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Conceptualizing Blakely

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Abstract

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

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

The fundamental and sound principle at work in the Blakely line of cases, as well as the principle's proper limit, centers on an essential offense/offender distinction. The Constitution frames the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused." This language connotes that the jury trial right attaches to all offense conduct for which the state seeks to impose criminal punishment, but the language also connotes that the jury trial right does not attach to any offender characteristics which the state may deem relevant to criminal punishment. That is, all facts and only those facts relating to offense conduct which the law makes the basis for criminal punishment are subject to the jury trial right;

such facts are in effect the essential parts of those “crimes” which the state wishes to be able to allege against “the accused” in a “criminal prosecution.”

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

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

I. The *Blakely* Principle

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

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

[2] In previous works, I have analogized *Blakely* to an earthquake which has shaken the foundation of structured sentencing reforms. *See* Douglas A. Berman, *The* Blakely *Earthquake and its Aftershocks*, 16 FED. SENT. REP. 307 (2004); *see also* Douglas A. Berman et al., "Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System," Written Testimony Submitted to the Senate Judiciary Committee (July 13, 2004). However, Justice Sandra Day O'Connor received a lot more press when she utilized the same metaphor to describe *Blakely*. *See, e.g.*, *Senate, Judges Urge 'Blakely' Redux*, N.Y.L.J., July 26, 2004, at 2 (quoting Justice O'Connor's earthquake comments at the Ninth Circuit's annual conference in July).

by an impartial jury." In addition to highlighting the favored status of the jury trial right, the language of these provisions can and should be read together to help chart the proper metes and bounds of the right itself.

The Constitution frames the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused." This language connotes that the jury trial right attaches to all *offense conduct* for which the state seeks to impose criminal punishment, but the language also connotes that the jury trial right does not attach to any *offender characteristics* which the state may deem relevant to criminal punishment. That is, all facts and only those facts relating to offense conduct which the law makes the basis for criminal punishment are subject to the jury trial right; such facts are in effect the essential parts of those "crimes" which the state wishes to be able to allege against "the accused" in a "criminal prosecution."[3]

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

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

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[3] In this discussion, I am intentionally avoiding using the term "element" because the term has no clear constitutional pedigree, but seems to carry much constitutional baggage.

[4] *See, e.g.*, U.S. Sentencing Guidelines § 2B1.1(b) (linking punishment levels to amount of loss) U.S. Sentencing Guidelines § 2D1.1(c) (linking punishment levels to drug quantities); ARIZ. REV. STAT. § 13-702(C)(3) (calling for consideration of "value of the property"); CAL. RULE 4.421(a)(10) (calling for consideration of whether "crime involved a large quantity of contraband").

[5] *See, e.g.*, U.S. Sentencing Guidelines § 2B3.1(b)(2) (linking punishment levels to whether and how firearm or other dangerous weapon was used); CAL. RULE 4.421(a)(2) (calling for consideration of whether "defendant was armed with or used a weapon" in offense).

[6] *See, e.g.*, U.S. Sentencing Guidelines § 2B3.1(b)(3) (linking punishment levels to whether and how "any victim sustained bodily injury"); OHIO REV. CODE § 2929.12(B)(2) (calling for consideration of whether "victim of the offense suffered serious physical, psychological, or economic harm").

In short, an essential offense/offender distinction should inform the jury trial right.[7] This offense/offender distinction, in addition to being suggested by the text of the Constitution, resonates with and is buttressed by the distinctive institutional competencies of juries and judges, and the distinctive judicial ambit of trials and sentencings. Trials are about establishing the specific offense conduct that the state believes merits criminal punishment; sentencing is about assessing both the offense and the offender to impose a just and effective punishment. Juries can reasonably be expected to determine all offense conduct at a (pre-sentencing) trial, and the state can reasonably be required to prove to a jury at trial all the specific offense conduct for which the state seeks to impose punishment. But judges are better positioned to consider (potentially prejudicial) offender characteristics at a (post-trial) sentencing, and the state should be permitted to proffer information concerning an offender's life and circumstances directly to a judge to assist punishment determinations.

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

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

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

A. The source and content of sentencing law

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

But the authorization of punishment based on certain findings does not always trigger the

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[7] Perhaps to be more faithful to the constitutional text, I should describe this key point in terms of a "crimes"/criminals distinction. But the offense/offender language seems to be a linguistically better way to capture the same substantive point.

[8] *Blakely*, 124 S. Ct. at 2538-39 (first emphasis added).

[9] As explained more fully *infra* p. 11, my discussion and conclusions here address *only* the Constitution's jury trial right; other constitutional principles and provisions might impact whether and how a judge can make various findings at sentencing.

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

B. The status and scope of the "prior conviction" exception

Understanding the *Blakely* principle aided by the offense/offender distinction suggests that the Supreme Court's decision in *Almendarez-Torres v. United States*[10] is constitutionally sound. That decision, as subsequently defined, is the source of the "prior conviction" exception to the *Appendi*/*Blakely* rule, and some commentators have asserted that this exception is an illogical and inappropriate gap in the Supreme Court's recent sentencing jurisprudence.[11] But considered against the constitutional text and the offense/offender distinction suggested here, the *Almendarez-Torres* decision appears on firm constitutional ground.

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

Of course, a state is permitted to provide for jury consideration of prior convictions (or any other offender characteristic). Indeed, a few states provide by statute for jury consideration of the

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[10] 523 U.S. 224 (1998).

[11] *See* Colleen P. Murphy, *The Use of Prior Convictions after Apprendi*, 37 U.C. DAVIS L. REV. 973 (2004); Kyron Huigens & Danielle Chinea, *"Three Strikes" Laws and* Apprendi*'s Irrational, Inequitable Exception for Recidivism*, 37 CRIM. L. BULL. 575 (2001).

[12] In a few settings, such as felon-in-possession gun laws, otherwise lawful activity is made unlawful only if and when a defendant has a prior conviction. In these instances, a defendant's status as a felon *is* an essential part of the crime the state seeks punish because it is that status which makes otherwise lawful conduct unlawful. In these settings, the jury trial right would be implicated in determining status as a felon and, to my knowledge, statutes generally treat felon status as a jury issue in these settings.

[13] *See Almendarez-Torres*, 523 U.S. at 235 ("As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice.").

existence of prior convictions in the application of habitual offender laws.[14] States are always free to provide more procedure and procedural protections to a defendant than the Constitution demands; provisions requiring jury consideration of offender characteristics are thus constitutionally permissible (and may also be wise as a matter of policy).[15] But, critically, the Constitution's jury trial right does not demand that offender characteristics, such as a defendant's prior convictions, be proven to a jury because such characteristics are not parts of "crimes."

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

Helpfully, understanding the *Blakely* principle aided by the offense/offender distinction suggests that the "prior conviction" exception ought to be given a broad reading. As explained above, the "prior conviction" exception is not a unique, *sui generis*, unsound gap in an all-encompassing *Appendi*/*Blakely* principle. Rather the *Appendi*/*Blakely* principle is properly applied only to offense conduct, and thus enhancements based on varied criminal history factors ought not trigger the jury trial right when these enhancements concern only offender characteristics. To return to the lingo of the constitutional text, a defendant's status on probation or the nature of his criminal past is not itself properly considered part of a "crime" that the state must allege against "the accused" in a "criminal prosecution." And to return to a focus on distinctive institutional competencies, evidence of a defendant's status on probation or the nature of his criminal past risks prejudicing a defendant if and when such evidence is placed before juries at trial rather than

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[14] *See , e.g.*, IND. CODE ANN. § 35-50-2-8.5(b); N.C. GEN. STAT. § 14-7.5; *see also People v. Epps*, 18 P.3d 2 (Cal. 2001) (holding that defendants have a limited statutory right to jury trial of prior conviction allegations under California law). *See generally* Murphy, *supra* note 11, at 992 n.155 (listing state statutes providing for jury consideration of some recidivism issues); Huigens & Chinea, *supra* note 11, at 580-81 n.25 (detailing that most state do not require a jury finding of criminal history facts for application of recidivism enhancements).

[15] Interestingly, it appears that a century ago, habitual offender laws typically did provide for jury consideration of prior convictions. *See* Graham v. West Virginia, 224 U.S. 616, 625 (1912) (noting that, in the application of habitual offender laws, "it is familiar practice to set forth in the indictment the fact of a prior conviction of another offense, and to submit to the jury the evidence upon that issue, together with that relating to the commission of the crime which the indictment charges").

[16] *See, e.g.*, CAL. RULE 4.421(b)(4); OHIO REV. CODE § 2929.12(D)(1); *see also* Vera Institute of Justice, State Sentencing and Corrections, *Aggravated Sentencing — Blakely v. Washington: Legal Considerations for State Sentencing Systems* 10 (Sept. 2004) [hereinafter Vera Institute, *Legal Considerations*] (discussing this issue).

[17] *See* Vera Institute, *Legal Considerations*, *supra* note 16, at 10.

presented only to judges at sentencing. In short, the Constitution's jury trial right should be understood to allow an array of criminal history issues to be matters of purely judicial concern.

C. The sometimes fuzzy nature of the offense/offender distinction

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

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

The historical importance at sentencing of so-called mixed offense/offender issues is not surprising, since our punishment practices have always sought to be responsive to both the nature of the offense and the character of the offender. However, mixed offense/offender issues create challenges for the *Blakely* principle because neither the constitutional text nor distinctive jury/judge competencies readily indicate how these mixed issues should be treated procedurally. One could reasonably claim that facts relating to the defendant's obstructive behavior or street gang involvement are so linked to offense conduct that they should be classified as part of the defendant's "crimes" which are the basis for a "prosecution" of "the accused" and thus ought to require jury consideration. But perhaps an equally compelling claim could be made that a defendant's economic motive or obstructive behavior or street gang involvement are more properly considered offender characteristics that are not really part of the defendant's "crimes" and thus are not essential jury issues.

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

[18] Of course, those who ascribe to an extremely robust view of the jury trial right might not accept the constitutional significance of the offense/offender distinction to assert that even "pure" offender

administration reasonably could and likely would contend that the Constitution allows mixed offense/offender issues to be resolved by a judge and that only "pure" offense conduct facts trigger the jury trial right.[19]

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

D. The power and problems of the offense/offender distinction

In my view, conceptualizing and defining the *Blakely* principle and the jury trial right through an offense/offender distinction, in addition to its textual and institutional justifications, has considerable practical appeal. As noted by the *Blakely* dissenters and many commentators (and as further detailed in Part III *infra*), an extremely broad reading of *Blakely* and of the jury trial right

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characteristics trigger the jury trial right when the basis for specific punishment consequences. Some of the broad language in the *Blakely* decision — and particularly the indication that the jury trial right applies to "*all* facts legally essential to the punishment," *Blakely*, 124 S. Ct. at 2543 (emphasis added) — suggests that the Court has not (yet) embraced an offense/offender distinction in its articulation of the jury trial right. Moreover, Justice Scalia's dissenting opinion in *Almendarez-Torres* suggests that he may be especially unlikely to believe that the jury trial right should be informed by the offense/offender distinction. *See Almendarez-Torres*, 523 U.S. at 257-59 (Scalia, J., dissenting).

[19] It would seem possible to develop a highly nuanced jurisprudence concerning when mixed offense/offender issues trigger the jury trial right — e.g., one might contend that such mixed issues trigger the jury trial right when they are closely linked to traditional *mens rea* considerations or when a certain quantum of punishment is involved. However, I think the development and results of any such jurisprudence will be driven principally by views on the basic normative question of how broad a reach the jury trial right should be given.

[20] As hinted *supra* note 18, though my account of the jury trial right through the offense/offender distinction may harmonize the Supreme Court's holdings in the *Blakely* line of cases, the *Blakely* decision's broad language — and particularly the indication that the jury trial right applies to "*all* facts legally essential to the punishment," *Blakely*, 124 S. Ct. at 2543 (emphasis added) — suggests that I may ultimately be advocating a *re*-conceptualization of the *Blakely* principle. Though I may well be trying to write revisionist history for the *Blakely* line of cases, I believe the Constitution's text and spirit supports and justifies such an effort.

would be extremely disruptive to existing sentencing systems built around judicial fact-finding, and would also create considerable challenges for effective revision of guideline sentencing structures. By placing a sound and sensible and "intelligible" limit on the reach of the *Blakely* principle and the jury trial right, the offense/offender distinction should provide legislatures and sentencing commissions with more administrative breathing room when seeking to (re-)design fair and effective sentencing systems. By requiring proof to a jury of all offense conduct, the jury would still be able to "function as circuitbreaker in the State's machinery of justice."[21] But by allowing proof to a judge of offender characteristics, states should still be able to effectively and efficiently structure at least some aspects of sentencing decision-making without always having to pay the "substantial constitutional tax" that accompanies the jury trial right.[22]

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

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

III. Other Conceptual Challenges Presented by *Blakely*

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[21] *Blakely*, 124 S. Ct. at 2539.

[22] *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting).

[23] *See* State v. Hanf, 2004 WL 2340246 (Minn. App. Oct. 19, 2004); New Jersey v. Abdullah, 2004 WL 2281236 (N.J. Super. A.D. Oct. 12, 2004). *But see* State v. Warren, 2004 Ore. App. LEXIS 1305 (Or. App. Oct. 13, 2004) (rejecting an offense/offender reading of *Blakely*).

[24] *See* State v. Schroeder, 880 P.2d 192, 199-204 (Haw. 1994) (distinguishing facts "intrinsic to the commission of the crime charged," which must be alleged in an indictment and found by a jury, from facts "wholly extrinsic to the specific circumstances of the defendant's offense," which do not have to be alleged in an indictment or found by a jury).

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

A. The unresolved meaning of "facts" and "punishment"

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

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

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

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[25] *Blakely*, 124 S. Ct. at 2543 (emphasis in original).

[26] *See, e.g.*, United States v. Trala, 2004 U.S. App. LEXIS 22264 (3d Cir. Oct. 26, 2004) (explaining that "whether an offense is a 'crime of violence or a controlled substance offense' is a legal determination, which does not raise an issue of fact under *Blakely*"); United States v. Swan, 327 F. Supp. 2d 1068 (D. Neb. 2004) (concluding that a "determination of whether attempted robbery amounts to a crime of violence is a question of law" that does not implicate *Blakely*).

[27] OHIO REVISED CODE § 2929.14(B) & (C); *see also* Vera Institute, *Legal Considerations*, *supra* note 10, at 4-5 (discussing the "uneasy nature of 'facts' under *Blakely*").

There is broad language in parts of the *Blakely* decision which suggest juries must now be involved in *all* punishment-enhancing sentencing determinations, and yet the decision's overall emphasis on juries finding "facts" may support a contrary conclusion.

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

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

The offense/offender distinction developed in Parts I and II above does not provide any obvious guidance on the meaning and scope of "facts" and "punishment" for purposes of defining the reach of the jury trial right. However, because the offense/offender distinction establishes an important limit on the *Blakely* principle, the consequences of a broad interpretation of "facts" and "punishment" in this context may not be too profound. If the *Blakely* principle is understood

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[28] 536 U.S. 545 (2002).

[29] *See e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Kyron Huigens, Harris*,* Ring*, and the Future of Relevant Conduct Sentencing*, 15 FED. SENT. REP. 88 (2002); *see also Harris v. United States*, 536 U.S. 545, 569 (2002) (Breyer, J., concurring in part and concurring the judgment) ("I cannot easily distinguish *Apprendi v. New Jersey*, 530 U.S. 466 (2000), from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction.").

[30] *Cf.* Vera Institute, *Legal Considerations*, *supra* note 10, at 7 (exploring the question: "What is a 'sentence' for *Blakely* purposes?").

[31] *See id.* at 8-9.

[32] *Blakely*, 124 S. Ct. at 2538.

relatively narrowly to mean that a jury trial right is applicable *only* to "pure" offense conduct issues, then the broad applicability of the *Blakely* principle to a range of "facts" and "punishments" may not ultimately prove too disruptive to modern sentencing laws and practices.

B. The reach of other constitutional provisions

Though I have not previously emphasized the point, I have throughout this discussion been focused exclusively on the jury trial right. There may be a host of other constitutional provisions and concepts — including the other provisions of the Sixth Amendment, the Due Process Clause, the Equal Protection Clause, the Eighth Amendment and structural considerations like separation of powers and federalism — which may help inform the *Blakely* principle and which should certainly play a significant role in any broad theory of constitutional regulation of sentencing laws and procedures.[33] Indeed, it is valuable to remember that the jury trial right does not itself directly address applicable burdens of proof or notice requirements or other related procedural issues. The requirements of a certain type of notice and of proof beyond a reasonable doubt in federal and state criminal prosecutions arise from interpretations of the Due Process Clause and other constitutional provisions. In other words, the jury trial right only concerns *who* makes certain determinations, it is not directly concerned with *how* these determinations are made.

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

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[33] *See generally* Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT. REP. 1 (2004) (criticizing *Blakely*'s interpretation of the Sixth Amendment in the course of developing a comprehensive theory of constitutional limits on sentencing procedures and outcomes). *Cf.* Ring v. Arizona, 536 U.S. 584, 614-19 (2002) (Breyer, J., concurring) (explaining view that "jury sentencing in capital cases is mandated by the Eighth Amendment").

[34] *See* Vera Institute, *Legal Considerations*, *supra* note 10, at 6 (noting that "a discussion of the due process clause was conspicuously absent in the *Blakely* opinion").

[35] *Cf.* Mitchell v. United States, 526 U.S. 314, 330 (1999) (concluding that the Fifth Amendment's right against self-incrimination precludes a sentencing judge from "holding [a defendant's] silence against her in determining the facts of the *offense* at the sentencing hearing," while expressly not addressing whether a sentencing judge may constitutionally consider a defendant's silence in a "determination of a lack of remorse, or upon acceptance of responsibility") (emphasis added).

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

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

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

> Under a sentencing system whose goal was rehabilitation, crime was seen as a "moral disease"; the system delegated its cure to "experts" like judges. Each offense carried a broad range of potential sentences; the judge had the discretion to pick any sentence within the range. In order to maximize the information available to the judge, and to minimize constraints on her discretion, sentencing procedures were less formal than trial procedures. No one challenged judges' sentencing procedures as somehow undermining the Sixth Amendment's right to a jury trial precisely because judge and jury had "specialized roles," the jury as fact finder, the judge as the sentencing expert. However flawed a judge's decision might be, it was not the case that he or she was usurping the jury's role.
>
> Twentieth century determinate sentencing regimes, however, changed the landscape and have appropriately raised Sixth Amendment concerns. In determinate regimes, facts found by the judge have fixed consequences — the judge finds x drug quantity, the result is y sentencing range. In this regard, the judge is "just" another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences. By rights, sentencing in a determinate regime should be closer to a bench trial on the issue of culpability than the relatively informal mix that characterized indeterminate sentencing. While the court may be more sophisticated — perhaps justifying more informal rules of evidence than is usually the case before juries — the significant sentencing consequences at stake mean that the standard of proof should remain high, the overall approach rigorous.[37]

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[36] In 1949, the Supreme Court constitutionally approved this philosophical and procedural approach to sentencing in *Williams v. New York*, 337 U.S. 241 (1949), but we should never lose sight of how much *Williams* was a creature of its own distinct sentencing times. The *Williams* Court stressed that "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence" and spoke approvingly of the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.* at 247-48. Thus, continued the Court, the Due Process Clause should not be read to require courts to "abandon their age-old practice of seeking information from out-of-court sources," because "[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies" which rely upon judges having "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 250-51.

[37] Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT. REP. 83, 83-85 (2002).

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

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