Mergerson, 995 F2d 1285, 1291–93 (5th Cir 1993); United States v Restrepo, 946 F2d 654, 657 (9th Cir 1991) (en banc); State v Rottinghaus, 591 NW2d 15, 17 (Iowa 1999); Farris v McKune, 911 P2d 177, 184 (Kan 1996); Vega v People, 893 P2d 107, 116 (Colo 1995); State v Christie, 506 NW2d 293, 298–99 (Minn 1993); People v Eason, 458 NW2d 17, 21–24 (Mich 1990); State v Krantz, 788 P2d 298, 303 (Mont 1990).

The U.S. Supreme Court itself before long was swept up in these trends, primarily because the structure and operation of the Federal Sentencing Guidelines heightened the importance of sentencing factfinding while also highlighting the absence of procedural safeguards at sentencing. After upholding the constitutionality of the Sentencing Reform Act against structural complaints in *Mistretta v United States*, the Supreme Court began regularly confronting claims that certain aspects of sentencing under the Federal Guidelines were constitutionally problematic because of defendants' limited procedural rights.

Though the Supreme Court initially rebuffed most of these claims simply by denying certiorari, the sheer number and significance of the procedural issues that impacted federal guideline sentencing meant that the Court could not long avoid weighing in on these matters. In a series of decisions, the Supreme Court consistently rejected defendants' claims that guideline procedures were constitutionally problematic, and repudiated defendants' arguments for expanding the procedural rights available during sentencing under the Federal Guidelines.

In *Wade v United States*, for example, the Court held that, absent a "substantial threshold showing" of discriminatory behavior, a defendant has "no right to discovery or an evidentiary hearing" to explore a prosecutor's reasons for refusing to recommend a reduced sentence based on the defendant's cooperation with authorities. In *United States v Dunnigan*, the Court upheld a sentence enhancement based on judicial finding of perjury at trial, stating that the fact the "enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds . . . for its invalidation." In *Nich-
ols v United States,\textsuperscript{103} the Court citing both Williams and McMillan, stressed that the "traditional understanding of the sentencing process [is] . . . less exacting than the process of establishing guilt," and held that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction when sentencing him for a subsequent offense.\textsuperscript{104} In Witte v United States,\textsuperscript{105} the Court again placed heavy reliance on Williams and McMillan and the fact that sentencing courts traditionally have considered a wide range of information without the procedural protections of a criminal trial to hold that there was no double jeopardy violation when a prior conviction increased punishment through sentence calculations under the Federal Guidelines.\textsuperscript{106}

As in McMillan, the Supreme Court in this line of federal guideline cases consistently relied on tradition and precedent to support judge-centered administrative sentencing procedures. The Court never demanded that the government offer a compelling (or really any) conceptual justification for administering a punitive offense-focused federal sentencing system without providing defendants with traditional adversarial procedures.

This line of cases reached its high-water mark, and demonstrated a telling disregard for traditional adversarial processes, with the Supreme Court's 1997 decision in United States v Watts.\textsuperscript{107} In Watts, the Court constitutionally blessed the Federal Guidelines provisions that require judges to enhance defendants' sentences based on conduct underlying charges of which they have been acquitted, if the government establishes that conduct by a preponderance of the evidence.\textsuperscript{108} Remarkably, to justify this ruling, the Watts Court parroted the statement in Williams that it is essential to selection of an appropriate sentence that a judge have "possession of the fullest information possible concerning the defendant's life and characteristics." But the Watts Court failed to discuss or even acknowledge: (1) that the Williams Court made this statement in service to the rehabilitative model of sentencing, and (2) that the Federal Guideline at issue con-

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\textsuperscript{103} 511 US 738 (1994).
\textsuperscript{104} Id at 747.
\textsuperscript{105} 515 US 389 (1995).
\textsuperscript{106} Id at 399–401.
\textsuperscript{107} 519 US 148 (1997).
\textsuperscript{108} Id at 157.
cerned only offense conduct and not any broader aspects of the offender's "life and characteristics."\(^{109}\)

The *Watts* Court, again without any conceptual discussion of the impact of a new sentencing structure, stressed the "significance of the different standards of proof that govern at trial and sentencing" and noted that "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.'\(^{110}\) Continuing to act as if the sentencing revolution never happened—or at least as if the revolution had absolutely no significance to the constitutional inquiry—the *Watts* Court held that it was permissible for the Guidelines to mandate an increase in a defendant's punishment based on "conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."\(^{111}\)

Throughout the line of federal sentencing cases culminating in *Watts*, a few Justices noted that the transformation of sentencing under the Guidelines raised questions about continued approval of the administrative procedures sanctioned in the context of the rehabilitation-oriented pre-Guidelines model of sentencing.\(^{112}\) But only Justice Stevens, by repeatedly assailing the application of pre-Guidelines precedents to sustain the limited procedural rights afforded to defendants under the Guidelines, addressed the underlying conceptual realities of the sentencing revolution that had produced the Federal Sentencing Guidelines.

In his dissent in *Witte*, for example, Justice Stevens stressed "the change in sentencing practices caused by the Guidelines" and argued that there were double jeopardy concerns when a prior conviction was used to increase punishment in Guidelines calculations.\(^{113}\) And in his *Watts* dissent, Justice Stevens astutely noted that the "goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution."\(^{114}\) Justice Stevens in *Watts* also complained about the

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\(^{109}\) *Id* at 151–52.

\(^{110}\) *Id* at 155, 152.

\(^{111}\) *Watts*, 519 US at 157.

\(^{112}\) See, for example, *id* at 170–71 (Kennedy dissenting); *Nichols*, 511 US at 754–63 (Blackmun dissenting).

\(^{113}\) *Witte*, 515 US at 409–11 (Stevens concurring in part and dissenting in part).

\(^{114}\) *Watts*, 519 US at 159 (Stevens dissenting).
Court's continued reliance on *Williams*, since "its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system." Invoking broad conceptual principles, Justice Stevens closed his *Watts* dissent by stressing the "longstanding procedural requirements enshrined in our constitutional jurisprudence" and by asserting that the "notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence." But no other Justice joined Justice Stevens in these dissents; he was, at the time, a lone voice decrying the Court's failure to reform its sentencing jurisprudence in light of new sentencing realities.

B. A Reaction to the Revolution?: A Sudden and Extreme Jurisprudential Shift

Justice Stevens's dissents in *Watts* and *Witte* clearly foreshadowed his vote and his opinion for the Court in *Apprendi*, the critical precursor to the *Blakely* and *Booker* decisions. But the fact that Justice Stevens's dissents did not garner any other votes at the time seemed to indicate that the Court's continued application of pre-Guidelines sentencing precedents to the revolutionary new world of structured sentencing troubled only one Justice.

Aided by hindsight, it now appears that a number of Justices may have been impacted by cases throughout the 1990s that highlighted the consequences of reliance on judge-centered administrative sentencing procedures after the sentencing revolution had turned sentencing decisionmaking into a more trial-like enterprise. In *Almendarez-Torres* and *Jones*, a significant and consequential number of Supreme Court Justices started to express serious concerns with judge-centered administrative sentencing procedures.

In 1998, the Supreme Court in *Almendarez-Torres* considered whether evidence of a defendant's prior convictions could be used to increase a sentence without being subject to the procedural rules for elements of crimes at trial. Especially in light of recent decisions in *Watts* and *Witte*, the defendant's claim for the application of traditional trial procedures seemed to run against

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115 Id at 165.
116 Id at 169, 170.
all the Court's recent sentencing jurisprudence. The Court in *Almendarez-Torres* ultimately concluded that evidence of a defendant's prior convictions could be used to increase a sentence without being alleged in an indictment, but the 5-4 division of the Court in *Almendarez-Torres*, as well as Justice Scalia's strong dissent asserting that the Court's holding raised serious constitutional problems, were harbingers of decisions to come.

The following term, in *Jones*, five Justices suggested that *Almendarez-Torres* announced a prior conviction exception to a rule that facts establishing higher penalties must be treated procedurally as offense elements. The *Jones* Court asserted that "a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century" suggests that "under the Due Process Clause of the Fifth Amendment and the notice and jury-trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

Then, in 2000, the same five Justices voted in *Apprendi* to convert the *Jones* Court's dicta into what Justice O'Connor, in dissent, called a "watershed" ruling. The *Apprendi* Court declared unconstitutional a New Jersey hate-crime enhancement that enabled a sentencing judge to impose a sentence higher than the otherwise-available statutory maximum for various crimes based on a finding by a preponderance of the evidence that an offense involved racial animus. The *Apprendi* Court asserted that the hate-crime statute was constitutionally problematic because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

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118 Joining Justice Scalia's dissent in *Almendarez-Torres* were Justices Stevens, Souter and Ginsburg. See id at 248–71 (Scalia dissenting).

119 526 US at 235. The *Jones* majority, which was comprised of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg, avoided an express constitutional holding by interpreting the statute at issue in *Jones* to comply with the suggested constitutional rule. See id at 232–39.

120 Id at 251 n 11.

121 Id at 243 n 6.

122 See *Apprendi*, 530 US at 524 (O'Connor dissenting) (asserting that, because the *Apprendi* decision "imposes as a constitutional rule the principle first identified in *Jones*," it "will surely be remembered as a watershed change in constitutional law").

123 Id at 497.

124 See id at 490.
At the time that it was decided, observers of modern sentencing reforms realized that, by finally establishing a constitutional limitation on the procedures attending a legislative sentencing scheme, *Apprendi* was a landmark decision. But perhaps the most remarkable aspect of the rulings culminating in the *Apprendi* decision was their divergence from the United States Supreme Court's sentencing jurisprudence of the prior half-century as well as the Court's continued failure to engage conceptually with the sentencing revolution. As detailed above, in numerous cases challenging sentencing laws and procedures, from *Williams* in 1949 through *Watts* in 1997, the Supreme Court consistently upheld a wide array of sentencing systems and practices while commanding considerable deference to legislative judgments in the sentencing arena. The Supreme Court then dramatically held in *Apprendi* not merely that some sentencing procedures are constitutionally required, but that any and every fact (other than the fact of a prior conviction) that raises a statutory maximum sentence must be submitted to a jury, and proved beyond a reasonable doubt. The *Apprendi* Court even stated that "it is arguable that *Almendarez-Torres*—the decision from just two years earlier that supplied the prior conviction exception to *Apprendi*'s elements rule—"was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested."

Justice Stevens's majority opinion in *Apprendi* intimated that the Court's ruling was "a matter of simple justice," and claimed that the ruling was a straightforward and sensible extension of an established legal history and constitutional precedents concerning what aspects of a crime must be treated as "elements" with the full panoply of procedural protections. But


126 See notes 102–12 and accompanying text.

127 *Apprendi*, 530 US at 490. See also id at 539, 525 (O'Connor dissenting) (lamenting that the *Apprendi* decision is "a substantial departure from our settled jurisprudence" through which the Court "casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule").

128 See id at 489–90.

129 Id at 476.

130 *Apprendi*, 530 US at 492.
the 5-4 vote of the Justices in *Apprendi*, the length and contentiousness of the five separate opinions, and the particularly strenuous dissents of Justices O'Connor and Breyer, revealed that the *Apprendi* decision was anything but "simple" and that the majority's reading of history and precedent was quite contestable.\(^{131}\)

In previous writings I have suggested that *Apprendi* can be viewed as the inevitable product of pressures from the intersection of the Supreme Court's own revolution of criminal trial procedures and sentencing reformers' revolution of the substance of sentencing laws.\(^{132}\) As some commentators have noted, structured sentencing reforms—particularly because they have tended to make sentencing determinations more offense-oriented and fact-driven—have transformed sentencing decisionmaking into a more trial-like enterprise.\(^{133}\) This reality—combined particularly with the fact that a large percentage of cases resolve through guilty pleas and thus sentencing often serves as the only trial-like procedure for most defendants\(^{134}\)—likely prodded the Supreme Court to place some limits on how much of criminal justice decisionmaking could be relegated to the lax administrative procedures that historically have governed at sentencing.\(^{135}\)

\(^{131}\) See id at 525 (O'Connor dissenting) ("In its opinion, the Court marshals virtually no authority to support its extraordinary rule."); id at 555 (Breyer dissenting) ("At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it."). See also Rory K. Little and Teresa Chen, *The Lost History of Apprendi and the Blakely Petition for Rehearing*, 17 Fed Sent Rptr 69 (2004) (disputing the historical story that the majority tells in *Apprendi*).

\(^{132}\) See Berman, 37 Crim L Bull at 627–45 (cited in note 62) (concluding that *Apprendi* "demonstrates that sentencing reformers cannot disregard procedures while transforming the substance of sentencing and expect the Supreme Court to continue to blindly approve of sentencing systems which seem to have the potential to undermine what are now considered the basic procedural tenets of the modern criminal justice system").


\(^{134}\) See Bibas, 110 Yale L J at 1149–50 (cited in note 3) (stressing the significance of the prevalence of guilty pleas in the criminal justice system and the appropriateness of more fully developed procedural rules at sentencing); *United States v Green*, 346 F Supp 2d 259, 264–79 (D Mass 2004) (detailing the centrality of plea agreements and plea bargaining in the operation of the federal criminal justice system and suggesting these realities justify greater procedural rights at sentencing for defendants).

\(^{135}\) Professor Hoffmann made a similar observation in an article written after *Apprendi*:

*The* evolution in both the form and substance of sentencing hearings undoubtedly influenced the Court to see sentencing hearings as more like guilt/innocence trials than before [and] seems to be reflected in the Court's abrupt change of direction in
But Justice Stevens's opinion for the Court in *Apprendi*, unfortunately, did not grapple conceptually with the impact of the sentencing revolution on the Supreme Court's sentencing jurisprudence. Nor did Justice Stevens fully engage the important conceptual ideas that he had developed in his *McMillan* and *Watts* dissents. In *Apprendi*, Justice Stevens did not highlight, as he had in *Watts*, that the *Williams* Court's approval of administrative sentencing procedures was the product of its commitment to an old, offender-oriented rehabilitative sentencing theory. Rather, Justice Stevens's opinion for the Court in *Apprendi* essentially reaffirmed *Williams*'s holding that judges permissibly could exercise broad discretion when "imposing sentence within statutory limits in the individual case." Moreover, though *Apprendi*'s holding seemed to vindicate Justice Stevens's assertion in his *McMillan* dissent that a state should have "to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt," his opinion for the Court in *Apprendi* merely distinguished *McMillan* as dealing only with mandatory minimum sentences and not with available maximum sentences. Consequently, though *Apprendi* created a significant constitutional limitation on sentencing procedures, the *Apprendi* Court failed to provide a clear conceptual justification for why judge-centered administrative sentencing procedures, which had been constitutionally blessed for so long, were now constitutionally-impermissible whenever a fact (other than a prior conviction) increased the applicable maximum sentence.

In short, then, the outcome in *Apprendi* seemed to reflect the impact of the sentencing revolution, but the majority opinion in *Apprendi* barely even acknowledged that this revolution had occurred. The dissents of Justices O'Connor and Breyer in *Apprendi*. In short, as an unintended consequence of the recent move from discretionary to determinate sentencing, sentencing hearings have begun to look more and more like adversarial proceedings, which in turn has helped to ensure that they will be treated, for constitutional purposes, more and more like adversarial proceedings. *Apprendi*, in other words, is a natural and perhaps even predictable consequence of the recent trend toward adversarial-ness in sentencing.
prendi, however, directly engaged the modern sentencing revolution. Both Justices expressed, often in dramatic language, their distress over the prospect that the Apprendi decision could "invalidate with the stroke of a pen three decades' worth of nationwide reform." Expressing their concerns with the majority's holding, the Apprendi dissenters highlighted in various ways that the Apprendi decision was conceptually opaque (although the dissenters' arguments for a different rule seemed based more on pragmatism than on principle).

C. A Counter-Reaction to the Revolution?: An Effort to Rein in the New Jurisprudence

The meaning and import of the Supreme Court's decision in Apprendi was hotly debated as soon as the Court handed it down, in part because the Court's conceptually unclear opinion raised many questions and provided little guidance for lower courts and legislatures needing to make sense of and apply Apprendi's watershed rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As the Apprendi dissenters had warned, and as many commentators have noted, the benefits of determinate sentencing schemes" and its discussion of the federal guidelines, the Apprendi majority ominously and somewhat confusingly stated that it expressed "no view on the subject [of the federal guidelines] beyond what this Court has already held." Id at 497 n 21.

Id at 550 (O'Connor dissenting).

See id at 547 ("Although the Court acknowledges the legitimacy of discretionary sentencing by judges . . . it never provides a sound reason for treating judicial factfinding under determinate-sentencing schemes differently under the Constitution."). See also Apprendi, 530 US at 563-64 (Breyer dissenting) (expressing puzzlement over the way that the Apprendi majority distinguished McMillan).

See Apprendi, 530 US at 550 (O'Connor dissenting) (asserting that "the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes"); id at 555 (Breyer dissenting) (assailing the "impractical nature of the requirement that the majority now recognizes").

Within a year of the Apprendi decision, in addition to numerous academic and practitioner articles examining Apprendi, see note 137, there had already been at least three major scholarly symposia devoted to examining Apprendi. See Assessing Apprendi, 12 Fed Sent Rptr 301 (2000); Symposium: Reflections on the Consequences of Apprendi v. New Jersey, 37 Crim L Bull 552 (2001); Apprendi Symposium, 38 Am Crim L Rev 241 (2001).

Apprendi, 530 US at 490.

See id at 550 (O'Connor dissenting); id at 565 (Breyer dissenting).

See, for example, Jane A. Dall, Note, "A Question for Another Day": The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey, 78 Notre Dame L Rev 1617 (2003); Susan N. Herman, Applying Apprendi to the Federal Sentenc-
the *Apprendi* decision cast constitutional doubt on many sentencing statutes and guidelines enacted during the modern sentencing reform movement. Most structured and guideline sentencing reforms were built around judicial factfinding without traditional trial procedures—a sentencing process which the Supreme Court in a series of cases had previously approved, but in *Apprendi* suggested was constitutionally-problematic.

The *Apprendi* decision, however, initially had a smaller impact than the dissenter's and many observers may have expected. Although the decision generated much litigation,\(^{148}\) *Apprendi*'s direct effect on established criminal sentencing laws was relatively limited. Lower federal and state courts typically interpreted *Apprendi* narrowly in order to preserve, as much as possible, existing sentencing structures that relied on judicial fact-finding,\(^{149}\) and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*:\(^{150}\)

The Supreme Court itself restricted the reach and impact of *Apprendi* through its decision in *United States v Harris*.\(^{151}\) In *Harris*, the Court examined anew the issue that it previously had addressed in *McMillan*, namely the procedures constitutionally required when a statute specifies a mandatory minimum sentencing term. The *Apprendi* majority opinion had distinguished *McMillan*, but the Court accepted certiorari in *Harris* because there was an obvious tension between *Apprendi*’s “elements” rule for facts that raise available maximum sentences and *McMillan*’s holding that facts that trigger mandatory minimum sentences could be found by a judge using a preponderance standard of proof.\(^{152}\) Though in his *Harris* concurrence Justice Breyer can-

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\(^{148}\) See, for example, King and Klein, 12 Fed Sent Rptr at 331–32 (cited in note 125) (detailing some of the immediate post-*Apprendi* lower court litigation); Hoffmann, 38 Am Crim L Rev at 255 (cited in note 85) (noting that there were more than 400 reported federal and state court decisions dealing with *Apprendi* issues within a year of the Supreme Court's decision).


\(^{150}\) The one exception to this story comes from Kansas, where the Kansas Supreme Court held after *Apprendi* that its judicially-administered sentencing guidelines system was constitutionally problematic. See *State v Gould*, 23 P3d 801, 814 (Kan 2001); *State v Cullen*, 60 P3d 933, 934–35 (Kan 2003). The Kansas legislature responded by creating procedures for using sentencing juries to find necessary facts in certain cases. See Kan Stat Ann § 21-4718 (1995).

\(^{151}\) 536 US 545 (2002).

\(^{152}\) Id at 549–50.
didly admitted that he could not “easily distinguish Apprendi v New Jersey from this case in terms of logic,”\textsuperscript{153} the Supreme Court in \textit{Harris} ultimately reaffirmed \textit{McMillan}.\textsuperscript{154} The Court held, in another 5-4 decision, that submission to a jury or proof beyond a reasonable doubt was not required for facts that mandated minimum penalties.\textsuperscript{155}

\textit{Harris} marked the first time that the Court directly discussed the sentencing revolution, noting that “in the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion.”\textsuperscript{156} For Justice Kennedy and the \textit{Harris} plurality, however, this recent sentencing reform history did not provide a conceptual reason to reconsider precedents like \textit{Williams} and \textit{McMillan}; rather it provided a practical reason to reaffirm them. Citing numerous statutes in which “Congress and the States have conditioned mandatory minimum sentences upon judicial findings,” Justice Kennedy stated:

It is critical not to abandon \textit{[McMillan]} at this late date. Legislatures and their constituents have relied upon \textit{McMillan} to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. . . . We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.\textsuperscript{157}

Seeking to harmonize the Court’s sentencing jurisprudence to date, Justice Kennedy in \textit{Harris} thus provided this summary:

Read together, \textit{McMillan} and \textit{Apprendi} mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the politi-

\textsuperscript{153} Id at 569 (Breyer concurring in part and concurring in the judgment).
\textsuperscript{154} Id at 568.
\textsuperscript{155} \textit{Harris}, 536 US at 568–69. On the same day that the Court decided \textit{Harris}, it also expanded \textit{Apprendi’s} reach in \textit{Ring v Arizona}, 536 US 584 (2002), by holding that capital defendants are “entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Id at 588. Because most jurisdictions already relied on jury sentencing in capital cases, however, the Court’s decision in \textit{Harris} to limit the procedural requirements for imposition of minimum sentences seemed, at the time, to be the most important and telling iteration of \textit{Apprendi’s} scope and reach.
\textsuperscript{156} \textit{Harris}, 536 US at 558.
\textsuperscript{157} Id at 567–68.
cal system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.158

Though the *Harris* Court perhaps deserves praise for finally acknowledging the sentencing revolution, the decision sowed more conceptual confusion. Justice Breyer provided the key fifth vote in *Harris* to keep *Apprendi* from applying to mandatory minimum sentencing factfinding, but he expressly stated in his concurrence that he could not easily see the logic of distinguishing *Harris* from *Apprendi*.159 And Justice Kennedy's assertion that “the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings”160 is curious to say the least. The reference to “judicial expertise” is an obvious throwback to the old-world sentencing model in which judges were expected to use their unique insights to craft an individualized offender-oriented rehabilitative sentence.161 But, as Judge Nancy Gertner has astutely noted in a commentary about *Harris*, within the context of modern structured sentencing systems, often “the judge is ‘just’ another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences.”162 To speak in this setting—as Justice Kennedy did—of reliance on “judicial expertise” for making offense-based factual findings is almost nonsensical.

Despite its conceptual cloudiness, the practical consequences of *Harris* appeared mighty clear at the time. As seemed to be the Court's goal, *Harris* suggested that, despite an *Apprendi* scare, the structured and guidelines sentencing provisions developed during the sentencing revolution could continue to operate with judge-centered, administrative sentencing procedures. As Professor Stephanos Bibas put matters at the time, by holding in *Harris* that only facts that raise maximum sentences must be treated procedurally as elements, and not those that establish minimums, the Supreme Court seemed to have “caged the potentially

158 Id at 567.
159 Id at 569 (Breyer concurring in part and concurring in the judgment).
160 *Harris*, 536 US at 567.
161 See Part I.
162 Gertner, 15 Fed Sent Rptr at 83–85 (cited in note 12). See also *United States v Mueffleman*, 327 F Supp 2d at 83 (cited in note 13) (noting that, after a prosecutor makes a variety of discretionary charging and bargaining choices, the judge's role is “transformed to 'just' finding the facts, now with Commission-ordained consequences”).
ravenous, radical Apprendi tiger that threatened to devour modern sentencing law."\textsuperscript{163}

In addition to permitting guideline sentencing to continue to rely on judicial factfinding procedures, the Court's decision in \textit{Harris} also seemed to eliminate the prospect for a conceptually-nuanced constitutional approach to modern sentencing procedures. Had the \textit{Harris} Court more fully engaged conceptually with the theories and structures of modern sentencing decision-making, the Court perhaps could have started to develop a more refined jurisprudence of heightened due process protections at sentencing, even as it restricted the reach of \textit{Apprendi}'s elements rule.\textsuperscript{164} But instead, as Judge Gertner has observed, the Court's binary approach in \textit{Apprendi} and \textit{Harris} "was 'all-or-nothing': if there is no jury trial, the 'all' of our criminal justice system, there is next to 'nothing,' the comparative informality of sentencing."\textsuperscript{165}

D. The \textit{Blakely} Earthquake and the \textit{Booker} Aftershock

When the Court granted certiorari in \textit{Blakely v Washington}, most observers believed that the case was to serve as final confirmation that \textit{Apprendi} would not radically transform modern sentencing practices. After \textit{Harris}, the widely-shared belief was that the sentencing revolution had been spared from further constitutional intrusion; many thought that the Supreme Court would use \textit{Blakely} to rule, as had nearly all lower courts, that \textit{Apprendi} did not apply to judicial factfinding that impacted only guideline sentencing outcomes \textit{within} otherwise applicable statutory ranges.

But then in June 2004 the \textit{Blakely} earthquake hit. Justice Scalia, writing for the Court and on behalf of the same five Jus-


\textsuperscript{164} In both \textit{Watts} and \textit{Almendarez-Torres}, the Supreme Court concluded its rejection of the defendants' challenges to applicable sentencing procedures by suggesting that greater due process protections might possibly be constitutionally required in some cases. See \textit{Almendarez-Torres}, 523 US at 248 (stating, after noting that the defendant in the case at hand had "admitted his recidivism at the time he pleaded guilty," that the Court expressed "no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence"); \textit{Watts}, 519 US at 156–57 (acknowledging "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," but holding that the "cases before us today do not present such exceptional circumstances, and we therefore do not address that issue"). The Court in \textit{Harris} did not discuss or even acknowledge this potentially significant dicta from prior cases.

\textsuperscript{165} Gertner, 15 Fed Sent Rptr at 84 (cited in note 12).
tices constituting the majority in *Jones* and *Apprendi*, concluded that Ralph Blakely’s Sixth Amendment right to a jury trial was violated when a Washington State sentencing judge enhanced Blakely’s sentence based on the judge’s factual finding that his kidnapping offense involved “deliberate cruelty.” Linking this holding back to the Court’s *Apprendi* ruling, Justice Scalia explained:

Our precedents make clear . . . that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge imposes punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Justice Scalia further explained that this particular articulation of the meaning and reach of *Apprendi* “reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Rebuffing a range of practical concerns expressed by the dissenters, Justice Scalia concluded his opinion for the Court with the breathtakingly bold assertion that “every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”

Because the *Blakely* decision not only redefined the reach of *Apprendi* but also further suggested that any and every fact “legally essential to the punishment” must be proven beyond a reasonable doubt to a jury or admitted by the defendant, the potential impact of *Blakely* on modern sentencing systems is truly staggering. Indeed, it is hard to read the opinion without believing that the *Blakely* majority had decided that the sentencing revolution, which relied on judge-centered administrative sen-

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166 *Blakely*, 124 S Ct at 2538.
167 Id at 2537 (emphasis in original) (citations omitted).
168 Id at 2538–39.
169 Id at 2543 (emphasis in original).
sentencing procedures, must start granting defendants the full panoply of jury-centered adversarial procedures.

The *Blakely* dissenters, not surprisingly, spoke in near cataclysmic terms about what the *Blakely* decision might mean. Justice O'Connor predicted that the "practical consequences of today's decision may be disastrous" because *Blakely* "casts constitutional doubt over [sentencing guidelines systems] and, in so doing, threatens an untold number of criminal judgments." Justice O'Connor stated that if "the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would," and she concluded her dissent by lamenting that "[o]ver 20 years of sentencing reform are all but lost; and tens of thousands of criminal judgments are in jeopardy." Justices Kennedy and Breyer likewise expressed in dire terms their concerns about the *Blakely* majority's ruling. Justice Kennedy lamented that the decision does "considerable damage to our laws and to the administration of the criminal justice system," and he suggested that the decision essentially commanded jurisdictions with sentencing guidelines systems "to scrap everything and start over." Justice Breyer commented that he "thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion."

The potential impact of *Blakely* was quickly realized: within days, *Blakely* began disrupting state and federal structured sentencing systems. As reflected in a rapid-fire series of lower federal court decisions, the shock waves from the *Blakely* earthquake were especially destructive to the operation of the Federal Sentencing Guidelines, a system that has judicial factfinding built into its very foundation. Within weeks of the *Blakely* decision, dozens of lower federal courts had declared at least portions of the Federal Sentencing Guidelines unconstitutional.

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170 *Blakely*, 124 S Ct at 2544, 2549 (O'Connor dissenting).
171 Id at 2550.
172 Id.
173 Id at 2550, 2551 (Kennedy dissenting).
174 *Blakely*, 124 S Ct at 2561. (Breyer dissenting).
and the Acting Solicitor General was compelled to seek expedited consideration in the Supreme Court of Blakely's applicability to the Federal Sentencing Guidelines. Though the immediate spectacle of federal sentencing chaos captured most of the newspaper headlines and academic attention in the wake of Blakely, before long there were also major state court rulings—in California, Colorado, Minnesota, New Jersey, Oregon, and more than a dozen other states—suggesting that many jurisdictions might have to significantly restructure their sentencing systems after Blakely.

Though the practical ramifications of Blakely were obvious, the conceptual foundation and ultimate reach of the ruling were opaque. From its discussion of the jury as a democratic institution, to its explanation of the Sixth Amendment as a "reservation of jury power," to its concluding disparagement of "the civil-law ideal of administrative perfection," Justice Scalia's opinion for the Court in Blakely sketched the outlines of a conceptual argument for juries to have a significant role and authority at sentencing. But the Blakely Court undercut the conceptual clarity of its ruling by failing to explain or even examine how its principles squared with the many precedents that previously had championed judges' role and authority at sentencing. As in Apprendi, the Court in Blakely did not overrule or even seriously question either the old-world, judge-centered Williams

termath, 16 Fed Sent Rptr 333 (2004) (same). Many judges not only found the Guideline enhancements based on judicial factfinding unconstitutional, but also concluded that these parts of the Guidelines were not severable from the rest of the federal sentencing system. Consequently, some federal judges ruled that the entire federal guidelines system must be legally inoperative in some or all cases. Consider Albert W. Aelscher, To Sever or not to Sever? Why Blakely Requires Action by Congress, 17 Fed Sent Rptr 11 (2004).


179 Blakely, 124 S Ct at 2538–39.

180 Id at 2540.

181 Id at 2543.

182 See Part IV for an effort to give a conceptual account of the principles behind Blakely.
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decision or the more recent judge-friendly precedents of McMillan and Harris. Instead, the Blakely Court, in a few brief sentences, summarily distinguished Williams, McMillan, and Harris.\footnote{Blakely, 124 S Ct at 2538.} Much of Justice Scalia's opinion for the Court in Blakely, rather than seeking to provide a conceptually-cogent account of the Supreme Court's sentencing jurisprudence, is devoted to assailing—even lampooning—the protestations of the dissenting Justices.

The Blakely decision also demonstrated an amazing ability to dodge, without any conceptual engagement, troublesome precedents. The Blakely holding expressly restated Apprendi's exception for prior convictions, but Justice Scalia's opinion did not even deign to mention or cite Almendarez-Torres, the case from which the exception emerged. The Blakely Court also completely failed to acknowledge the 1997 Watts decision—which, by expressly holding that judges could find facts to increase Federal Guidelines sentences if proven by a preponderance of the evidence, seemed to conflict directly with Blakely.

Justice Scalia's opinion for the Court in Blakely did respond to the dissenters' concerns about the impact of the majority's ruling on modern sentencing reforms, but the response was both spartan and conceptually tepid. Speaking in one paragraph to these issues, Justice Scalia said simply that "we are not . . . finding determinate sentencing schemes unconstitutional. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."\footnote{Id at 2540.} In response to the dissenters' complaints that the majority's broad ruling would render unconstitutional fundamental provisions of the Federal Sentencing Guidelines, Justice Scalia dropped a footnote to assert simply that "The Federal Guidelines are not before us, and we express no opinion on them."\footnote{Id at 2538 n 9.}

Because Blakely so quickly and so dramatically disrupted federal sentencing practices, it was clear that the Supreme Court would soon have to write the next chapter in this jurisprudential saga. With thousands of sentencings in the federal system each month,\footnote{The official statistics from the United States Sentencing Commission for fiscal year 2002 document nearly 65,000 federal sentencings in that year, which averages out to more than 5,000 federal sentencings each month. United States Sentencing Commission,} and with many (if not most) of those sentencings turn-
ing on judicial factfinding, the Court had no choice but to consider on an expedited schedule Blakely's applicability to the Federal Sentencing Guidelines. Granting certiorari only six weeks after Blakely was decided, and ordering two full hours of oral argument for the first day of its October 2004 Term, the Supreme Court considered directly, in Booker and United States v Fanfan, whether and how the rule announced in Blakely would apply to the Federal Sentencing Guidelines. Three months later, with tens of thousands of federal sentencings hanging in the balance, the Supreme Court issued a set of opinions in Booker and Fanfan that surprised few by finding Blakely applicable to the federal system, but surprised many by devising an unexpected remedy for the federal system.

The Booker decision, which runs 118 pages and has two majority opinions made up of two distinct coalitions of five Justices, is difficult to comprehend, let alone summarize. The opening passage of Justice Stevens's opinion for the Booker Court distills the decision:

We hold that [lower] courts correctly concluded that the Sixth Amendment as construed in Blakely does apply to the [Federal] Sentencing Guidelines. In a separate opinion authored by Justice Breyer, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.

The five Justices who comprised the majorities in Apprendi and Blakely declared in Booker that the Federal Sentencing Guidelines, when instructing judges to make factual findings to calcu-
late increases in applicable sentencing ranges, transgressed the Sixth Amendment jury-trial right. But the prescribed remedy was not, as this ruling would seem to connote, a larger role for juries in the operation of the federal sentencing system. Rather, as a result of a defection by Justice Ruth Bader Ginsburg, a separate group of five Justices—the Apprendi and Blakely dissenters plus Justice Ginsburg—concluded that the remedy for this Sixth Amendment problem was to declare the Federal Sentencing Guidelines wholly advisory.

A remarkable ruling for many reasons, the Booker decision somehow found a way to make a conceptually muddled constitutional jurisprudence of sentencing even more opaque. Through the dual rulings of dueling majorities, the Court declared that the federal sentencing system no longer could rely upon mandated and tightly-directed judicial factfinding. As a remedy, however, the Court created a system relying on discretionary and loosely-directed judicial factfinding. Thus, to culminate a jurisprudence that previously seemed interested in vindicating the role of the jury in modern sentencing systems, Booker devised a remedy for the federal system that granted federal judges more sentencing power than they had ever wielded previously.

Though the peculiar logic and stunning consequences of the Booker decision can and likely will be discussed and debated for years to come, in this context it is important to spotlight Booker's notable conceptual highlights (or lowlights). First, repeating the pattern of Apprendi and Blakely, the Court in Booker, though again finding unconstitutional a sentencing scheme's reliance on judicial factfinding, did not reexamine or even question any of the Court's precedents—from Williams to McMillan to Almendarez-Torres to Harris—that previously had embraced judicial factfinding at sentencing. Indeed, laying the groundwork for the remedy devised by Justice Breyer in Booker, Justice Stevens in his portion of the Booker opinion cited both Apprendi and Williams to espouse that the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." Thus, even as Justice Stevens's opinion for the "merits majority" in Booker championed the importance of "enforcement of the Sixth Amendment's guarantee of a jury trial in today's world," his opinion provided a ready

190 Booker, 125 S Ct at 750–52.
191 Id at 750.
192 Id at 751.
means for eviscerating that guarantee through broad grants of discretionary authority to sentencing judges.

The opinion of Justice Stevens for the Court in *Booker* does discuss expressly the impact of modern sentencing reforms on defendants' procedural rights and on the Court's constitutional jurisprudence. Addressing the "new trend in the legislative regulation of sentencing," Justice Stevens highlighted that the "effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury. . . . [As] the enhancements became greater, the jury's finding of the underlying crime became less significant." Consequently, continued Justice Stevens,

[T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism but by the need to preserve Sixth Amendment substance.

Through this passage, the United States Supreme Court, to its credit, finally explained that its new Sixth Amendment jurisprudence reflects a reaction to the revolution in sentencing law and practice engendered by modern statutory and guidelines reforms. But though the Court finally engaged conceptually with the sentencing revolution, Justice Stevens's opinion still constitutionally blessed judge-centered discretionary sentence decisionmaking and failed to acknowledge that the historical approval in cases like *Williams* of lax procedural rights at sentencing had been premised expressly on the rehabilitative "medical model" that had been dominant before modern reforms.

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193 Id.
194 *Booker*, 125 S Ct at 752.
195 As evidenced by his dissents in cases like *McMillan* and *Watts*, see *McMillan*, 477 US at 96 (Stevens dissenting); *Watts*, 519 US at 159, 169–70 (Stevens dissenting), Justice
Thus, while the *Booker* merits-majority is to be praised for its express consideration of modern sentencing reforms, so much more could have been said—indeed, needed to be said—to provide greater conceptual clarity in this arena. Justice Stevens wrote insightfully and eloquently of "the need to preserve Sixth Amendment substance" in the modern sentencing era, but the Court failed to grapple with key precedents that impeding that goal. And Justice Breyer's remedy in *Booker*, which crafts a revised federal sentencing system that still relies fully on judge-centered administrative sentencing procedures, dramatically undercuts any serious effort to truly "preserve Sixth Amendment substance."

**IV. TAKING STOCK AND MOVING FORWARD CONCEPTUALLY**

A month after *Blakely* was handed down, Justice O'Connor described the Supreme Court's decision as a "No. 10 earthquake." Professor Frank O. Bowman, III, one of the most astute and informed commentators on federal sentencing, called *Blakely* a train wreck. Ultimately, I am not sure that any metaphor can do justice to the *Blakely* decision, because, as I stated in a commentary soon after the decision, *Blakely* may be the most consequential and important criminal justice decision not just in recent terms, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court.

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Stevens himself seems ready to reconsider various aspects of *Williams* and its approval of lax procedures within a discretionary sentencing system. But it would seem that in *Booker* he did not have five votes for a broader reconsideration of this jurisprudence. See *Senate, Judges Urge Blakely' Redux, NY L J* at 2 (cited in note 78).


On June 24, 2004, five black-clad figures seized control of the Criminal Justice Express, crashed through warning barriers, flattened the Washington State Sentencing Guidelines, opened the throttle, and sent the train hurtling from the main line down the old rail spur where the Federal Sentencing Guidelines and the sentencing systems of numerous states lay tied helplessly to the tracks. Whereupon, the 2003 Term of Court being concluded, the justices twirled their collective mustachios, sent their robes off to the cleaners, and went on vacation. Two months on, as this Essay goes to press, the rest of us stand staring slack-jawed, some delighted and some aghast, at the disarray and paralysis in the locomotive's wake and the impending carnage at the end of the line.

Id at 218.

The *Booker* aftershock, which effectively gutted a federal guidelines sentencing system twenty years in the making, serves as just the most tangible example of the way that *Blakely* already has and will continue to reshape the modern criminal justice landscape. Because a broad reading of *Blakely* suggests that the Constitution does not permit judges to find any facts that permit or mandate an increased sentence, even though nearly all modern sentencing systems rely heavily on judicial factfinding, the potential ramifications of *Blakely* for modern sentencing reforms, and for the criminal justice system as a whole, cannot be overstated.\footnote{199}{As but one marker of the *Blakely* decision's enormous impact, consider that there were nearly 1500 online decisions discussing or mentioning the ruling only six month after it was handed down. See Douglas A. Berman, *Happy Blakely Half-Birthday!* Sentencing Law and Policy Blog (Dec 24, 2004), available at <http://sentencing.typepad.com/sentencing_law_and_policy/2004/12/happy_emblakely.html> (last visited Feb 2, 2005). These numbers do not reflect the tens of thousands of indictments, plea negotiations, and sentencings *Blakely* may have altered that do not appear in an online opinion.}

Unfortunately, the conceptual uncertainty and confusion that *Blakely* and *Booker* have produced also cannot be overstated. The *Blakely* and *Booker* rulings are the dramatic culmination of a zigzagging jurisprudence over constitutionally-required sentencing procedures that has been conceptually underdeveloped at every point along the way.\footnote{200}{See Part III.} The decisions themselves, with their sweeping dicta, notable doctrinal gaps, and remarkable holdings, are at once majestic and mysterious, stunning and stupefying. By preserving decisions that broadly endorse certain types of judicial factfinding at sentencing, such as *Williams*, *McMillan*, *Almendarez-Torres*, and *Harris*, the *Blakely* rule incorporates a dizzying array of uncertain and per-
haps illogical exceptions. By creating an advisory federal sentencing guidelines system, Booker undermines in practice the entire spirit and chief goals of the modern Apprendi line of jurisprudence. Moreover, though Blakely and Booker purport to focus on the reach and meaning of the Sixth Amendment’s right to a jury trial, the rulings encompass—though without any express analysis whatsoever—critical due process concepts relating to notice and burdens of proof. Put simply, the state of sentencing law after Blakely and Booker is, both conceptually and doctrinally, an utter mess.

In my view, however, criticisms of Blakely and Booker are a form of shooting the messenger: the decisions are ultimately just the most obvious symptom of a broader disease, one aspect of the failure to reconceptualize modern sentencing after the demise of the rehabilitative ideal. As detailed in Part II of this Article, the sentencing revolution, which brought law to sentencing, has been both theoretically and procedurally underdeveloped. Though commentators have questioned whether we can “reconceive a good guideline system in light of Blakely,” that very framing of the issue fails to confront the fact that most jurisdictions had not initially conceived a good guideline system before Blakely.

201 See Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum L Rev 1082, 1086-1101 (2005) (discussing “the convolutions and perversities of the case law” in this arena). Through its recent decision in Shepard v United States, 161 L Ed 2d 205 (2005), the Supreme Court sowed further confusion and uncertainty regarding the Almendarez-Torres “prior conviction” exception to the Apprendi rule. In a concurrence in Shepard, Justice Thomas, who in 1998 provided the key fifth vote for allowing judicial factfinding of prior convictions in Almendarez-Torres, contended that the Almendarez-Torres “prior conviction” exception “has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.” Id at 219 (Thomas concurring). But the four other Justices in the Shepard majority—the Almendarez-Torres dissenters, no less—refused to overrule Almendarez-Torres, although they did hint that they might do so in a future case. Id at 217 n 5.


In its *Standards for Criminal Justice*, the American Bar Association insightfully asserts that "without reasonably clear identification of goals and purposes, the administration of criminal justice will be inconsistent, incoherent, and ineffectual."\(^{206}\) But after the sentencing revolution repudiated rehabilitation as the dominant goal of sentencing, most criminal justice systems now operate without a reasonably clear identification of sentencing goals and purposes.\(^ {207}\) And not only have jurisdictions created sentencing laws without effectively defining or articulating a clear underlying theory, they also have instituted these laws without reconsidering or updating sentencing procedures. We are long overdue to reconceptualize the entire project of modern sentencing reform because the sentencing revolution rejected the old (offender-oriented) rehabilitative theory, retained its lax administrative procedures for the application of a new (offense-oriented) sentencing structure, and, along the way, policymakers, courts, and academics collectively have failed to address conceptually the (often troubling) sentencing policy and practice realities that have emerged.

Whatever else one thinks about the outcome of *Blakely* and *Booker*, the decisions merit praise for engendering 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.\(^{208}\) Moreover, as highlighted throughout this Article, from a conceptual perspective, such a dialogue is long overdue because the theories, structure, and procedures for modern sentence decisionmaking have not been seriously rethought following the rejection of a now seemingly antiquated rehabilitative sentencing philosophy.


\(^{207}\) See Part II.

Though this tale may seem dark and dire, there is a silver lining: seeking to understand and define the core conceptual values of Blakely provides not only a needed impetus, but also a helpful framework, for broadly reconceptualizing modern sentencing reforms. Not surprisingly, the Blakely decision has generated impassioned judicial and academic criticisms because it seems to announce a destructive rule in search of a sound principle.\(^{209}\) 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 sentencing reforms—without stating a clear principle to justify the disruption it has caused. And the schizophrenic Booker decision, by simultaneously extending and undermining jury-trial rights in the federal sentencing system, necessarily impedes an effort to mine Blakely and the Court’s recent jurisprudence for conceptually-comprehensible principles to guide modern sentencing reforms.

Nevertheless, I believe there are important conceptual principles at work in Blakely (and Booker), even though the Supreme Court has been woefully ineffective in articulating and defending these principles (and their proper limits). Moreover, as part of an effort to reconceptualize modern sentencing, I believe policymakers, courts, and academics can and should draw from the many “on-the-ground” developments that the sentencing revolution has brought in legislatures, sentencing commissions, and courtrooms for three decades. There is a stunning and rich array of fledgling and partially-developed concepts in state and federal sentencing laws and guidelines just waiting to be appreciated and analyzed. Though existing in varied forms with varied attributes, the raw material for effectively reconceptualizing sentencing for modern times already is burgeoning in the diverse and dynamic sentencing reform developments of the sentencing revolution. To date, however, policymakers, courts, and academics largely have failed to fully appreciate and effectively analyze the revolutionary developments in the field of sentencing over the last thirty years.

In the concluding subsections below, I seek to identify some conceptual principles that might be mined from Blakely and Booker and from recent federal and state sentencing reforms. Through this very brief effort to draw conceptual principles from modern sentencing developments, I do not mean to suggest I

\(^{209}\) See Blakely, 124 S Ct at 2544–50 (O'Connor dissenting); id at 2551–62 (Breyer dissenting); Bowman, 17 Fed Sent Rptr 1 (cited in note 204).
have found the only or the key foundational concepts for modern sentencing reforms; rather my modest goal here is to highlight that thoughtful examination of Blakely and Booker and thirty years of "on-the-ground" reforms may help chart a path for the sound reconceptualizing of modern sentencing.

A. Reconceptualizing Sentencing Theory

Though the Apprendi-Blakely line of cases is formally about sentencing procedures, the concepts and consequences of these cases reflect, at least indirectly, a revised understanding of sentencing theory after the demise of the rehabilitative ideal. Though the Apprendi-Blakely line never explores or even examines the express or implicit theories driving modern sentencing reform, these cases clearly are the product of efforts by legislators and sentencing commissions to pursue greater uniformity at sentencing through statutory and guidelines reforms. Indeed, one might (over) simplify the dynamic and intricate story of modern sentencing reform as reflecting a shift from (excessive) devotion to the "rehabilitative ideal" to (excessive) devotion to a "uniformity ideal."

But just as the old sentencing world's commitment to the rehabilitative ideal proved both unrealistic and ineffective, so too have we learned that the new sentencing world's commitment to a "uniformity ideal" has proven unrealistic and ineffective. First, as Professor Kevin Cole and others have noted, any discussion of disparity and uniformity is fundamentally vacuous when not grounded in a particular substantive theory of punishment. Moreover, and perhaps more importantly, even if we are able to develop a deep substantive conception of sentencing uniformity,

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210 Justice Breyer's opinion for the remedial-majority in Booker perhaps most clearly reflects the impact of the modern pursuit of sentencing uniformity: to address Blakely problems in the federal sentencing system, Justice Breyer crafts a remarkable remedy for the Court that makes the federal guidelines advisory, purportedly in service to Congress's goals of achieving greater sentencing uniformity through its enactment of the Sentencing Reform Act of 1984. See Booker, 125 S Ct at 759. Consider Michael M. O'Hear, The Myth of Uniformity, 17 Fed Sent Rptr 249 (2005) (criticizing statements by Justice Breyer in Booker concerning the pursuit of sentencing uniformity); Hoffman, Booker, Pragmatism and the Moral Jury (cited in note 202) (criticizing the Booker remedy).

211 Kevin Cole, The Empty Idea of Sentencing Disparity, 91 Nw U L Rev 1336, 1336-41 (1997). See also Rappaport, 6 Buff Crim L Rev at 1069-70 (cited in note 60) (explaining that "judgments about unwarranted disparity rest on a judgment about which offenders are similarly situated, which in turn requires some assumption about the moral purpose of punishment"); Miller, 54 Emory L J at 275 (cited in note 61) (highlighting that "for a system to reduce unwarranted disparity there must be some theory of what types of variation are warranted").
experience has proved that uniformity is likely always to be an elusive goal because of the overlapping discretion of the many actors who can impact sentencing outcomes.\textsuperscript{212}

Many critics of modern sentencing reforms astutely have highlighted the various harms of a blind pursuit of sentencing uniformity.\textsuperscript{213} In the words of one set of leading critics of the federal sentencing system, “[u]niform treatment ought to be one objective of sentencing, to be sure, but not the sole or overriding objective.”\textsuperscript{214} Against this backdrop, we might see \textit{Blakely} as shedding new light on long-running debates about efforts to achieve greater uniformity through modern sentencing reforms. The \textit{Blakely} decision might be viewed in part as a statement by the United States Supreme Court that some other values—in this case procedural values such as the jury-trial right and a broad commitment to adversarial justice—need to be balanced with, or perhaps integrated into, our modern quest to achieve sentencing uniformity. Indeed, Justice Scalia’s opinion for the Court in \textit{Blakely} speaks of the “salutary objectives” that “prompted Washington’s adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants,” but explains that the \textit{Blakely} decision is

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  \item[212] See, for example, US Sentencing Commission, \textit{Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform} xii, 81–92 (Nov 2004) (discussing disparities introduced at pre-sentencing stages and explaining that “a variety of evidence developed throughout the guidelines era suggest that the mechanisms and procedures designed to control disparity arising at pre-sentencing stages are not all working as intended and have not been adequate to fully achieve uniformity of sentencing”); Stephen J. Schulhofer and Ilene H. Nagel, \textit{Plea Negotiations Under the Federal Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period}, 91 NW U L REV 1284 (1997) (documenting that guidelines are circumvented in a significant percentage of cases); US Sentencing Commission, \textit{Mandatory Minimum Sentencing in the Federal Criminal Justice System} ii–iii, 61–85 (Aug 1991) (detailing that “lack of uniform application [of mandatory sentencing provisions] creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity”).
  \item[213] See, for example, O’Hear, 17 Fed Sent Rptr at 249 (cited in note 210) (discussing the harms of “exalt[ing] uniformity to the detriment of other important objectives” in a sentencing system); Miller, 54 Emory L J (2005) (cited in note 61); Stith and Cabranes, \textit{Fear of Judging} (cited in note 12).
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about ensuring that those objectives are "implemented in a way that respects the Sixth Amendment."\textsuperscript{215}

Saying that uniformity must be balanced with other sentencing goals of course does not go very far in creating a new set of conceptual principles for modern sentencing reforms. Fortunately, as academics come to recognize the impact of the conceptual vacuum resulting from the demise of the rehabilitative ideal, significant work is underway seeking to forge a new set of punishment theories for modern sentencing reforms.

Specifically, the American Law Institute, through its revision of the sentencing part of the Model Penal Code,\textsuperscript{216} as well as several other scholars and authors,\textsuperscript{217} are starting to embrace and actively promote for modern sentencing systems the hybrid theory of "limiting retributivism." The theory of limiting retributivism, which provides that retributivist notions of desert provide outer limits on permissible punishments and that utilitarian goals can operate within those limits, was first championed by Professor Norval Morris.\textsuperscript{218} A number of insightful observers have suggested that many modern sentencing reforms already reflect, indirectly if not by design, limiting retributivism principles.\textsuperscript{219} It might even be said that the \textit{Apprendi-Blakely} rule, by requiring jury determinations and proof beyond a reasonable doubt when the law defines an upper limit on available punishments and allowing judicial punishment determinations within those limits, reflects a particular procedural commitment to principles embodied by limiting retributivism.

In addition, and also drawing from the path-breaking work of Norval Morris, the sentencing value of parsimony might come to play a much larger role in the modern development and evolu-

\textsuperscript{215} \textit{Blakely}, 124 S Ct at 2540.
\textsuperscript{216} See Reitz, \textit{Model Penal Code} at 4 (cited in note 71) (reporting that the Model Penal Code's revision of its sentencing articles will borrow from Morris's theory of limiting retributivism).
\textsuperscript{217} See, for example, Richard Frase, \textit{Limiting Retributivism}, in Tonry, ed, \textit{The Future of Imprisonment} 83, 112 (cited in note 2) (concluding that Morris's theory of limiting retributivism provides the best starting point for researchers, reformers, and sentencing policymakers to develop a consensus model of punishment); Hofer and Allenbach, 40 Am Crim L Rev at 73–75 (cited in note 61) (arguing that by identifying the philosophy underlying the Guidelines to be a modified version of "just deserts," judges will be able to interpret ambiguous provisions and apply the Guidelines properly).
\textsuperscript{218} Morris, \textit{The Future of Imprisonment} at 60 (cited in note 42) ("No sanction should be imposed greater than that which is 'deserved' for the last crime, or series of crimes for which the offender is being sentenced.").
\textsuperscript{219} See, for example, Reitz, \textit{Model Penal Code} at 4 (cited in note 71); Frase, \textit{Limiting Retributivism} (cited in note 217); Hofer and Allenbach, 40 Am Crim L Rev (cited in note 61).
tion of sentencing policy and practice. The parsimony principle, the roots of which may trace back to the work of Jeremy Bentham,\textsuperscript{220} calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes.\textsuperscript{221} The federal Sentencing Reform Act includes a parsimony provision through its instruction to judges in 18 USC § 3553(a) that “the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of punishment] set forth in [the Sentencing Reform Act],”\textsuperscript{222} and provisions some other modern state sentencing systems might also be said to reflect parsimony principles.\textsuperscript{223} Though the federal parsimony provision received little attention during the first fifteen years of federal guidelines sentencing,\textsuperscript{224} the \textit{Booker} remedy now makes the federal parsimony provision a more central part of the federal sentencing enterprise, and lower courts already are grappling thoughtfully with this important concept in federal sentencing.\textsuperscript{225} It might be said also that the \textit{Apprendi-Blakely} rule, by allowing an increase to available punishments only based on jury determinations and proof beyond a reasonable doubt, also reflects a particular procedural commitment to parsimony principles.

Though a full account of the substantive theories of limiting retributivism and parsimony (and their possible flaws) are beyond the scope of this Article, my goal is simply to spotlight some of the substantive sentencing theories that might be drawn from \textit{Blakely} and \textit{Booker} and thirty years of “on the ground” reforms to inform the project of reconceptualizing modern sentencing. Though limiting retributivism and parsimony may not necessar-

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  \item \textsuperscript{221} See Morris, \textit{The Future of Imprisonment} at 60–62 (cited in note 42) (“The least restrictive—least punitive—sanction necessary to achieve defined social purposes should be chosen.”). See also Sharon Dolovich, \textit{Legitimate Punishment in Liberal Democracy}, 7 Buff Crim L Rev 307 (2004) (discussing the parsimony principle in similar, through slightly different, terms).
  \item \textsuperscript{222} 18 USC § 3553(a). See also \textit{United States v Wilson}, 350 F Supp 2d 910, 922–24 (D Utah 2005) (discussing the Sentencing Reform Act’s parsimony provision).
  \item \textsuperscript{225} See Wilson, 350 F Supp 2d at 922–24 (D Utah 2005) (exploring the meaning and impact of the federal parsimony provision); \textit{United States v Brown}, 356 F Supp 2d 470, 479 (M D Pa 2005) (same).
\end{itemize}
ily be the only or the most appropriate theories to help fill the conceptual vacuum left by the demise of the rehabilitative ideal. All of these modern developments bode well for developing a more solid conceptual foundation for future sentencing reforms.

B. Reconceptualizing Sentencing Procedures

Turning from matters of sentencing theory to matters of sentencing process, we can and should identify fundamental procedural principles at work in the *Apprendi-Blakely* line of cases. As I have developed more fully in another recent article, the *Blakely* principle, and its proper limit, could be better understood and appreciated if the Supreme Court linked its rulings to the constitutional text that it purports to be applying. The jury-trial right at issue in the *Blakely* line of cases actually appears twice in the United States Constitution. Section 2 of Article III provides, “The trial of all crimes, except in cases of impeachment, shall be by jury.” The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” The Constitution, by framing the jury-trial right in terms of “crimes,” which are the basis for a “prosecution” of “the accused,” connotes that this 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 that the state may deem relevant to criminal punishment.

In short, an essential offense/offender distinction should inform the jury-trial right. This offense/offender distinction, in

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228 US Const Art III, § 2.

229 US Const Amend VI.

230 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
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 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 in order to assist punishment determinations. To parrot the language of Justice Scalia’s opinion for the *Blakely* Court, 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.”

Understanding *Blakely* and the jury-trial right through the offense/offender distinction suggests that the Supreme Court’s decision in *Almendarez-Torres* and the “prior conviction” exception to the *Apprendi-Blakely* rule is constitutionally sound. Prior

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231 124 S Ct at 2538–39 (emphasis in original).

232 Moreover, given the *Blakely* ruling’s emphasis on “factfinding”—and also given that questions of fact are traditionally considered the province of a jury, while questions of law are traditionally for judicial determination—we might also identify and draw insight from a fact/law distinction operating at heart of the *Blakely* principle. But just as offense/offender distinctions historically have been swept under the broad rug of judicial discretion, likewise historically there has been precious little development or even consideration of the distinction between questions of fact and questions of law at sentencing.

A fact/law distinction is becoming of great importance at sentencing in the wake of *Blakely*; 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. See, for example, *United States v Trala*, 386 F3d 536, 547 n 15 (3d Cir 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, 1073 (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*).
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. 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 a defendant's alleged current criminal conduct; a judge considering a wide array of facts and issues at sentencing is less likely to be inappropriately biased by evidence of prior convictions.

Beyond its ability to conceptually ground the Supreme Court's recent Sixth Amendment jurisprudence, the offense/offender distinction provides useful guideposts for considering a range of other issues of sentencing policy and practice and can help policymakers and courts develop a more refined approach to substantive and procedural sentencing issues. A reexamination of a range of sentencing issues may be usefully informed by the offense/offender distinction, and the work of legislatures, sentencing commissions, prosecutors, defense attorneys, probation officers, and parole boards all may be furthered by an attentiveness to the offense/offender distinction.

CONCLUSION

The modern revolution of sentencing laws and practices marks one of the most dynamic and important law reform stories in recent American legal history. But, as detailed in this Article, one hallmark of this revolution has been a conceptual shallowness that has negatively impacted the work of all the institutions that have had a hand in the revolution. Placed in proper historical and conceptual context, we can better see that the United States Supreme Court's recent work in Blakely and Booker is just the latest dramatic chapter in a lengthy, dynamic, and conceptually confused story about the modern evolution of sentencing rules and practices.

A chief lesson to be drawn from Blakely and Booker and the dramas that have surrounded these decisions is that policymakers, courts, and academics are long overdue to take up the task of
reconceptualizing modern sentencing. Attentiveness to sentencing concepts such as limiting retributivism, parsimony and the offense/offender distinction perhaps could help begin the overall—and overdue—project of broadly reconceptualizing modern sentencing reforms. But, in the wake of the turmoil and uncertainty produced by *Blakely* and *Booker*, the specifics of the project of reconceptualizing modern sentencing are less important than just an appreciation that the project must begin.

Thus, to conclude, I exhort policymakers, courts, and particularly scholars to start serious work on the task of reconceptualizing sentencing for modern times. In so doing, I suggest that this task can and immediately should advance by mining important but underdeveloped principles from *Blakely* and *Booker*, as well as all the raw conceptual materials to be found in the diverse and dynamic sentencing laws and practices that have emerged in jurisdictions nationwide. The task of reconceptualizing modern sentencing is a massive undertaking, but *Blakely* and *Booker* can be not only critical catalysts, but also great assets, in this project. Efforts to flesh out these decisions' core principles, as well as to find appropriate limits to those principles, should provide an effective running start on reconceptualizing the project and goals of modern sentencing reforms.