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Nora V. Demleitner
Washington and Lee University School of Law, demleitnern@wlu.edu

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Where to Go from Here? The Roberts Court at the Crossroads of Sentencing

NORA V. DEMLEITNER

Vice Dean for Academic Affairs and Professor, Hofstra University School of Law; Managing Editor, *Federal Sentencing Reporter*

In recent months we have witnessed a host of major changes to state and federal sentencing. State commissions and legislatures have acted on the Supreme Court's mandate in *Blakely* and amended sentencing legislation. Similarly, the U.S. Sentencing Commission has continued its data collection resulting from *Booker*, though it has not issued any strong recommendations to Congress. The Department of Justice, on the other hand, and some members of Congress continue to press for a sentencing regime that would provide a floor and turn the statutory maximum into the Guidelines maximum.[1] In the absence of legislative guidance, so far, federal courts on the trial and appellate level have attempted to respond to the myriad of questions *Booker* left unresolved. The Supreme Court decided some sentencing issues during the last term and already has granted writs of certiorari in other sentencing-related cases.[2] Not all of these matters are guideline-related—the death penalty and the development of the meaning of the Eighth Amendment are likely to return to the Court's docket in the near future.

This Issue presents an impressive array of articles, written by practitioners and academics, which address some of the sentencing issues facing the Supreme Court. The questions range from the survival of *Harris* to the use of foreign court opinions in developing the meaning of the Eighth Amendment Cruel and Unusual Punishment Clause; they cover the role of the Chief Justice in the rule-making process as well as the relevance of the International Court of Justice's (ICJ) decision in the *Avena* case to the fate of Mexican death-row inmates in state prisons around the country; they address the use of risk-based sentencing and challenge the continued viability of *Williams v. New York*.[3] The Issue highlights the scope of the unresolved questions facing the Court and their importance to the future of federal and state sentencing. It is particularly timely as two new Justices have changed the face of the Court and may be crucial in the resolution of some of these issues.

In addition, this Issue features an article that begins to develop a new approach to a particularly harsh collateral sanction—deportation. Moreover, we publish a set of primary materials from the Inter-American Commission's hearings on mandatory minimum sentences in the federal system.

I. The Court's Sentencing Philosophy in Light of *Williams*

A number of authors either investigate or allude to the sentencing philosophy that has animated the Court's recent jurisprudence. While all agree that *Williams*, which not only continues to be accepted precedent but also remains frequently cited, reflects a long-gone rehabilitation-based system, they fail to find consensus on what animates, or should animate, the current Court.

Laura Appleman investigates the sentencing philosophy that has informed the *Blakely* decision. She argues that *Blakely* is based on "an unarticulated theory of community-based retribution." As retribution implies moral blame, it is only fair that a direct representative of the community—the jury—should determine the penalty. For that reason Appleman views *Blakely* as continuing past Sixth Amendment practice and as representative of modern ideals of punishment.

Appleman's piece, however, raises larger questions about the role of the jury in this process. *Blakely* requires the jury only to find facts that can enhance a sentence. Even though the decision does not necessarily relegate the jury to be a mere fact-finder, largely the jury lacks a voice with

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regard to the ultimate penalty level. Such a limited role for the jury implies a truncated view of direct community involvement, especially in light of testimonials of jury members indicating that they never conceived of the ultimate sanction the court imposed and public opinion surveys implying that penalty levels for some crimes are too high, or too low.[4] Nevertheless, Appleman's piece adds to the literature explicating the punishment philosophy underlying select sentencing regimes.[5]

In her article, Appleman implies that *Williams* has become outdated, a quaint relic of the past. A number of the other authors in this Issue explicitly criticize the Supreme Court's continued adherence to its decision in *Williams.*[6] They, like Appleman, note the substantial change in prevailing sentencing philosophy which conflicts with the underlying premise of *Williams.* In addition, they challenge the Court to expand Fifth Amendment rights to the sentencing process in order to allow for better-informed decision-making at sentencing.

Sentencing Resource Counsel Anne Blanchard takes the opportunity to exhort the Court to apply Fifth Amendment principles to sentencing, as it does the Sixth Amendment right to a jury trial. Due Process rights may encompass a heightened standard of proof, increased notice of facts related to sentencing, and enhanced confrontation rights. As sentencing is no longer based on rehabilitative principles, such an extension of procedural rights would create greater fairness and equalize the power relationship between defense and prosecution.

Judge Michael Marcus, in his critique of *Williams,* focuses on what he considers crucial at sentencing—the protection of public safety rather than just deserts. He views the Supreme Court's role as largely reactive in the sentencing area. While nothing in *Blakely* prevents courts from applying a public safety model, he is concerned that the Court may reject risk assessments and the use of social science in sentencing, thereby foreclosing the focus on public safety.

> [I]t is essential that the Court continue to recognize that once an offender is convicted and any sentencing enhancement facts decided, it is a *risk of harm* that we are managing, and that there is no constitutional impediment short of disproportionality or protected class discrimination to allocating our devices for harm reduction based on our best *estimate* of that risk.

Marcus, like Blanchard, suggests that the Court revisit *Williams,* largely because he considers the disclosure of facts that are important to the determination of the sentence level crucial in determining a fair and appropriate sentencing outcome that accords with public safety goals.

The Federal Public Defender of Arizona, Jon Sands, joins the chorus but asks the new Chief Justice, John Roberts, to intervene, not in cases before the Court but instead through his role in the rule-making process. As head of the federal judiciary and the Administrative Office of the Courts, the Chief Justice should promote fair and early disclosure of sentence-enhancing facts to the defense, and assist in making this requirement a part of the Federal Rules of Criminal Procedure, to make sentencing more transparent.

Any application of the Fifth Amendment to the sentencing process would require the Court to reconsider the philosophy that stands behind sentencing in a larger and more meaningful manner. The Court may be ready to do so, unless it becomes bogged down in solving specific issues triggered by its decisions in *Apprendi, Blakely,* and *Booker.*

II. Sentencing Case Law in a Larger Context

Decisions in the area of sentencing and punishment cannot be viewed outside a larger context. Our authors pick up on two larger settings: one comprises other cases decided by the Supreme Court in recent years; the other is the role of non-U.S. cases.

A. *Crawford*

Michael Pardo focuses on the connection between *Blakely* and *Crawford,*[7] two of the blockbuster Sixth Amendment decisions of recent vintage. Their connection has been sorely underdeveloped, and Pardo's piece makes a substantial contribution. In *Blakely* the Court found that a jury must determine leftover trial issues that appear at sentencing. Pardo argues that *Blakely,* together with *Crawford,* requires that the defendant be able to confront witnesses whenever a factual issue must be decided at sentencing. The corollary should also follow: If a fact is irrelevant to the level of the sentence, it does not trigger the confrontation right. This means that as long as a sentencing issue is in effect a trial issue, the confrontation right will apply. Pardo elegantly walks the reader through a set of scenarios illustrating the scope of the Confrontation Clause right at sentencing. In his examples, Pardo delves also into the issue of how

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Crawford applies to an advisory system that becomes virtually mandatory because of the way in which appellate courts exercise their "reasonableness" review powers.

I have argued in a different setting[8] that there might be a distinct philosophy underlying *Blakely*, the *Booker* merits majority, and *Crawford*. All three of these decisions are animated by the Sixth Amendment. In contrast to other provisions in the Bill of Rights which have become standard elements of international human rights treaties, the right to a jury trial is not such a quintessential right. Even though a few countries have in recent years expanded jury trial rights,[9] juries are largely viewed as a quintessential feature of U.S. criminal law. On the other hand, the confrontation right is deemed an international human right but not in the expansive way in which U.S. courts, even before *Crawford*, have construed it. Civil law systems have such a dramatically different procedural system that such confrontation at trial is often neither feasible nor required. For all these reasons, *Blakely* and *Crawford*, in many ways, highlight America's uniqueness rather than underscore universally shared values. It might be an overstatement to argue that some members of the Court may have a stake in moving the Supreme Court to emphasize the uniqueness of the U.S. system. However, in light of their rejection of references to foreign cases in the sentencing and punishment realm, any decision that highlights differences rather than supports commonalities will assist in this endeavor.

B. The Role of Non-U.S. Decisions

The role of foreign court decisions is at the forefront of the analysis by Ernest Young and Carina Cuellar. As the ICJ in *Avena* ordered the United States to provide a remedy for the violation of the Vienna Consular Convention to the Mexican citizens currently on U.S. death row, state and federal courts and the executives in states and the federal system continue to struggle with how to comply with the decision.[10] Young and Cuellar urge Congress to develop a remedy for any Convention violation which would be subject to any federal claim on habeas review. Such a remedy would allow the United States to revoke its denial of jurisdiction to the ICJ with respect to future Consular Convention cases, a decision the President made soon after the ICJ's decision in *Avena*. Yet more importantly, Young and Cuellar address how the courts should apply *Avena* in domestic litigation. They propose focusing on the Court's requirement that U.S. courts determine whether prejudice arose from the denial of consular rights. Young and Cuellar argue that the determination of whether the inmates suffered prejudice be based on a domestic standard analogous to that applied to ineffective assistance of counsel cases. Since they determine that Medellin—the Mexican who is challenging his sentence in Texas state courts—suffered no prejudice, they consider the resolution of all other questions about the relationships between ICJ and domestic court decisions inappropriate and unnecessary at this time.

The Young and Cuellar article develops most ably the connections between state, federal, and international decisions without addressing the ongoing dispute about the continued viability of the death penalty which underlies *Avena*. Young and Cuellar caution that this policy question should not overshadow the larger question of the balance between state and federal power. Most fundamentally, U.S. courts will continue to struggle with directly applicable international decisions, even if those are not legally binding.

In this Issue we reprint a set of testimony from the Inter-American Commission of Human Rights (IACHR). Based on the American Declaration of Human Rights, the Commission may hear challenges to domestic laws and their application which are alleged to violate provisions in the Declaration. This particular set of hearings focused on challenges to federal mandatory minimum sentences launched by a group of civil rights organizations and the American Bar Association.

IACHR hearings are just one component of recent opposition to mandatory minimum drug sentences for minor offenders. The U.S. Conference of Mayors, in its annual convention in Las Vegas, recently passed a resolution that opposed mandatory minimum sentences for drug crimes. The resolution calls for increased judicial discretion to allow for sentences proportionate to the crime committed and the individual offender's personal situation. In February leaders of a host of civil, political, and human rights organizations requested congressional review of mandatory minimum sentencing for crack cocaine offenders. Since Congress has not scheduled hearings on mandatory minimum sentences, groups increasingly look for support in alternative fora and the judiciary. Whether they will succeed in the courts may depend on how the Supreme Court views below-guideline sentences that are based on systemic grounds rather than on individual characteristics.

Youngjae Lee and David Gray focus their separate remarks on the Court's Eighth Amendment jurisprudence. Lee advocates for the Court to create a principled proportionality analysis. He

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considers this a doable task as long as the Court looks at comparative, rather than absolute, proportionality, which would allow the Court to apply existing judicial techniques to limit excessive punishment. In doing so, he rejects interjurisdictional comparisons as inappropriate but squarely defends intrajurisdictional comparisons.

Lee may overestimate the ease with which a "tolerably uncontroversial list of crimes in order of seriousness" can be created. Even his general rule that "generally violent crimes are considered more serious than nonviolent offenses" may have dramatically broken down in a time of multimillion-dollar corporate offenses and prison overcrowding. Most difficult may be the classification of drug offenses that do not fit easily into such a framework.

Presumably in contrast to Lee's rejection of interjurisdictional analysis, Gray defends the Court's increasing references to non-U.S. tribunals in Eighth Amendment cases against the critique of originalists. He signs on to the overall belief structure of originalists and argues from that vantage point in favor of considering foreign decisions. Gray states that the Eighth Amendment, as drafted, relies on natural law conceptions of what is "cruel and unusual." Even though he acknowledges the difficulties courts have in determining the content of "cruel and unusual" and discusses the potential democratic deficit in leaving this decision to the courts, he defends this allocation of responsibility based on the Constitution. To help them determine the meaning of "cruel," courts should engage in open discourse, which includes the consideration of foreign opinion on the matter.

These articles exemplify the major issues with regard to the usage of foreign decisions which appear to have engulfed the Court. While this debate arises in connection with highly politicized and emotional sentencing issues, it has substantially broader application, as the authors explain.

III. Cleaning Up the Meaning of *Blakely* and *Booker*

A number of authors focus on inconsistencies in the sentencing case law, and others urge the Court to resolve some of the many issues so far left unresolved. Amy Baron-Evans and Anne Blanchard revisit the continued viability of *Harris* in their analysis of the most widely discussed legislative proposal to change the current system.[11] The "Sentencing Fairness and Equity Restoration Act of 2006," introduced in the House, would declare the bottom of the guideline range as the minimum sentence, while the statutory maximum would become the upper end of the range. Therefore, any sentence within that range would be subject to reasonableness review, while any sentence below the range would attract de novo review. Baron-Evans and Blanchard reject the legislation as unfair, inequitable, and in violation of the goals and spirit of sentencing reform. Most importantly, they find the proposal constitutional only if *Harris*, which upheld the use of judicial fact-finding to trigger a mandatory minimum, survives. They consider that unlikely, however, as two Justices who were part of the *Harris* plurality have left the Court. In addition, Baron-Evans and Blanchard argue that two others, Scalia and Breyer, have been inconsistent between their rulings in *Harris* and later cases. Since some district and circuit courts have concluded that *Harris* is no longer viable, they predict that the Supreme Court will have to revisit *Harris*—if not in conjunction with the proposed legislation, then at some other point.

Even though Michael O'Hear's starting point is *Cunningham v. California*, the case before the Court in which the constitutionality of California's guideline regime is at stake,[12] he raises the question of how that case relates to federal sentencing. California's system provides an upper, a middle, and a lower term of punishment for each offense. The sentencing judge may choose the appropriate sentence based on the existence of mitigating and aggravating circumstances, set out in a nonexhaustive list. While Cunningham has argued that the California system is indistinguishable from Washington's in *Blakely*, the state of California has not only made the case that its system is more discretionary but has also argued that it is virtually identical with the post-*Booker* federal system. O'Hear views *Cunningham* as crucial to how the Supreme Court will respond to future federal sentencing issues, including the continued viability of *Harris*. He also wonders whether the Supreme Court will use *Cunningham* to guide federal courts as to whether downward departures on policy grounds rather than individual case factors are permissible and what the parameters of congressional sentencing proposals will be. Whether the Court will use *Cunningham* as the vehicle to illuminate federal sentencing issues will soon be resolved. However, even if the Court fails to do so, ultimately it will have to address these matters.

Jason Hernandez addresses the question of what reasonableness review does and should mean in the federal sentencing system. Six circuits currently perceive within-guideline sanctions as carrying a presumption of reasonableness; three have rejected such a presumption rule, and others have not conclusively resolved the issue. Apparently the presumption rule has led circuit courts to reject

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below-guideline sentences and created a regime in which district courts in presumption circuits are discouraged from considering the factors outlined in 18 U.S.C. § 3553(a). Hernandez suggests an alternative to the presumption rule which would tie the degree of the variance from the Guideline range to the quality of the reasoning provided by the sentencing court. While a few circuits have adopted variations of this proposal, they have tied it to a presumption that Hernandez rejects.

Steven Sanders, in his discussion of *Recuenco*, suggests that the Court apply its harmless-error analysis to claims arising under *Blakely*.[13] He states that "appellate courts conducting harmless-error analysis of a trial court's failure to submit a sentence-enhancing fact for jury findings must apply *Chapman* with due regard for what the underlying substantive law actually required the jury to find." Even though the Supreme Court in its recent decision did not go as far as Sanders recommended, the Washington Supreme Court may, on remand, apply a *Chapman*-style harmless error analysis, which Sanders views as protective of the principles inherent in *Blakely*.

Specific proposals to the Court on how to resolve individual sentencing issues are counterbalanced in this Issue by some policy prescriptions that raise questions about the role of the Court.

IV. What Role for the Court?

Jon Sands' discussion of the role of the Chief Justice raises larger questions as to the extent to which a Chief Justice has the right—and duty—to move forward a specific policy agenda. It also highlights the importance of the position of Chief Justice, which may frequently be underestimated or be reduced to the role the Chief Justice plays in assigning the writing of decisions. Sands suggests that the Chief Justice not only spearhead changes in the Federal Rules of Criminal Procedure but also advocate for evenhanded representation within the Sentencing Commission and advisory committees, which would mean the addition of defense representatives. Such changes, which the Chief Justice could help bring about, would increase the expertise available to the Sentencing Commission, according to Sands. While no one can quarrel with this assessment, the question remains whether such additional information is desired by those currently at the table.

Juliet Stumpf leaves ambiguous the ultimate recipient of her policy descriptions. What could and should the role of the Supreme Court be in the development and application of collateral sanctions? Stumpf focuses on the deportation of noncitizen offenders. She critiques the increasing harshness of criminal deportations, which apply to an ever larger group of noncitizens as the number of triggering criminal sanctions has expanded dramatically and deportation enforcement has grown exponentially. These changes have weakened any connection between the type of crime committed, the criminal justice sanction imposed, and the impact deportation may have on the offender, his family, and his community. Stumpf therefore develops a regime of graduated sanctions for noncitizen offenders, in addition to their criminal justice sanction, to replace deportation as the sole governmental response to a wide range of offenses. Deportation would be understood as the ultimate, most serious sanction, imposed based on an assessment of the seriousness of the criminal conduct combined with the quality and quantity of the ties the noncitizen has to the United States. Such assessments have been typical in European countries even though pressure increases to move to a strengthened deportation regime there as well.

In contrast to the other authors, who focus on the many flaws in the current sentencing regime, Stumpf contrasts it favorably with the increasingly mandatory immigration sanction. While her perception of the sentencing system might be too favorable, her overall approach is intriguing as it is among the rare proposals presenting graduated collateral sanctions.[14] Even though Stumpf admits that her proposal includes a host of unresolved issues, the largest problem may be who should implement such a regime. Stumpf suggests granting the judiciary that imposes the criminal sanction the power to impose immigration sanctions. This idea appears politically infeasible in a climate in which courts are increasingly denied discretionary power and even deprived of jurisdiction. Nevertheless, Stumpf's idea may provide a blueprint for sentencing commissions and courts to at least consider at sentencing the impact of additional collateral consequences.[15]

Stumpf's analysis may attract the attention of courts if they were inclined to follow the Supreme Court's lead in *Bajakajian*. In that case, as Lee points out, the Court struck down a forfeiture sanction on Eighth Amendment grounds. The same analysis could be applied to deportation, which may present an excessive punishment for certain types of offenses. Even though the Court has abdicated responsibility for such review in earlier deportation cases, because it views deportation as a civil sanction, it may reconsider its position in light of a dramatic change in substantive law.

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V. Conclusion

This Issue presents substantial food for thought, and we will reconsider many of these issues in upcoming FSR Issues. The authors have superbly analyzed changes in the prevailing sentencing philosophy, created a larger context for sentencing decisions, and illuminated some of the specific issues facing lower courts in the wake of *Blakely* and *Booker*. Whether the Court will take on some of the larger issues or rather be content with resolving individual matters stemming from its landmark decisions, will perhaps become clearer during the next term. The Court may choose to increase procedural protections, cite foreign decisions, provide protections for non-citizen offenders, and develop a more robust Eighth Amendment analysis, or instead it may leave it to lower courts to resolve the myriad issues resulting from the upheaval in sentencing, without giving them much guidance. In any event, the Court may have reached a crossroads. While our authors present various paths, only the future will tell whether the Court, under its new leadership, will take any of them. All that is certain is that sentencing will continue to change—and remain a fascinating area of law.

Notes

1. For a description of the envisioned system, *see* Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with* Blakely v. Washington, 16 FED. SENT. REP. 364, 367 (2004).
2. *See, e.g., Washington v. Recuenco*, 2006 U.S. Lexis 5164 (June 26, 2006); *Cunningham v. California, cert. granted*, 126 S. Ct. 1329 (2006).
3. 337 U.S. 241 (1949).
4. *See, e.g.*, JULIAN V. ROBERTS et al., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES (2003); Linda Drazga Maxfield et al., U.S. Sentencing Commission, Research Bulletin, *Just Punishment: Public Perceptions and the Federal Sentencing Guidelines* (1997), at www.ussc.gov/publicat/JUSTPUN.PDF.
5. *See, e.g.*, Paul J. Hofer & Mark H. Allenbough, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).
6. *See also* Mark D. Harris, Blakely's *Unfinished Business*, 17 FED. SENT. REP. 83, 85-87 (2004) (criticizing *Williams* because its "logic has evaporated").
7. *Crawford v. Washington*, 541 U.S. 124 (2004).
8. Distinguished lecture at St. Thomas University School of Law, Miami, Apr. 2005.
9. *See, e.g.*, Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95, 106-08 (2004) (discussing Russian juries in criminal cases); Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35 (2006).
10. *See also Sanchez Llamas v. Oregon*, No. 04-10566 (S. Ct., decided June 28, 2006) (holding that the exclusionary rule does not apply to a violation of the Vienna Consular Convention).
11. *Harris v. United States*, 536 U.S. 545 (2002).
12. *People v. Cunningham*, 2005 WL 880983 (Cal. Ct. App.), cert. granted, *sub nom. Cunningham v. California*, 126 S. Ct. 1329 (2006).
13. *Washington v. Recuenco*, 2006 U.S. Lexis 5164 (June 26, 2006).
14. *See also* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement*, 84 MINN L. REV. 753 (2000) (hereinafter Demleitner, *Continuing Payment on One's Debt to Society*) (describing disenfranchisement for criminal offenders in Germany as an alternative to the system in U.S. states, as disenfranchisement is considered part of the overall sanction and is applied in a graduated way depending on the type of offense committed).
15. *See, e.g.*, Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339 (2005); Demleitner, *Continuing Payment on One's Debt to Society, supra* note 14.

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