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Beyond Blakely and Booker: Pondering Modern Sentencing Process

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SUPREME COURT REVIEW

FOREWORD: BEYOND *BLAKELY* AND *BOOKER*: PONDERING MODERN SENTENCING PROCESS

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The Supreme Court's landmark decision in *Blakely v. Washington*[1] and its federal follow-up *United States v. Booker*[2] are formally about the meaning and reach of the Sixth Amendment's right to a jury trial. But these decisions implicate and reflect, both expressly and implicitly, a much broader array of constitutional provisions and principles, in particular, the Due Process Clause of the Fifth and Fourteenth Amendments and the notice provision of the Sixth Amendment. And the future structure and operation of modern sentencing systems may greatly depend on how courts and others approach the due process provisions and principles which lurk in the unexplored shadows of the Supreme Court's decisions in *Blakely* and *Booker*.

In this foreword, I explain why an important enduring question which emerges from the Supreme Court's recent sentencing jurisprudence concerns whether, when and how procedural issues other than the Sixth Amendment's jury trial right will be addressed after *Blakely* and *Booker*. In Part I, I provide a brief account of modern sentencing reform and its neglect of an array of procedural issues. Part II focuses upon the Supreme Court's past and present jurisprudential struggles with procedural rights at sentencing. Part III concludes by briefly sketching some considerations for courts and other key sentencing actors and institutions as they explore what process is due in modern sentencing systems.

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[1] 124 S. Ct. 2531 (2004).

[2] 125 S. Ct. 738 (2005).

I. THE SENTENCING REVOLUTION: MODERN SENTENCING REFORMS AND THE NEGLECT OF SENTENCING PROCEDURES

A. THE ORIGINS OF THE SENTENCING REFORM MOVEMENT

Beginning in the late nineteenth century and throughout the first three-quarters of the twentieth century, a highly discretionary, rehabilitative "medical" model was the dominant approach to sentencing.[3] Trial judges in both federal and state systems had nearly unfettered discretion to impose on defendants any sentence from within the broad statutory ranges provided for criminal offenses.[4] Such broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender.[5] The rehabilitative ideal was often conceived and discussed in medical terms—with offenders described as "sick" and punishments aspiring to "cure the patient"[6]—and 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 rehabilitative potential.[7] Procedurally,

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[3] *See, e.g.*, J. L. MILLER ET AL., SENTENCING REFORM 1-6 (1981); SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 5-6 (1985). *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3-7 (1981) (discussing the "dominance" and "almost unchallenged sway of the rehabilitative ideal" through the late 1960s).

[4] *See, e.g.*, Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169-70 (1995) ("Subject only to statutory maximums and the occasional minimums, judges had the authority to sentence convicted defendants either to probation (and under what conditions) or to prison (and for what maximum term)."); *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989) (discussing the "wide discretion" given to federal judges in ascribing sentences during this time).

[5] *See, e.g.*, Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (Andrew von Hirsch et al. eds., 1987) (noting that "wide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment"). *See generally* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-22 (1998) (reviewing the early history of federal sentencing and the link between the rehabilitative ideal and discretionary sentencing practices).

[6] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 163 (1967) (describing offenders as "patients"); *see also* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016-18 (1991) (discussing the medical model and its "powerful sway within the criminal justice system").

[7] *See* STITH & CABRANES, *supra* note 5, at 19-21 (describing view of parole officials as experts in assessing an offender's rehabilitation); Nancy Gertner, *What Has* Harris *Wrought*,

sentencing was really a form of administrative decision-making in which sentencing judges and parole officials, aided by complete information about offenders and unfettered discretionary authority, were expected to craft individualized sentences "almost like a doctor or social worker exercising clinical judgment."[8]

But through the 1960s and 1970s, criminal justice researchers and scholars were growing concerned about the unpredictable and disparate sentences highly discretionary sentencing systems could produce. Evidence suggested that broad judicial sentencing discretion was resulting in substantial and undue differences in the lengths and types of sentences meted out to similar defendants,[9] and some studies found that personal factors such as an offender's race, gender and socioeconomic status were impacting sentencing outcomes and accounted for certain disparities.[10] Troubled by the disparity and discrimination resulting from highly discretionary sentencing practices—and fueled by concerns over increasing crime rates and powerful criticisms of the entire rehabilitative model of punishment and corrections[11]—many criminal justice experts proposed reforms in order to bring greater consistency and certainty to the sentencing enterprise.[12]

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15 FED. SENTENCING REP. 83, 83 (2002) (describing vision of "judge as the sentencing expert" in a rehabilitative sentencing system).

[8] United States v. Mueffelman, 327 F. Supp. 2d 79, 83 (D. Mass. 2004).

[9] *See, e.g.*, Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-74 (1977) (reviewing studies and asserting that "the data on unjust sentencing disparity have indeed become quite overwhelming"); Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (detailing studies showing widespread, unwarranted sentencing disparities).

[10] *See* Nagel, *supra* note 9, at 895-97, nn.73-84 (discussing empirical studies documenting sentencing impact of race, gender, socioeconomic class and other status characteristics); William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359-62 (1991) (reviewing studies revealing the impact of racial discrimination at sentencing).

[11] *See* ALLEN, *supra* note 3, at 7-20 (discussing "wide and precipitious decline of penal rehabilitationism" as a foundational theory for the criminal justice system). *See generally* AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

[12] *See, e.g.*, UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT (Nat'l Conference of Comm'rs on Unif. State Laws, 1979) [hereinafter MODEL SENTENCING ACT]; DAVID FOGEL, "... WE ARE THE LIVING PROOF ...": THE JUSTICE MODEL FOR CORRECTIONS (1975); VON HIRSCH, *supra* note 11; PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974) (stressing need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment). *See generally* ALFRED BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 126-42 (1983)

While concerns about sentencing disparities and discrimination were a catalyst for modern sentencing reforms, the fundamental problem with traditional discretionary sentencing systems was the absence of any defined sentencing law. This was Judge Marvin Frankel's central insight and criticism in commentaries that helped fuel the modern sentencing reform movement over thirty years ago.[13] Sentencing disparity, in Frankel's words, was a symptom of the greater disease of "lawlessness in sentencing." Frankel recognized that, at a time of declining faith in the rehabilitative model, "legislatures [had] not done the most rudimentary job of enacting meaningful sentencing 'laws',"[14] and thus sentencing judges (and parole officials) exercised broad discretion and wielded enormous sentencing power "effectively subject to no law at all."[15]

Frankel was concerned about not only the absence of substantive sentencing law, but also the questionable procedures through which sentencing decisions were rendered. In a chapter of his book *Criminal Sentences: Law Without Order* entitled "The Dubious Process," Frankel noted the absence of significant procedural safeguards in discretionary sentencing decision-making,[16] and he suggested that the lack of procedural regularity contributed to "a wild array of sentencing judgments without any semblance of consistency."[17] Frankel expressed particular concern about how information considered at sentencing was assembled and examined. He noted that "presentence investigation represents a sudden and total departure from [a court's usual] fact-gathering procedures," because it provides information to judges that is not "exposed to adversary scrutiny, to rechecking at sources, to cross-examination."[18] Frankel highlighted that, because presentence investigations relied upon *ex parte* reports from prosecutors and findings were typically not disclosed to defendants, courts at sentencing were often making "grave decisions of law upon untested hearsay and rumor."[19] Frankel lamented that, because the contents of

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(describing forces behind early reforms); MILLER ET AL., *supra* note 3, at 6-13 (noting that sentencing reform was "stimulated by perceptions of increasing crime, unwarranted differences in sentences, and ineffective rehabilitation programs").

[13] *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) [hereinafter Frankel, *Lawlessness*]; *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972) [hereinafter FRANKEL, CRIMINAL SENTENCES].

[14] FRANKEL, CRIMINAL SENTENCES, *supra* note 13, at 7.

[15] *Id.* at 3-11; *see also* Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992) (calling prior sentencing "thoroughly lawless").

[16] *See* FRANKEL, CRIMINAL SENTENCES, *supra* note 13, at 26-38.

[17] *Id.* at 7-8.

[18] *Id.* at 27-32.

[19] *Id.* at 28-32.

presentence reports originated "from the prosecutor or the prosecutor's files" and were "passed on with little or no independent scrutiny," sentencing decision-making involved a "process of reaching [a sentencing judgment that was] not reflective or orderly."[20]

Since "lawlessness" was the fundamental problem in discretionary sentencing systems, Frankel urged the development of a "code of penal *law*" which would "prescribe guidelines for the application and assessment" of "the numerous factors affecting the length or severity of sentences."[21] Moreover, Frankel suggested creating a new institution in the form of a special agency—a "Commission on Sentencing"—to help address lawlessness in sentencing.[22] Embracing the spirit and substance of Frankel's ideas, many experts and scholars soon came to propose or endorse some form of sentencing guidelines to govern sentencing determinations,[23] and urged the creation of specialized sentencing commissions to develop the sentencing law called for by the "guidelines model."[24]

These 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 which abolished parole and created presumptive sentencing ranges for various classes of offenses.[25] Minnesota became the first state to turn Frankel's ideas into a full-fledged reality in 1978, when the Minnesota legislature established the Minnesota

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[20] *Id.* at 34, 38.

[21] *Id.* at 103-18; *see also* Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 656 (1993) (statement by Marvin Frankel) (explaining that the "overriding objective" of sentencing guideline reforms "was to subject sentencing to *law*").

[22] FRANKEL, CRIMINAL SENTENCES, *supra* note 13, at 118-24; *see also* Frankel, *Lawlessness*, *supra* note 13, at 50-54.

[23] *See* sources cited *supra* note 12; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988) (explaining that "[a]t the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines"); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988) (noting that the "general consensus . . . among judges, lawyers, criminal justice experts, and scholars, [was] that sentencing guidelines were needed").

[24] *See* MODEL SENTENCING ACT, *supra* note 12, at § 3-110 & cmt.; O'DONNELL ET AL., *supra* note 12, at 73-74; Michael H. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315, 324 (1979).

[25] *See* MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, SENTENCING REFORM IMPACTS 77-85 (1987); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 14-17 (1996) (discussing move to determinate sentencing in various jurisdictions) [hereinafter STRUCTURED SENTENCING].

Sentencing Guidelines Commission to develop comprehensive sentencing guidelines.[26] Washington and Pennsylvania followed suit by creating their own distinctive forms of sentencing commissions and sentencing guidelines in 1981 and 1982, respectively.[27] 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.[28] The federal government soon thereafter joined this sentencing reform movement through the passage of the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop guidelines for federal sentencing.[29] Throughout the next two decades, many more states adopted some form of structured sentencing either though mandatory sentencing statutes or comprehensive guideline schemes.[30]

Though there is considerable variation in the form and impact of structured sentencing reforms, the overall transformation of the sentencing enterprise throughout the United States over the past three decades has been remarkable.[31] The highly-discretionary indeterminate sentencing systems

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[26] *See* 1978 Minn. Laws 723 (enabling statute). The initial version of the Minnesota sentencing guidelines was contained in MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1980). *See generally* DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (Daniel J. Freed ed., 1988) (discussing the operations of Minnesota's Sentencing Guidelines Commission, the state's enactment, and early experiences with sentencing guidelines).

[27] *See* 204 PA. CODE § 303 (1982) (codified at 42 PA. CONS. STAT. ANN. § 9721 (West 1982)); WASH. REV. CODE ANN. § 9.94A.040 (West 1988). *See generally A Summary of the Minnesota, Washington, and Pennsylvania Guidelines*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES app. at 177-88 (Andrew von Hirsch et al. eds., 1987) (reviewing major components of guidelines developed in Minnesota, Washington and Pennsylvania).

[28] *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING REP. 69, 70 (2000) (providing table summarizing development of sentencing guidelines systems).

[29] Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 58, 98 Stat. 1987, 2017-26 (1984).

[30] *See* STRUCTURED SENTENCING, *supra* note 25, at 19-29, tbls. 3-3 to 3-5 (detailing sentencing structures throughout United States as of February 1994); DALE PARENT ET AL., NAT'L INST. OF JUSTICE, MANDATORY SENTENCING 1 (1997) (noting that "[b]y 1994, all 50 States had enacted one or more mandatory sentencing laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders"); Frase, *supra* note 28, at 69-72 (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).

[31] *See* Marc L. Miller, *Sentencing Reform "Reform" Through Sentencing Information Systems*, *in* THE FUTURE OF IMPRISONMENT 121 (Michael Tonry ed., 2004) ("Sentencing has undergone more reform over the past several decades than any other area of criminal justice, and perhaps as much reform as any area of the law."); *see also* Tonry, *supra* note 4, at 169 ("If a time machine were to transport a group of state and federal judges from 1970 to a

that had been dominant for nearly a century have been replaced by an array of sentencing structures that govern and control sentencing decision-making. Put simply, in response to Judge Frankel's call for reforms, jurisdictions brought law—often lots and lots of law—to sentencing.

B. A NEGLECT OF SENTENCING PROCEDURES

The arrival of modern sentencing laws did not come with a new modern set of sentencing procedures. While legislatures and sentencing commissions were revolutionizing the substance of sentencing in an effort to ensure more consistent and rational sentencing outcomes, serious consideration of the procedures of sentencing was essentially overlooked. Legislatures and sentencing commissions have committed much time and energy to enacting laws and developing guidelines to govern substantive sentencing decisions, but they have given scant attention to regulating the processes through which judges obtain and assess the information that serves as the basis for reaching these decisions. Despite creating a significant body of substantive sentencing law, legislatures and commissions in most jurisdictions have left largely unaddressed fundamental issues such as notice to parties, burdens of proof, appropriate fact-finders, 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.[32]

Though the particulars of this story could be recounted in various jurisdictions, the experience and struggles of the federal sentencing system are the most conspicuous and well-documented. The Sentencing Reform Act of 1984,[33] though an elaborate piece of legislation, makes only brief mention of sentencing procedures.[34] The initial Federal Sentencing Guidelines promulgated by the U.S. Sentencing Commission—which

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national conference on sentencing in 1995, most would be astonished by a quarter century's changes.").

[32] *See* Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedures in the Guidelines Era*, 12 FED. SENTENCING REP. 187, 187 (2000) (noting that sentencing reformers largely forgot procedural issues in the development of new sentencing systems); *see also* Douglas A. Berman, *Appreciating* Apprendi*: Developing Sentencing Procedures in the Shadow of the Constitution*, 67 CRIM. L. BULL. 627, 636-40 (2001) (discussing sentencing reformers' emphasis on substance over procedure).

[33] Pub. L. No. 98-473, 98 Stat. 1987 (1984).

[34] *See* THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 6A1.3 (1998) (noting that "[i]n the Sentencing Reform Act, Congress did not provide for specific procedures at sentencing"); *see also* 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) (stating that "[t]he Sentencing Reform Act does not mention procedure").

comprised more than two hundred pages and contained over one hundred multi-section guidelines—were remarkably detailed and sought to comprehensively prescribe the weight to be given at sentencing to a host of offense and offender factors.[35] Yet, even though the Sentencing Commission itself recognized that "[r]eliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing,"[36] less than three pages of the initial Guidelines expressly addressed the sentencing process.[37]

Through a few terse policy statements in these pages, the Sentencing Commission did call for the preparation and timely disclosure of pre-sentence reports,[38] and urged judges to give parties "an adequate opportunity" to dispute any factor important to the sentencing determination and rely only on information with "sufficient indicia of reliability to support its probable accuracy."[39] But, in sharp contrast to the other portions of the Guidelines, which intricately delineated how various substantive matters should be incorporated into the Guidelines 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 fact-finders, or applicable evidentiary rules and hearing procedures. As Professor Kate Stith and Judge Jose Cabranes aptly recognized, "[b]eyond making the important but obvious point that fact-finding at sentencing should be reliable, the Commission's Policy Statements prescribe few procedural safeguards to ensure that this objective is achieved."[40] And lest the U.S. Sentencing Commission be unduly singled out, it should be noted that the vague exhortations concerning sentencing procedures in the Federal Sentencing Guidelines generally surpass the amount of attention given to procedural matters in many state sentencing reforms.[41]

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[35] *See generally* U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS (1987) [hereinafter 1987 U.S.S.G.].

[36] *Id.* § 6.1 (Introductory Commentary).

[37] *See id.* §§ 6.A.1-6.A.3.

[38] *See id.* §§ 6A1.1, 6A1.2.

[39] *Id.* § 6A1.3.

[40] STITH & CABRANES, *supra* note 5, at 154; *accord* Herman, *supra* note 34, at 315 (noting that "the Commission contented itself with simply commenting that more formal proceedings should be required at sentencing under the guidelines and leaving it to the courts to implement this suggestion"); *see also* AM. COLL. OF TRIAL LAWYERS, FED. RULES OF EVIDENCE COMM., THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS, 177 F.R.D. 513, 514 (1998) (noting that "neither Congress (in the SRA) nor the Commission (in the Guidelines) addressed in any detail critical evidentiary issues such as burdens of proof, admissibility of evidence, confrontation rights and hearing procedures").

[41] *See, e.g.*, People v. Williams, 599 N.E.2d 913, 921 (Ill. 1992) (noting absence of language in Illinois sentencing statute specifying burden of proof); Commonwealth v. Hartz,

Real limitations of time and perceived limitations of authority may in part explain the failure of federal and state sentencing reformers to give serious attention to matters of procedure. Given the challenge of developing legal rules for the previously law-free arena of sentencing,[42] and with disparities in substantive sentencing outcomes a principal concern, legislatures and sentencing commissions understandably focused their attention first and foremost on reforming (or, in most cases, creating) substantive sentencing laws. Moreover, the U.S. Sentencing Commission suggested in various ways that it believed other institutions—in particular, the judiciary—were in the best position and possessed ultimate authority to prescribe procedural rules for sentencing.[43] Nevertheless, whatever reasons or excuses might be given for the failure to attend to sentencing procedures, the fact remained that the applicable procedures used at sentencing—a key concern expressed by Judge Frankel in his impassioned call for sentencing reforms—were not seriously addressed or carefully considered in most modern sentencing laws and guidelines.

II. THE SUPREME COURT'S PROCEDURAL SENTENCING JURISPRUDENCE

A. THE OLD WORLD ORDER

It is possible that modern sentencing reforms neglected procedural considerations because the U.S. Supreme Court's constitutional sentencing jurisprudence readily permitted such neglect. Through a series of cases extending over fifty years and through the start of the sentencing reform era, the Supreme Court expressed little or no interest in interpreting various constitutional provisions to regulate the procedures which governed (non-

532 A.2d 1139, 1157-58 (Pa. Super. Ct. 1987) (noting failure of Pennsylvania guidelines to provide specified burden of proof for sentencing enhancement).

[42] *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 64-69 (1996) (detailing the host of significant substantive issues and policy choices that face sentencing commissions when drafting guidelines); *see also* Breyer, *supra* note 23, at 2-31 (stressing the unique challenges facing the U.S. Sentencing Commission and the range of substantive compromises reached in developing the Federal Sentencing Guidelines).

[43] *See* 1987 U.S.S.G., *supra* note 35, at § 6A1.3 cmt. (indicating that it is up to a sentencing court to "determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law"); *see also* STITH & CABRANES, *supra* note 5, at 154 (noting that "[i]t is arguable that the Commission is not authorized by statute to address issues of procedural fairness under the Guidelines in any definitive way"); Herman, *supra* note 34, at 314-15 (indicating that there "is some doubt as to whether the Commission had authority to develop procedures to accompany the guidelines" and suggesting that the Commission did not create procedural rules "because of doubts about its own powers or optimism about the ability of the courts to develop procedures appropriate to the new mode of sentencing").

capital) sentencing.

The modern line of precedents marking the Supreme Court's hands-off jurisprudence concerning sentencing procedures starts in 1949 with the critical decision in *Williams v. New York*.[44] The trial judge in *Williams* sentenced to death a defendant convicted of first-degree murder, despite a jury recommendation of life imprisonment. The judge relied on information of illegal and unsavory activities by the defendant which was not presented at trial but appeared in a pre-sentence report.[45] In rejecting a claim that Williams had a right to confront and cross-examine the witnesses against him, the Supreme Court stressed that "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence" and spoke approvingly of the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."[46] Thus, continued the Court, the Due Process Clause should not be read to require courts to "abandon their age-old practice of seeking information from out-of-court sources," because "[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies" which rely upon judges having "the fullest information possible concerning the defendant's life and characteristics."[47] In short, 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."[48]

In other words, for the *Williams* Court the rehabilitative ideal not only justified entrusting judges with enormous sentencing discretion, it also called for sentencing judges (and presumably also parole officials) to be freed from any procedural rules which might work to limit the sound exercise of their discretion. Significantly, the *Williams* Court suggested that the rehabilitative ideal and its distinctive procedures had 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."[49] Rather, explained the Court, "a

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[44] 337 U.S. 241 (1949).

[45] *See id.* at 242-44. For a full discussion of the various "facts" relied upon by the sentencing judge in *Williams*, see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 528-30 (1993).

[46] *Williams*, 337 U.S. at 247-48.

[47] *Id.* at 247, 250-51.

[48] *Id.* at 247.

[49] *Id.* at 249.

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."[50] And, claimed the *Williams* Court, "[t]his belief to a large extent has been justified."[51]

Notably, *Williams* was decided before the Supreme Court began "revolutionizing" criminal procedure by expansively interpreting the Constitution to provide criminal defendants with an array of procedural rights.[52] 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 was to be treated differently—and could be far less procedurally regulated—than a traditional criminal trial.[53] Though the Supreme Court did ensure that defendants had a right to an attorney at sentencing hearings and suggested defendants also had a right to discovery of evidence that could impact a sentence,[54] the Court did not formally extend other Bill of Rights protections to the sentencing process.

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[50] *Id.*

[51] *Id.*

[52] The application and extension of considerable procedural rights to criminal defendants has been called the "criminal procedure revolution" and is often associated with the work of the Warren Court in the 1960s. *See, e.g.*, BUREAU OF NAT'L AFFAIRS, THE CRIMINAL LAW REVOLUTION 1960-68 (1968); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995). However, as commentators have discussed, many of the foundational decisions of this era were extended, or even first developed, by the Burger Court through the 1970s. *See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

[53] *See, e.g.*, United States v. Grayson, 438 U.S. 41, 45-54 (1978) (discussing *Williams* favorably while noting the few limits on the gathering of information for sentencing and a judge's broad discretion to consider a wide range of information in arriving at an appropriate sentence); Chaffin v. Stynchcombe, 412 U.S. 17, 21-25 (1973) (reviewing *Williams* while stressing "the need for flexibility and discretion in the sentencing process"); North Carolina v. Pearce, 395 U.S. 711, 723 (1969) (favorably citing *Williams* while stressing "the freedom of a sentencing judge" to consider a defendant's post-conviction conduct in imposing a sentence); *see also id.* at 742 (Black, J., concurring in part and dissenting in part) (noting that the Supreme Court has "continued to reaffirm" *Williams* and its "reasons for refusing to subject the sentencing process to any [significant procedural] limitations, which might hamstring modern penological reforms").

[54] *See* Mempa v. Rhay, 389 U.S. 128 (1967) (addressing the right to counsel); Brady v. Maryland, 373 U.S. 83 (1963) (discussing the right to discovery of evidence helpful to the defense).

In 1970, the Supreme Court established, through *In re Winship*,[55] that the Fifth Amendment's Due Process Clause incorporated "beyond a reasonable doubt" as the standard of proof applicable in criminal cases, and stressed that this heightened proof standard operated as a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[56] But, in many cases addressing sentencing matters decided not long after *Winship*, the Court did not suggest this standard of proof was to be applicable at sentencing. Rather, the Supreme Court repeatedly stated, in a series of cases that touched on various sentencing issues, 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."[57]

The U.S. Supreme Court next confronted a direct constitutional claim concerning sentencing procedures in *McMillan v. Pennsylvania*.[58] Litigated during the early development of structured sentencing reforms, *McMillan* involved a constitutional challenge to a Pennsylvania statute passed in 1982, 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.[59] 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, Pennsylvania's Mandatory Minimum Sentencing Act was obviously not enacted in service to the rehabilitative ideal, and its focus was exclusively on the offense and not 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."[60] Thus, the

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[55] 397 U.S. 358 (1970).

[56] *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

[57] *Grayson*, 438 U.S. at 50 (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)); *see also* Roberts v. United States, 445 U.S. 552, 556 (1980) (reaffirming as a "fundamental sentencing principle" that "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") (quoting *Grayson* and *Tucker*).

[58] 477 U.S. 79 (1986).

[59] *See id.* at 81-82 n.1 (quoting provisions and describing operation of Pennsylvania's Mandatory Minimum Sentencing Act).

[60] Commonwealth v. Wright, 494 A.2d 354, 362 (Pa. 1985).

Supreme Court in *McMillan* was 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 suggested nearly forty years earlier in *Williams*, that limiting defendants' procedural rights in this setting was about providing sentencing judges with "the fullest information possible concerning the defendant's life and characteristics" in order to help defendants "be less severely punished and restored sooner to complete freedom and useful citizenship."[61]

Nevertheless, the Supreme Court rejected McMillan's challenges to Pennsylvania's Mandatory Minimum Sentencing Act in an opinion that largely echoed *Williams* without any revised justifications. The *McMillan* Court stressed 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.'"[62] The Court rejected the claim that visible possession of a firearm must be treated procedurally as an element by stating simply 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."[63] The Court even rebuffed the suggestion that the Due Process Clause at least required that visible firearm possession be proved by clear and convincing evidence; it cited *Williams* for the proposition that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," and suggested that it would be inappropriate to be "constitutionalizing burdens of proof at sentencing."[64] Coining the term "sentencing factor," the *McMillan* Court simply asserted, without any

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[61] Williams v. New York, 337 U.S. 241, 249 (1949).

[62] *McMillan*, 477 U.S. at 85 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)). The *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, *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977), in which the Supreme Court struggled to define limits for how states could structure affirmative defenses as applied to criminal laws. According to the *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." 477 U.S. at 84. *See generally* Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future*, 38 AM. CRIM. L. REV. 255, 269-72 (2001) (also discussing holdings and the import of *Mullaney* and *Patterson* in the Supreme Court's sentencing jurisprudence); Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. (forthcoming) (discussing holdings and the import of *Mullaney* and *Patterson* in the Supreme Court's sentencing jurisprudence).

[63] *McMillan*, 477 U.S. at 88.

[64] *Id.* at 91-92.

conceptual discussion of sentencing theories or procedures, that Pennsylvania's decision to dictate the "precise weight" of possession of a firearm at sentencing "has not transformed against its will a sentencing factor into an 'element' of some hypothetical 'offense.'"[65] The *McMillan* Court stressed repeatedly the importance of allowing state legislatures to devise approaches to sentencing without significant constitutional limitations; it asserted that "we 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 a "tolerance for a spectrum of state procedures dealing with a common problem of law enforcement."[66]

Notably, Justice Stevens delivered a passionate dissent in *McMillan* which did engage conceptually with the new realities of Pennsylvania's sentencing law. Stressing the significance of the fact that Pennsylvania's statute "automatically mandates a punishment" for visible firearm possession, Justice Stevens 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."[67] 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."[68] Consequently, according to Justice Stevens, because the mandatory minimum statute "describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, . . . the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies."[69]

Rendered in 1986 when many legislatures and sentencing commissions were starting to explore and develop sentencing reforms, *McMillan* could

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[65] *Id.* at 89-90.

[66] *Id.* at 84-91 (quoting Spencer v. Texas, 385 U.S. 554, 566 (1967)). In addition to the obvious impact of federalism concerns, I am inclined to speculate that the decision in *McMillan* may also reflect the Supreme Court's frustration and fatigue by the mid 1980s with its own considerable efforts to constitutionally regulate state *capital* sentencing procedures. *See generally* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (noting that in the early 1980s the Supreme Court had diminished interest in regulating capital punishment procedures).

[67] *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting).

[68] *Id.* Writing in a separate dissent joined by Justices Brennan and Marshall, Justice Blackmun expressly agreed with this statement in Justice Stevens's dissent. *See id.* at 94 (Blackmun, J., dissenting).

[69] *Id.* at 96 (Stevens, J., dissenting).

have had a profound impact, both conceptually and practically, on modern sentencing laws if Justice Stevens's views had carried the day or if the Court's opinion had suggested that the Constitution imposed some significant requirements on the sentencing process. But, with the *McMillan* Court stressing the importance of "tolerance for a spectrum of state procedures" at sentencing,[70] legislatures and commissions could, and typically did, neglect procedural matters when reforming the substance of sentencing laws.

In the wake of *McMillan*, as progressively more jurisdictions adopted forms of structured sentencing through guideline systems or mandatory sentencing statutes, two significant trends emerged. State courts and lower federal courts, citing *McMillan* and *Williams* as controlling authority, regularly upheld against a range of constitutional challenges various structured sentencing systems that imposed punishment without affording defendants at sentencing the traditional procedural protections of a criminal trial.[71] But, at the same time, individual judges and academic commentators, citing the unfairness to defendants of being subject to fact-driven guideline sentencing determinations without significant procedural rights, regularly lamented the continued adherence to *McMillan* and *Williams* as controlling authority.[72]

The Supreme Court before long was itself swept up in these trends, primarily because the structure and operation of the federal sentencing guidelines served to heighten the importance of sentencing fact-finding while highlighting the absence of procedural safeguards at sentencing.

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[70] *Id.* at 90.

[71] *See, e.g.*, United States v. Mergerson, 995 F.2d 1285, 1291-93 (5th Cir. 1993); United States v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991) (en banc); People v. Vega, 893 P.2d 107, 116 (Colo. 1995); State v. Rettinghaus, 591 N.W.2d 15 (Iowa 1999); Farris v. McKune, 911 P.2d 177 (Kan. 1996); People v. Eason, 458 N.W.2d 17, 21-24 (Mich. 1990); State v. Christie, 506 N.W.2d 293 (Minn. 1993); State v. Krantz, 788 P.2d 298, 303 (Mont. 1990);.

[72] *See, e.g.*, United States v. Concepcion, 983 F.2d 369, 389, 396 (2d Cir. 1992) (Newman, C.J., concurring); United States v. Silverman, 976 F.2d 1502, 1519, 1527-34 (6th Cir. 1992) (Merritt, C.J. & Martin, J., dissenting); United States v. Galloway, 976 F.2d 414, 436 (8th Cir. 1992) (Bright, J., dissenting, joined by Arnold, C.J., Lay, & McMillian, JJ.); Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147 (1993); Herman, *supra* note 34; Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057 (1999); Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249 (1998); Reitz, *supra* note 45; Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992).

After upholding the constitutionality of the Sentencing Reform Act against structural complaints in *Mistretta v. United States*,[73] 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*,[74] the sheer number and significance of the procedural issues that impacted federal guideline sentencing meant that the Court could not avoid weighing in on these matters for long. And, 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.[75]

This line of constitutional sentencing jurisprudence 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*.[76] In *Watts*, the Court constitutionally blessed the federal guidelines provisions which 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. The *Watts* Court parroted the statement in *Williams* that it is essential to the selection of an appropriate sentence for a judge to have "possession of the fullest information possible concerning the defendant's life and

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[73] 488 U.S. 361 (1989).

[74] *See generally* Kinder v. United States, 504 U.S. 946, 947-50 (1992) (White, J., dissenting from denial of certiorari).

[75] In *Wade v. United States*, 504 U.S. 181 (1992), 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, *id.* at 186-87; in *United States v. Dunnigan*, 507 U.S. 87 (1993), the Court upheld a sentence enhancement based on a judicial finding of perjury at trial, and it stated that the fact the "enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds . . . for its invalidation," *id.* at 98; in *Nichols v. United States*, 511 U.S. 738 (1994), the Court cited both *Williams* and *McMillan* and stressed that the "traditional understanding of the sentencing process [is] . . . less exacting than the process of establishing guilt" to hold that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction when sentencing him for a subsequent offense, *id.* at 747; in *Witte v. United States*, 515 U.S. 389 (1995), the Court again placed heavy reliance on *Williams* and *McMillan* and the fact that sentencing courts have traditionally 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, *id.* at 399-401.

[76] 519 U.S. 148 (1997).

characteristics." But the Court did not discuss or even acknowledge that the *Williams* Court made this statement in service to the rehabilitative model of sentencing, nor that the federal guideline at issue concerned only offense conduct and not broad aspects of the offender's "life and characteristics."[77] The *Watts* Court, again without any conceptual discussion, 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."[78] Thus, continuing to act as if the sentencing revolution never happened (or at least as if the revolution had absolutely no significance to a constitutional inquiry about required sentencing procedures), 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."[79]

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.[80] 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, engaged with the underlying conceptual realities of the sentencing revolution that produced the federal sentencing guidelines. 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."[81] He complained about the 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."[82] And Justice Stevens closed his *Watts* dissent by stressing "longstanding procedural requirements enshrined in our constitutional jurisprudence" and by asserting that the

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[77] *Id.* at 151-52.

[78] *Id.* at 152, 155.

[79] *Id.* at 155.

[80] *See, e.g., id.* at 170-71 (Kennedy, J., dissenting); Nichols v. United States, 511 U.S. 738, 754-63 (1994) (Blackmun, J., dissenting).

[81] *Watts*, 519 U.S. at 159 (Stevens, J., dissenting).

[82] *Id.* at 165-66 (Stevens, J., dissenting).

"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."[83]

B. AN OVERDUE, BUT STILL SURPRISING, NEW WORLD ORDER

A quarter-century after Judge Frankel's call for sentencing reform, the sentencing revolution seemed to have achieved a measure of relative stability, if not conceptual soundness. The sentencing reform movement had brought an enormous amount of substantive law to a field that Judge Frankel rightly accused of being "lawless,"[84] but neither the Supreme Court's sentencing jurisprudence nor the work of legislatures and sentencing commission seemed particularly concerned about updating the procedures through which this sentencing law was administered. Defendants in specific cases and commentators in the academic literature often contended that the philosophical basis and discretionary structure for lax sentencing procedures had been eliminated by modern sentencing reforms. But the Supreme Court and other key sentencing actors and institutions seemed content to continue to rely upon an old world procedural model even for modern sentencing decision-making.

But then, all of a sudden, almost as if a mysterious *fin-de-siecle* doctrinal light-switch was flipped, the Supreme Court's sentencing jurisprudence took a remarkable turn and the Court started to express considerable concerns with traditionally lax sentencing procedures. This new jurisprudence first surfaced with *Almendarez-Torres v. United States*[85] and *Jones v. United States*,[86] then shook the world of sentencing with the "watershed" Supreme Court ruling in *Apprendi v. New Jersey*,[87] and it has recently culminated with the "earthquake" decision in *Blakely* and the federal aftershock of *Booker*.[88]

In other recent articles, I have detailed some of the conceptual ins-and-

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[83] *Id.* at 169-70 (Stevens, J., dissenting).

[84] *See* sources cited *supra* note 13.

[85] 523 U.S. 224 (1998).

[86] 526 U.S. 227 (1999).

[87] 530 U.S. 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. *See Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting) (asserting that the *Apprendi* decision "will surely be remembered as a watershed change in constitutional law").

[88] Justice Sandra Day O'Connor and others have invoked an earthquake metaphor to describe the impact of the *Blakely* decision. *See Senate, Judges Urge 'Blakely' Redux*, 231 N.Y.L.J. 2, 2 (2004) (quoting Justice O'Connor's earthquake comments at the Ninth Circuit's annual conference in July); *see also* Douglas A. Berman, *The* Blakely *Earthquake and Its Aftershocks*, 16 FED. SENTENCING REP. 307 (2004).

outs of this modern sentencing jurisprudence and suggested that this new jurisprudence can and should be viewed as the inevitable product of the pressures created by the intersection of the Supreme Court's own revolution of criminal procedures and sentencing reformers' revolution of the substance of sentencing decision-making.[89] In short form, the essence of this story is that structured sentencing reforms—particularly because they have tended to make sentencing determinations more offense-oriented and fact-driven—have transformed sentencing decision-making into a more trial-like enterprise.[90] Because of this reality—combined particularly with the fact that, because of the large percentage of cases are resolved through guilty pleas, sentencing typically serves as the only trial-like procedure for most defendants[91]—it was likely only a matter of time before the Supreme Court imposed some form of restriction on how much of the day-to-day dynamics of criminal justice administration could be relegated to the largely procedure-free world of sentencing.[92]

In *Almendarez-Torres v. United States*[93] and *Jones v. United States*,[94] a significant and consequential number of Supreme Court Justices started to express serious concerns with judge-centered administrative sentencing procedures. Though the Supreme Court in *Almendarez-Torres* ultimately concluded that evidence of a defendant's prior convictions could be used to

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[89] *See* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL FORUM 1 (forthcoming 2005) [hereinafter Berman, *Reconceptualizing Sentencing*]; Douglas A. Berman, *The Roots and Realities of* Blakely, CRIM. JUST., Winter 2005, at 9; Berman, *supra* note 32.

[90] *See generally* Beale, *supra* note 72; Herman, *supra* note 34; Hoffmann, *supra* note 62, at 267-68; Young, *supra* note 72.

[91] *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1149-50 (2001) (stressing significance of prevalence of guilty pleas in the criminal justice system); *see also* 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).

[92] Professor Hoffmann made a similar observation in his article on *Apprendi*, in which he states:

> Th[e] 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 *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.

Hoffmann, *supra* note 62, at 267-68.

[93] 523 U.S. 224 (1998).

[94] 526 U.S. 227 (1999).

increase a sentence without being subject to the procedural rules for elements of crimes at trial, the 5-4 division of the Court, as well as Justice Scalia's strong dissent asserting that the Court's holding raised serious constitutional problems, was a harbinger of decisions to come.[95] The following term, the Court in *Jones* suggested that *Almendarez-Torres* announced a prior conviction exception to a rule that facts establishing higher penalties must be treated procedurally as offense elements.[96]

Then, in 2000, the same five Justices in the *Jones* majority voted in *Apprendi v. New Jersey*[97] to convert the *Jones* Court's suggestion into what Justice O'Connor in dissent called a "watershed" ruling.[98] 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 sentencing enhancement 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."[99]

Despite the constitutional rumblings in *Almendarez-Torres* and *Jones*, much of the criminal justice world was taken by surprise by the Supreme Court's ruling in *Apprendi*. Given the constitutional discourse in *Almendarez-Torres* and *Jones*, however, it was not truly astonishing that a majority of Justices in *Apprendi*, perhaps impacted by cases litigated throughout the 1990s which highlighted the consequences of reliance on judge-centered administrative sentencing procedures after the sentencing revolution had turned sentencing decision-making into more of a trial-like enterprise, were troubled by provisions authorizing judges to greatly enhance criminal sentences based on preponderance fact-finding. Still, *Apprendi* was a shocking decision, in part because the Court's holding and dicta, especially if construed broadly, could cast constitutional doubt on many sentencing statutes and guidelines enacted during the modern sentencing reform movement. Most structured and guideline sentencing

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[95] Justices Stevens, Souter and Ginsburg joined Justice Scalia's dissent in *Almendarez-Torres*. 523 U.S. at 248 (Scalia, Stevens, Souter, & Ginsburg, JJ., dissenting).

[96] 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* 526 U.S. at 232-39.

[97] 530 U.S. 466 (2000).

[98] *See id.* at 524 (O'Connor, J, dissenting) (asserting that the *Apprendi* decision "will surely be remembered as a watershed change in constitutional law").

[99] *Id.* at 490.

reforms provided a significant role for judicial fact-finding at sentencing, and the federal guidelines built such fact-finding into the foundation of its sentencing scheme.[100] *Apprendi*'s holding and logic suggested that all modern sentencing decision-making which relied on judicial fact-finding, despite having been constitutionally blessed for decades, was now constitutionally problematic.

And yet, though *Apprendi* generated much litigation and many appellate decisions trying to interpret and give effect to its ruling,[101] the decision initially proved to have a smaller impact on modern sentencing reforms than many expected or even hoped. 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,[102] and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.[103]

The Supreme Court itself contributed significantly to restricting the reach of *Apprendi* through its decision in *United States v. Harris*.[104] In *Harris*, the Court examined anew the issue it had previously addressed in *McMillan*, namely what procedures were constitutionally required when a statute specified a mandatory minimum sentencing term. The Supreme Court in *Harris* ultimately reaffirmed *McMillan* and held, in a fractured ruling, that facts which mandated minimum penalties did not require submission to a jury or proof beyond a reasonable doubt.[105] Though *Harris*

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[100] *See* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 496 (1990) (describing the "relevant conduct" provisions, which call for judicial fact-finding of offense-related conduct, "the cornerstone of the federal sentencing guideline system").

[101] *See, e.g.*, Hoffmann, *supra* note 62, at 256 (noting that there were more than 400 reported *Apprendi* decisions within a year of the decision); Nancy J. King & Susan R. Klein, *Apres* Apprendi, 12 FED. SENTENCING REP. 331 (2000) (detailing some of the immediate post-*Apprendi* lower court litigation).

[102] *See generally* Stephanos Bibas, Apprendi *in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).

[103] 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. Cullen, 60 P.3d 933 (Kan. 2003); State v. Gould, 23 P.3d 801, 814 (Kan. 2001). The Kansas legislature responded by creating procedures for using sentencing juries to find necessary facts in certain cases. *See* KAN. STAT. ANN. § 21-4718 (Supp. 2A 2003).

[104] 536 U.S. 545 (2002).

[105] *Id.* On the same day *Harris* was decided, the Court also expanded *Apprendi*'s reach in *Ring v. Arizona*, 536 U.S. 584 (2002), by holding that facts that establish eligibility for the death penalty require submission to a jury and proof beyond a reasonable doubt. However, because most jurisdictions already relied on jury sentencing in capital cases, the Court's decision in *Harris* to limit the procedural requirements for imposition of minimum sentences

is deemed by many to be conceptually hazy in light of *Apprendi*,[106] the practical consequences of *Harris* appeared mighty clear at the time. The holding in *Harris* suggested that, despite an *Apprendi* scare, the statutory and guidelines sentencing provisions developed during the sentencing revolution could largely 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 which raise maximum sentences, and not those which establish minimums, must be treated procedurally as elements, the Supreme Court seemed to have "caged the potentially ravenous, radical *Apprendi* tiger that threatened to devour modern sentencing law."[107]

But then came the *Blakely* earthquake and the *Booker* aftershock. When certiorari was granted in *Blakely v. Washington*, most observers believed the case was to serve as final confirmation that the *Apprendi* decision would not radically transform modern sentencing practices. After *Harris*, the widely-shared belief was that the sentencing revolution had been spared from further constitutional intrusion, and it was thought that the Supreme Court would use *Blakely* to rule, as had nearly all lower courts, that *Apprendi* had no applicability to judicial fact-finding which only impacted guideline sentencing outcomes *within* otherwise applicable statutory ranges.

But Justice Scalia, writing for the Court and on behalf of the same group of five Justices 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 his guideline sentence based on the judge's factual finding that his kidnapping offense involved "deliberate cruelty."[108] 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*

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seemed at the time to be the most important and telling iteration of the scope and reach of *Apprendi*.

[106] *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Kyron Huigens, Harris, Ring, *and the Future of Relevant Conduct Sentencing*, 15 FED. SENTENCING REP. 88 (2002); *see also Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment) ("I cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction.").

[107] Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENTENCING REP. 79, 79 (2002).

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

> *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.[109]

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."[110] And 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."[111]

The potential impact of *Blakely* on modern sentencing systems is truly staggering because the decision not only redefined the reach of *Apprendi*, but also suggests that any and every fact "legally essential to the punishment" must be either proven beyond a reasonable doubt to a jury or admitted by the defendant. Indeed, it is hard to read the opinion without believing that the *Blakely* majority had conclusively decided that the sentencing revolution, which had come to rely on judge-centered administrative sentencing procedures, should have to start granting defendants the full panoply of jury-centered adversarial procedures. Consequently, after the Supreme Court agreed to consider on an expedited schedule *Blakely*'s applicability to the federal sentencing guidelines in the cases of *United States v. Booker*[112] and *United States v. Fanfan*,[113] nearly all observers were prepared for the Court to declare *Blakely* applicable to the federal system and thereby find unconstitutional the federal sentencing guidelines' reliance on judicial fact-finding at sentencing.

And yet, the Supreme Court in *Booker* still found a way to surprise and confound legal observers by devising an unexpected remedy for the federal system. The same five Justices who comprised the majorities in *Jones*, *Apprendi*, and *Blakely* did rule in *Booker* that the federal sentencing guidelines, when instructing judges to make factual findings to calculate increases in applicable sentencing ranges, transgressed the Sixth Amendment's jury trial right.[114] But the prescribed remedy in *Booker* was

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[109] *Id.* at 2537.

[110] *Id.* at 2538-39.

[111] *Id.* at 2543.

[112] *See* 125 S. Ct. 11 (2005) (granting certiorari in *Booker* and providing for expedited briefing schedule).

[113] *See* 125 S. Ct. 12 (2005) (granting certiorari in *Fanfan* and providing for expedited briefing schedule).

[114] *See* United States v. Booker, 125 S. Ct. 738, 746 (2005).

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 different 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.[115]

The *Booker* decision, remarkable for many reasons, found a way to make a conceptually muddled constitutional jurisprudence concerning sentencing procedures even more opaque. Through the dual rulings of dueling majorities, the Supreme Court in *Booker* declared that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding, and as a remedy it created a system which now depends upon discretionary and loosely directed judicial fact-finding. Thus, to culminate a jurisprudence seemingly seeking to vindicate the role of the jury and to require a new set of sentencing procedures in modern sentencing systems, the so-called "remedial majority" in *Booker* devised a new system of federal sentencing which granted judges more sentencing power than they had ever previously wielded and seemingly endorsed the entire panoply of relatively lax sentencing procedures that had been used in the federal system over the prior two decades.

C. THE LURKING DUE PROCESS ASPECTS OF THE NEW SENTENCING JURISPRUDENCE

Though the Supreme Court's new sentencing jurisprudence can and will be examined and critiqued from many angles and perspectives, my chief goal in this Foreword is to spotlight the critical procedural issues that lurk in the jurisprudential penumbras of the discussion of the Sixth Amendment's jury trial right in *Blakely* and *Booker*. *Blakely* and *Booker* have been cast by the Supreme Court, and analyzed by commentators, as almost exclusively about jury trial rights and the decision-making authority of judges and juries. But it is critical to recognize and appreciate that the Supreme Court's reoriented sentencing jurisprudence has roots in the Due Process Clause of the Fifth and Fourteenth Amendments and the notice provision of the Sixth Amendment.

In the often overlooked case of *Jones v. United States*—which presaged *Apprendi* and set out the key principle that *Apprendi* announced and *Blakely* developed as a new constitutional mandate—the Supreme Court drew on constitutional provisions and principles beyond the Sixth

[115] *See id.* at 756-71 (Breyer J., announcing opinion of the Court, with Rehnquist, C.J. & O'Connor, Kennedy & Ginsburg, JJ., joining).

Amendment's jury trial right. Decided in 1999, the year before *Apprendi*, *Jones* was the first case in which five Justices expressly suggested that facts establishing higher penalties must be treated procedurally as offense elements,[116] and the *Jones* Court stated the basis and reach of its developing constitutional rule in broad terms. In a key footnote, the *Jones* Court asserted that "a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century" suggested the principle 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."[117] Notably, in his opinion for the Court in *Booker*, Justice Stevens explains and emphasizes *Jones* as the first case in which the Supreme Court, responding to the "new trend in the legislative regulation of sentencing," started to revise its constitutional jurisprudence of required sentencing procedures.[118]

Further, in building upon *Jones* to establish a definitive constitutional rule in *Apprendi*, the Supreme Court expressly drew upon the due process concepts which the Court in *Winship* had used to formalize "beyond a reasonable doubt" as the standard of proof in criminal prosecutions. The *Apprendi* Court explained that since *Winship*, "we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"[119] And Justice Stevens's opinion for the Court in *Booker* starts its substantive discussion with a quote from *Winship*'s due process ruling about standards of proof, and states that these principles, "firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures."[120]

In other words, before *Blakely* and *Booker* recast the Supreme Court's reoriented sentencing jurisprudence toward just the Sixth Amendment's jury trial right, it was clear that the "watershed" rule suggested in *Jones* and established in *Apprendi* was about a lot more—particularly, what the Due

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[116] 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* Jones v. United States, 526 U.S. 227, 232-39 (1999).

[117] *Id.* at 243 n.6.

[118] *See Booker*, 125 S. Ct. at 748-49, 771-52, 756 (Stevens, J., announcing opinion of the Court).

[119] Apprendi v. New Jersey, 530 U.S. 466, 484 (2000) (citation omitted).

[120] *See Booker*, 125 S. Ct. at 747-48 (Stevens, J., announcing opinion of the Court).

Process Clause of the Fifth and Fourteenth Amendments and the notice provision of the Sixth Amendment might mean for modern sentencing systems. The broader constitutional ambit of *Jones* and *Apprendi* was for good reason. As highlighted in Part I of this Foreword, the rehabilitative philosophy of punishment provided the conceptual justification in *Williams v. New York* for not extending constitutionally protected trial rights to sentencing.[121] Because the medical model of sentencing which dominated before modern reforms conceived sentencing as an enterprise designed to help "cure" the sick defendant, the idea of significant procedural rights at sentencing almost did not make sense: Just as patients are not thought to need "procedural rights" when being treated by a doctor, defendants were not thought to need procedural rights when being sentenced by a court. But it has now been nearly a quarter century since the rehabilitative model of sentencing has held sway, and yet until *Jones* and *Apprendi* and *Blakely* and *Booker* came along, our sentencing structures still relied without much question on lax procedures for proving the truth of facts that would lead to extended sentences.

Because the fundamental philosophy and essential goals of modern sentencing have been reconceived, a broad jurisprudential rethinking of the structures and procedures for modern sentencing decision-making has been long overdue. Though *Blakely* and *Booker* have spotlighted the jury trial right, the due process and notice issues raised by the Supreme Court in *Jones* and *Apprendi* should be an integral part of new jurisprudential debates over modern sentencing procedures. Indeed, in our real world of guilty pleas in which jury trial rights are waived in nine out of every ten cases, the future development of the due process and notice issues lurking around the Supreme Court's new sentencing jurisprudence are likely more important to the parties and likely to have a greater practical impact than further development of the jury trial right.[122]

But though *Jones* and *Apprendi* expressly, and *Blakely* and *Booker* implicitly, draw upon constitutional due process and notice principles and provisions, none of these decisions have charted a clear course for a reconceived constitutional jurisprudence of sentencing procedures. Indeed, though these rulings appear tortured and opaque concerning the meaning and application of the Sixth Amendment's jury trial right, they have actually produced an even greater conceptual and doctrinal muddle

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[121] *See supra* notes 44-51 and accompanying text.

[122] *See* Bibas, *supra* note 91, at 1177-78 (discussing importance to sentencing determinations of procedural issues other than the jury trial right); Bowman, *supra* note 32, at 187-91 (same); *see also* James E. Felman, *The Need for Procedural Reform in Federal Criminal Cases*, 17 FED. SENTENCING REP. (forthcoming 2005).

concerning other procedural rights of defendants at sentencing. Consequently, in this Foreword I do not—really cannot—aspire to provide a complete account of all the issues and concerns of sentencing procedure that deserve and demand attention in the wake of *Blakely* and *Booker*. But I can and will in Part III briefly sketch some considerations for courts and other key sentencing actors and institutions as they explore what process is due in modern sentencing systems.

III. PONDERING A MODERN SENTENCING PROCESS

Looking forward to conclude this Foreword, in this final Part my goal is to suggest that the doctrinal particulars and uncertainties of *Blakely* and *Booker* should not eclipse the broader procedural messages and lessons to be drawn from the Supreme Court's new sentencing jurisprudence. Whatever else one thinks about *Blakely* and *Booker*, these cases deserve credit for engendering a national conversation on a range of sentencing issues, and they should particularly encourage jurisdictions to examine and reflect broadly upon the appropriate structure and procedures of modern sentencing decision-making. In addition, as jurisdictions review and respond to the rulings in *Blakely* and *Booker*, policymakers have a unique opportunity to consider which institutions ought to take the lead in examining and establishing the appropriate structure and procedures of modern sentencing decision-making.

A. CRITICAL ISSUES, AND UNCERTAIN PRINCIPLES, FOR MODERN SENTENCING PROCEDURE

Because *Blakely* and *Booker* focus particularly on the division of decision-making authority between juries and judges, it is dangerously easy to view these cases as only about the Sixth Amendment's jury trial right. Indeed, because much of the post-*Booker* discussion of federal sentencing law and policy has focused upon the pros and cons of judicial sentencing discretion and the relative severity of federal sentences, it is dangerously easy to forget that *Blakely* and *Booker* are fundamentally cases about sentencing procedures in the first instance.

But, as suggested in the exegesis of the Supreme Court's old and new sentencing jurisprudence of Part II, the constitutional regulation of sentencing procedures in general, and the recent decisions in *Jones* and *Apprendi* and *Blakely* and *Booker* in particular, implicate other constitutional provisions and principles. Indeed, all of the Supreme Court's sentencing cases and the reactions they have engendered—especially when viewed against the backdrop of the historical development of sentencing laws and procedures detailed in the first two Parts of this Foreword—

highlight the inextricable link between the substance and procedures of modern sentencing reforms. Judge Frankel's concerns about "The Dubious Process" at sentencing, which he expressed more than three decades ago in *Criminal Sentences: Law Without Order*, highlighted at the very beginning of the modern sentencing reform era that effective procedural reforms are a critical and necessary part of any effort to achieve the substantive goals of sentencing reform.[123] And, throughout three decades of modern sentencing reforms, numerous judges and academic commentators have lamented the insufficient attention given to fundamental procedural issues—such as notice to parties, burdens of proof, appropriate fact-finders, evidentiary rules and hearing processes—that play a central role in the actual application of general sentencing rules to specific cases.[124] Moreover, in the wake of *Blakely* and *Booker*, an array of sentencing participants are starting to explore more fully the importance of effective and appropriate sentencing procedures to the broader goals of sentencing reform.[125]

Though *Blakely* and *Booker* have now ensured that the jury trial right of the Sixth Amendment receives attention and consideration, that right only concerns *who* makes certain determinations, not *how* these determinations are made. But, as stressed in the final section of Part II, the "watershed" rule suggested in *Jones* and established in *Apprendi* also concerns the procedural matters such as notice to parties and burdens of proof. Though *Blakely* and *Booker* spelled out what the *Jones/Apprendi* rule means for purposes of the Sixth Amendment's jury trial right in modern sentencing schemes, additional decisions will be needed for a full articulation of what the *Jones/Apprendi* rule means for notice and proof issues in modern sentencing schemes.

Moreover, sentencing decision-making encompasses or implicates many more procedural issues and many more constitutional provisions than

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[123] *See supra* notes 13-20 and accompanying text.

[124] *See* sources cited *supra* note 72; *see also* STITH & CABRANES, *supra* note 5, at 148-158; Bibas, *supra* note 91, at 1177-78; Gertner, *supra* note 7, at 83-85. *See generally* Richard Smith-Monahan, *Unfinished Business: The Changes Necessary to Make Guidelines Sentencing Fair*, 12 FED. SENTENCING REP. 219 (2000).

[125] *See, e.g.*, Assistant Attorney General Christopher Wray, *Testimony to the House Subcommittee of Crime, Terrorism, and Homeland Security: Oversight Hearing on "The Implications of the* Booker/Fanfan *Decisions for the Federal Sentencing Guidelines"* at 11 (Feb. 10, 2005), *available at* http://judiciary.house.gov/media/pdfs/Wray021005.pdf (stressing that "to have consistent sentences, it is essential that sentencing hearings have consistent form and substance"); Felman, *supra* note 122; *see also* United States v. Kelley, 355 F. Supp. 2d 1031, 1034-39 (D. Neb. 2005) (discussing role and importance of proof beyond a reasonable doubt even within an advisory guideline system); United States v. Gray, 362 F. Supp. 2d 714, 719-24 (S.D. W. Va. 2005) (same); United States v. Pimental, No. CRIM.99-1031-NG, 2005 WL 958245 (D. Mass. Apr. 15, 2005).

most courts and commentators realize. In a recent article, Professor Alan Michaels has identified twenty-five significant procedural rights that defendants have at a criminal trial—"from employing an attorney to not having inferences drawn from one's silence, from bail and *Brady* to presence and proceeding *pro se*"—which could plausibly be extended to sentencing.[126] Interestingly, in his comprehensive (pre-*Blakely*) taxonomy of sentencing rights, Professor Michaels has determined that the Supreme Court "has found roughly one quarter [of these twenty-five trial rights] apply at sentencing and one quarter do not" and that the rights "in the remaining half, still undecided at the Supreme Court level, have been resolved with similar percentages by lower courts—some apply, some do not, and about half remain unresolved."[127] Though the doctrinal particulars and broader significance of each of these rights is beyond the scope of this Foreword, Professor Michaels' analysis spotlights how much jurisprudential work lies ahead as the Supreme Court and lower courts continue to confront procedural issues that necessarily arise due to the ever more trial-like realities of modern sentencing decision-making within structured and guideline sentencing systems.[128]

But the key challenge for courts—and, as explained below, for other sentencing institutions and policy-makers—is not the sheer number of procedural issues, but rather the principles which should be brought to bear in deciding whether and how constitutional trial rights ought to be recognized and safeguarded at sentencing. Though lacking a fundamental legal structure and often leading to disparate outcomes, the rehabilitative model of sentencing at least had the virtue of providing an underlying theory for determining whether and how trial rights ought to be recognized at sentencing. In service to the rehabilitative ideal, sentencing judges and parole officials, purportedly endowed with unique insights and expertise in deciding what sorts and lengths of punishments were necessary to best serve each criminal offender's rehabilitative potential, needed complete information about offenses and offenders in order to craft effective rehabilitative sentences. As explained by the Supreme Court in *Williams v. New York*[129] and in other constitutional rulings of the period,[130] the

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[126] *See* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1775 (2003).

[127] *Id.*

[128] *See generally supra* text accompanying notes 83-91 (discussing the *Apprendi* lines of cases as the by-product of structured sentencing reforms having transformed sentencing decision-making into a more trial-like enterprise).

[129] *See* Williams v. New York, 337 U.S. 241, 246-48 (1949); *see also supra* text accompanying notes 44-51.

[130] *See, e.g.*, Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1 (1979); United States v. Grayson, 438 U.S. 41, 45-54 (1978).

rehabilitative ideal called for sentencing judges and parole officials to be freed from any procedural rules which might work to limit the sound exercise of their discretion.

The historical commitment to the rehabilitative ideal and the Supreme Court's long-standing adherence to *Williams* (even as the rehabilitative ideal was largely rejected by modern sentencing reforms[131]) perhaps accounts for how Professor Michaels was able to find "a consistent principle" in his (pre-*Blakely*) examination of the Supreme Court's sentencing jurisprudence. According to Professor Michaels, the Supreme Court's approach to sentencing procedures has historically sought to vindicate what he calls "the best-estimate principle" by facilitating judicial efforts to craft a "proper" sentence:

> The Court's decisions are consistent with a conception of sentencing as constitutionally mandating a balanced and thorough effort to determine the "right" sentence, within the range of prescribed penalties. In making that determination, however, there is no mandated presumption of "sentencing innocence"—in other words, no requirement that the defendant be given the benefit of the doubt. Within the range of allowable sentences, "too low" is not intrinsically better than "too high." The mandate is to make a best estimate of the "right" sentence, but without the built-in presumption towards resolving errors in the defendant's favor that is present at the trial level.[132]

Given that the Supreme Court's sentencing jurisprudence historically was influenced and shaped by the rehabilitative ideal and its commitment to "curing" offenders—which, explained the *Williams* Court, meant many offenders "could be less severely punished and restored sooner to complete freedom and useful citizenship"[133]—it once was in everyone's interest to keep procedural rights from getting in the way of determining the "best" sentence. The rehabilitative ideal necessarily incorporated pro-defendant values and this made sense for the Supreme Court's sentencing jurisprudence to foster "a balanced and thorough process [by recognizing] rights that support accuracy concerns or that tend to put the prosecution and defense on a more even playing field," but to not recognize rights "that offer the defendant special protections such as those that automatically resolve errors in the defendant's favor or primarily protect the defendant's autonomy."[134]

But, as suggested earlier, an express or implicit component of most statutory and guideline sentencing reforms has been a rejection of the

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[131] *See supra* text accompanying notes 9-31, 58-61.

[132] *See* Michaels, *supra* note 126, at 1775-76.

[133] *Williams*, 337 U.S. at 247.

[134] *See* Michaels, *supra* note 126, at 1862.

rehabilitative ideal.[135] The sentencing revolution has ushered in punitive sentencing provisions as jurisdictions have directly or indirectly repudiated or reformed many tenets of the old rehabilitative sentencing concept. But the sentencing revolution has rejected the old conceptual and procedural sentencing model without providing a clear and philosophically cogent new conceptual or procedural model to take its place.[136]

Interestingly, the Supreme Court's dual rulings in *Booker* can be viewed and understood as reflecting two divergent conceptual and procedural models competing for a new dominance in the wake of the demise of the rehabilitative ideal. The (partial) opinion of Justice Stevens for the Court in *Booker* discusses the impact of modern sentencing reforms on the Court's constitutional jurisprudence in a way that champions providing defendants with special procedural protections at sentencing.[137] Discussing the "new trend in the legislative regulation of sentencing," Justice Stevens's opinion for the Court in *Booker* highlights 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."[138] Consequently, explains Justice Stevens, the new sentencing laws required, for the sake of "preserving an ancient guarantee under a new set of circumstances,"[139] a new constitutional jurisprudence:

> 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

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[135] Recall the Pennsylvania's Mandatory Minimum Sentencing Act at issue in *McMillan* which sought, in the words of the Supreme Court of Pennsylvania, "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." Commonwealth v. Wright, 494 A.2d 354, 362 (Pa. 1985).

[136] I explore more fully the conceptual vacuum created by the decline of the rehabilitative ideal and suggest ways to fill this vacuum in another recent article. *See* Berman, *Reconceptualizing Sentencing*, *supra* note 89.

[137] Of course, as evidenced by his dissents in *McMillan* and *Watts*, *see supra* text accompanying notes 67-69, 80-82, Justice Stevens has been advocating a revised approach to the constitutional regulation of sentencing procedures since the outset of the modern sentencing reform era.

[138] *Booker*, 125 S. Ct. at 751 (Stevens, J., announcing opinion of the Court, with Scalia, Souter, Thomas, & Ginsburg, JJ., joining).

[139] *Id.* at 752.

Sixth Amendment substance.[140]

This passage reveals that Justice Stevens is seeking to lead a faction of the Supreme Court toward a new jurisprudence that will provide greater procedural protections to individual defendants in the application of modern statutory and guidelines sentencing systems.

But, of course, Justice Stevens's (partial) opinion for the Court in *Booker* is only half the story since, as a result of a defection by Justice Ginsburg, Justice Breyer's (partial) opinion for the Court established the remedy in *Booker*. The remedy crafted for the Court by Justice Breyer, which evades Sixth Amendment problems by making the federal sentencing guidelines advisory instead of mandatory, essentially endorses the relatively lax sentencing procedures that have been used in the federal system over the prior two decades. Justice Breyer makes clear throughout his opinion that he does not share Justice Stevens's concern with providing individual defendants with special protections at sentencing. Rather, Justice Breyer represents a faction of the Supreme Court embracing whatever sentencing procedures are needed to foster the modern sentencing reform goal of achieving greater sentencing uniformity.[141] Justice Breyer's opinion for the Court in *Booker* assails the proposed remedy of "engrafting" jury trial rights onto the federal sentencing system because doing so would undermine the goals of sentencing uniformity.[142] In other words, Justice Breyer thinks sentencing procedures should still serve, in Professor Michaels's terminology, the "the best-estimate principle,"[143] although now the goal is to achieve more uniform sentences rather than rehabilitative sentences.

In short, the pitched battle over the rights and results in *Blakely* and *Booker* reflect competing visions of what procedural concepts and norms will take center-stage as the Supreme Court considers the applicable constitutional rules for modern sentencing decision-making. Justice Stevens leads a faction of the Court concerned about safeguarding procedural rights for defendants at sentencing, while Justice Breyer leads a faction of the Court concerned about ensuring that applicable procedures at sentencing serve the goal of sentencing uniformity. But, with Justice Ginsburg having allied herself with both of these competing factions in

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[140] *Id.*

[141] *See id.* at 756-71 (Breyer, J., announcing opinion of the Court with Rehnquist, C.J., & O'Connor, Kennedy, & Ginsburg, JJ., joining).

[142] *See id.* at 761 (arguing the "real conduct/uniformity-in-sentencing relationship" would not be served by having juries involved in sentencing guideline determinations); *id.* at 762-63 (contending that, due to the impact of plea bargaining, application of jury trial rights in the federal guidelines system would undermine efforts to achieve greater sentencing uniformity).

[143] *See supra* notes 131-34 and accompanying text.

Booker, the schizophrenic *Booker* ruling further obscures which principles should guide lower courts in considering the broad range of procedural issues beyond jury trial rights that follow in the wake of *Booker*. Yet the fate and future of sentencing procedures—particularly concerning critical issues such as notice to parties and burdens of proofs—may depend greatly on the outcome of this conceptual battle. Consider, as but one possible example, the issue of burden of proof: A heightened concern for defendants' procedural rights at sentencing suggests a heightened burden of proof for facts which lead to longer sentences, but a concern for sentencing uniformity might support continued application of the preponderance standard of proof.

B. A ROLE FOR OTHER INSTITUTIONS

Seeking to find a silver lining in the conceptual dark cloud that is the *Booker* decision, we might laud the case for at least helping to define the terms of debate as courts ponder a new process for modern sentencing. Moreover, the agonizing jurisprudential struggles reflected in *Apprendi*, *Harris*, *Blakely* and *Booker* reveal that courts may not always be the ideal institution for the development of modern sentencing procedures and that other institutions need to play an integral role in the consideration of the critical procedural issues that surround modern sentencing reforms.

Indeed, the modern history of sentencing reforms set out in this Foreword suggests there are harmonic cycles in the way legislatures and courts develop sentencing laws and procedures. For more than fifty years there has been an on-going inter-branch dialogue about sentencing laws and practices,[144] although the discussion of sentencing procedures has been woefully underdeveloped and problematically stagnant. Indeed, the recent tortured development of the Supreme Court's sentencing jurisprudence may in part reflect the failure of other institutions to help work through the procedural issues raised by the modern sentencing revolution. Moreover, looking beyond the Supreme Court's jurisprudential struggles, it should be clear that the conceptual reconsideration of sentencing law and procedure in light of the sentencing revolution is not a job just for courts; the legal developments and principles spotlighted by *Jones* and *Apprendi* and *Blakely* and *Booker* should be understood by legislatures and sentencing commissions as an invitation to reexamine a broad range of issues of sentencing procedure and practice.[145] The work of legislatures, sentencing

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[144] *Cf.* Blakely v. Washington, 124 S. Ct. 2531, 2550-51 (2004) (Kennedy, J., dissenting) (discussing the inter-branch dialogue concerning modern sentencing reforms).

[145] *See generally* Berman, *Reconceptualizing Sentencing*, *supra* note 89 (suggesting some principles for the broad conceptual reconsideration of sentencing law and policy).

commissions, prosecutors, defense attorneys, probation officers and parole boards can and should be informed by attentiveness to all the substantive and procedural provisions and principles spotlighted by *Jones* and *Apprendi* and *Blakely* and *Booker*.

Reflecting broadly on the sentencing reform era, we should seize this moment in the evolution of modern sentencing reforms to return to the fundamental concepts and sound suggestions of Judge Marvin Frankel and we should particularly recall his advocacy of expert sentencing commissions as a central player in reforming sentencing law and procedures. The sentencing commission as an institution grew out of the realization that neither the judiciary nor legislatures had been able to, nor could really be expected to, develop and monitor effective and comprehensive sentencing reforms.[146] Sentencing commissions were envisoned, and have been designed, to have the resources and expertise needed to engineer systemic and effective sentencing reforms.[147] Moreover, as an administrative body able not only to study the workings of the criminal justice system as a whole, but also to implement, monitor and adjust multi-faceted system-wide reforms, sentencing commissions are uniquely positioned to assess the complex procedural issues that impact the workings of the criminal justice system.[148]

Of course, because of the general neglect of procedural matters in prior reform efforts, sentencing commissions have a lot of work to do: critical procedural issues like notice to parties, appropriate fact-finders, burdens of proof, applicable evidentiary rules, and sound hearing procedures are all in need of careful and extended study and call for thoughtful reforms, particularly since the move toward structured sentencing systems have tended to transform sentencing decision-making into a more trial-like

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[146] *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Need and Opportunity for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 95-96 (1999); *see also* von Hirsch, *supra* note 5 (discussing various justifications for, and benefits of, the creation of a sentencing commission); Tonry, *supra* note 24 (same).

[147] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (examining the history behind, and efficacies of, the development of sentencing commissions); Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 714-16 (1993) (same); *cf.* Berman, *supra* note 143, at 108-10 (noting some of the institutional struggles of the U.S. Sentencing Commission).

[148] *See* Barry L. Johnson, *The Role of the United States Sentencing Commission in the Reform of Sentencing Procedures*, 12 FED. SENTENCING REP. 229, 230-31 (2000) (highlighting features of the U.S. Sentencing Commission that make it an appropriate body for procedural reforms in the federal sentencing system); *cf.* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1380-87 (1999) (stressing the importance of a coordinated approach to sentencing and highlighting the inability of judges to effectively coordinate sentencing reforms).

enterprise. But it is not foolhardy to find optimism in the possible efforts of sentencing commissions given the generally positive track-record of these institutions in the development of substantive sentencing reforms.[149] Though, as stressed in Part I, the efforts of sentencing commissions have heretofore been directed primarily at substantive sentencing law, there is reason to hope that *Jones* and *Apprendi*, and now *Blakely* and *Booker*, will prompt commissions to carry forward their reform efforts to address the specifics of sentencing procedures. Moreover, there is a basis for believing that sentencing commissions are well-designed and well-positioned to explore and reach compromises concerning competing conceptual visions of modern sentencing procedures. There may prove to be considerable common ground shared by the seemingly divergent visions of modern sentencing procedures reflected in the opinions of Justice Stevens and Justice Breyer in *Booker*, and sentencing commissions developing new sentencing procedures proactively may be better able to find that common ground than can courts responding reactively to specific procedural claims being pressed in particular cases by individual defendants.

IV. CONCLUSION

Blakely and *Booker* do not, and even future constitutional rulings may not, directly force legislatures, sentencing commissions, lower courts and other sentencing actors and institutions to revisit and revise all (or even many) of the procedures that attend existing sentencing schemes. In other words, these decisions do not directly mandate that all those in the sentencing field move beyond *Blakely* and *Booker* to ponder modern sentencing process. The hope for more effective sentencing reforms may thus turn on whether the *Blakely* and *Booker* decisions have positive reverberations for the work of sentencing lawmakers, and in particular sentencing commissions, even beyond their constitutional impact. Even without any further Supreme Court guidance, legislatures, sentencing commissions, lower courts and other sentencing actors and institutions

[149] Calling commission-centered sentencing reform in the states a success would not engender much debate. *See, e.g.*, Barkow, *supra* note 147, at 771-98 (discussing the success of sentencing commissions and sentencing guidelines in the states); Tonry, *supra* note 144, at 713-16 (same). Though federal sentencing reforms driven by the U.S. Sentencing Commission have been subject to more criticism than praise, *see, e.g.*, Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 42-43 (2000) (detailing widespread criticisms of the federal sentencing system), even the U.S. Sentencing Commission can be expected to serve as an effective catalyst for future federal reform if it can learn from its past challenges. *See* Barkow, *supra* note 147, at 798-812 (suggesting means for sentencing commissions to be more effective).

should appreciate and respond to the simple, fundamental policy message that *Jones*, *Apprendi*, *Blakely* and *Booker* all radiate: Procedures really matter at sentencing.

Read together, the Court's work in those four cases, though divisive and conceptually underdeveloped, provides a wonderful primer on the significance and the centrality of procedural issues in the actual operation of a sentencing system. And the burgeoning academic commentary in the wake of these decisions only reinforces and amplifies this critical message. The *Jones* and *Apprendi* and *Blakely* and *Booker* decisions, as well as the renewed debate over sentencing policies, practices and procedures that they have helped engender, can and should effectively inform a long-overdue policy dialogue among legislatures, sentencing commissions and courts concerning procedural matters that have heretofore been incompletely contemplated in the modern sentencing reform movement. All of these decisions will truly mark a "watershed" development if they not only bring needed light to critical procedural issues raised in modern sentencing schemes, but also manage to prod sound procedural reforms that go beyond whatever constitutional minimums are ultimately established by the Supreme Court.