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Fall 2004

Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment

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Recommended Citation
Frank O. Bowman III, Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment, 17 Fed. Sent. R. 1 (2004)

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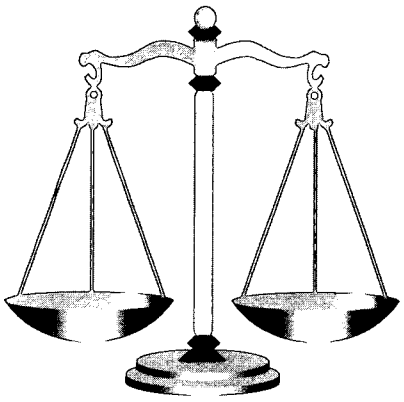
Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment



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This Issue of FSR is the second in our series on *Blakely v. Washington*,[1] in which the United States Supreme Court struck down the Washington State Sentencing Guidelines as violative of the jury clause of the Sixth Amendment[2] and cast the constitutional validity of the Federal Sentencing Guidelines and numerous state sentencing systems into grave doubt. I have explained elsewhere why *Blakely* is a bad decision from the point of view of real lawyers, judges, legislators, and defendants who will have to inhabit the oddly configured post-*Blakely* universe.[3] First, *Blakely* has brought the federal criminal justice system to a virtual halt and cast perhaps half of all state sentencing systems into varying degrees of disarray. (In this Issue, two articles, one by Ian Weinstein and Nathaniel Marmur[4] and another by Jane McClellan and Jon Sands,[5] offer guides to some of the problems and opportunities *Blakely* has created for federal defense counsel.) Second, if in the pending cases of *Booker*[6] and *Fanfan*[7] the Court extends *Blakely* to the Federal Sentencing Guidelines, the chaos will not abate; instead, as explained by Professor Albert Alschuler in this Issue,[8] the field of struggle will simply widen to include Congress. Third, the unprecedented disruption that *Blakely* has caused, and that a ratifying successor would extend, has been the predictable consequence of a ruling that is at best narrowly formalistic and at worst logically incoherent. Fourth, because of the odd formalism of the *Blakely* rule, it can be evaded by equally formalistic legislative responses. But if the *Blakely* rule were modified and extended to the degree necessary to make it logical and coherent, doing so would not only void the existing federal guidelines system, but would cripple the ongoing and generally successful structured sentencing movement in the states. Fifth, it seems likely that the *Blakely* decision, whatever its stated doctrinal basis, was in some measure influenced by rising concern among judges about a federal sentencing system that in recent years has produced ever-harsher sentencing rules and an ever-increasing tilt of sentencing authority away from the judiciary and toward an alliance of Congress and the Justice Department. Yet paradoxically, virtually all of the politically likely reconfigurations of federal sentencing law in response to *Blakely* would do little or nothing to reduce sentence length and would decrease judicial sentencing power while increasing prosecutorial and congressional control.

In short, my principal argument against *Blakely* has been the pragmatic complaint that it created a godawful and unprecedented mess which, unless at least one member of the majority can be convinced to reconsider, will not only clog and confusticate America's criminal courts for years to come but will require or induce legislatures to create sentencing systems markedly less attractive than those we now have. Nonetheless, pragmatic arguments against *Blakely*, powerful though I think they are, may not suffice to convince either wavering justices or some outside observers that the Court has gone badly astray.

Some observers are not convinced that the effects of *Blakely* are or will be all that bad. Others (including some of my editorial colleagues at FSR and Professor Alschuler) think *Blakely* provides an opening for sentencing reforms they would like to see, such as the innovative revised federal sentencing scheme described by Larry Kupers in this Issue.[9] Those in this camp view the

Federal Sentencing Reporter, Vol. 17, Issue 1, pp. 1–10, ISSN 1053-9867, electronic ISSN 1533-8363.
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risk that *Blakely* will make things worse as an acceptable price to pay for the hope that a post-*Blakely* world might get better. The large number of tents in this camp is undoubtedly attributable to a widely shared, if not universal, feeling that the current state of federal sentencing, at least, is pretty bad.[10] And some, including both Justice Scalia and not a few academics, seem to view arguments about *Blakely*'s effects in the real world as just a bit below the salt, not worthy of the high realms of constitutional discourse. In the academy, people who make practical arguments are termed "consequentialists," an ever-so-slightly disdainful label for those who care about what actually happens. I cheerfully confess to consequentialism. The experience that Holmes proclaimed to be life of the law is, after all, the experience of observing the consequences of applying law to the circumstances of ordinary life.

Nonetheless, this Essay attempts to go beyond my earlier pragmatic, consequentialist response to *Blakely* and to sketch an alternative constitutional model for criminal sentencing. I emphasize that this is only a sketch which, under ordinary circumstances, I would not place in the public realm without a good deal more private cogitation, input from colleagues, and textual elaboration. But these are not ordinary times in criminal law. In *Blakely*, the Supreme Court launched itself and the rest of us onto uncharted seas. If the opinions in *Booker* and *Fanfan* confirm the course that Justice Scalia plotted in *Blakely*, it will be very difficult to turn the ship around anytime soon. So, on the assumption that an incompletely elaborated theory advanced now may be of some value, while a perfectly honed presentation months hence may come too late to be of any consequence, I offer the following thoughts.

This Essay attempts to go beyond my earlier pragmatic, consequentialist response to Blakely *and to sketch an alternative constitutional model for criminal sentencing.*

My fundamental disagreements with Justice Scalia are two:

First, at the most basic level, Justice Scalia's expressed vision of what the Supreme Court should be doing when it interprets the Constitution in difficult and doubtful cases is mistaken. In *Blakely*, he concludes his response to the pragmatic arguments of Justices O'Connor and Breyer with the remarkable declaration that, "Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."[11] He is, of course, right that there may be occasions when the text of a constitutional provision admits of only one interpretation and that in such a case the Court is not at liberty to change the meaning of constitutional language to facilitate the Justices' preference for a different and arguably more equitable and efficient result. But where the meaning of a constitutional provision is doubtful or where the Court is applying Eighteenth Century constitutional language to situations unknown in the founding era, the Court surely must attend to the question of whether and to what degree its work "impairs the efficiency or fairness of criminal justice."[12] To do otherwise is to pretend that the Court is a sort of oracular priesthood rather than a vital policy-making institution in a functioning government.

More to the present point, the fact that a new and debatable reading of the constitution seems likely to produce very bad practical consequences has constitutional significance inasmuch as it suggests that the new reading is a bad interpretation of the constitution. In drafting the criminal provisions of the Constitution — the rights to jury trial, counsel, due process, and confrontation, and the prohibitions against self-incrimination, double jeopardy, ex post facto laws, and cruel and unusual punishments — the Framers identified interlocking elements of an overall system designed to promote "fairness of criminal justice" by balancing rights of defendants against the right of society to protect itself against crime and criminals. No single one of these constitutional provisions should be read in isolation, and any reading of one of them that risks impairment of the fairness of the criminal justice process as a whole ought to be viewed with the utmost suspicion.

My second point of difference with Justice Scalia flows from the first. His narrow focus on the role of juries under the Sixth Amendment seems to have blinded him to the necessity of defining and balancing the roles of the other institutional actors in the process of defining and punishing crime. An adequate constitutional model of criminal prosecution and punishment has to take account not only of the constitutional text and history of one portion of one amendment, but of the capabilities, historical roles, and places in the constitutional scheme of the institutions that administer the criminal law — juries, judges, legislatures, and the executive. This essay offers a "functionalist" alternative to *Blakely*'s narrow formalism.

Justice Scalia's *Blakely* Opinion

Blakely v. Washington involved a challenge to the Washington State Sentencing Guidelines. In Washington, pre-*Blakely*, a defendant's conviction of a felony produced two immediate

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sentencing consequences. First, the conviction rendered the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines within the statutory minimum and maximum sentences. Under the Washington State Sentencing Guidelines, a judge was empowered to sentence above this range, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. [13] The fact of conviction generated a "standard range" of forty-nine to fifty-three months;[14] however, the judge found that Blakely had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permitted, *but did not require*, imposition of a sentence above the standard range.[15] It bears repetition that the Washington judge was not required to impose an enhanced sentence even after finding an aggravating factor. The choice to do so or not remained within the judge's discretion. In Blakely's case, the judge exercised that discretion and imposed a sentence of ninety months.[16] The U.S. Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.[17]

In reaching its result, the Court relied on a rule it first announced four years ago in *Apprendi v. New Jersey*: "Other 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."[18] In the years since *Apprendi*, most observers (including myself) assumed that *Apprendi's* rule applied only if a post-conviction judicial finding of fact could raise the defendant's sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction.[19] For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant's motive in committing the offense was racial animus.[20] The Supreme Court held that increasing Apprendi's sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.[21]

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what has always before been considered the statutory maximum. Henceforward, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[22] Any fact that increases a defendant's "statutory maximum," as newly defined in *Blakely*, must be found by a jury.

In Blakely, *the Court found that the Sixth Amendment can be violated even by a sentence below what has always before been considered the statutory maximum.*

The *Blakely* model of constitutional sentencing practice appears to be this:

First, any fact proof of which exposes a defendant to a higher theoretical maximum sentence than he could have been subject to absent proof of that fact is an "element" of a crime and must be proven to a jury beyond a reasonable doubt or admitted by the defendant. It would not seem to matter whether the rule correlating the fact with increased possible punishment was enacted by a legislature or an administrative body like a sentencing commission (though the Court may tell us otherwise in *Booker* and *Fanfan*). Most importantly, the concept of a maximum sentence now includes the tops of fact-based presumptive sentencing ranges situated below what had previously been understood to be statutory maximum sentences.

Second, because *Blakely* seems to reaffirm the holding of *Harris v. United States*, [23] a fact proof of which subjects a defendant to a real and inescapable mandatory minimum sentence is not an element. Such a fact can be found by a judge, post-conviction, and to a lower standard of proof, so long as the resultant minimum sentence is below the legislatively established maximum sentence for the same crime. And it would appear that mandatory minimum sentences could be created by a non-legislative body.

Third, *Blakely* does not deny the power of a legislature to specify a single punishment for a crime. Conversely, *Blakely* confirms that if a legislature chooses to assign a range of punishments to proof of a crime, it may allow judges to impose a sentence anywhere within that range in the unchecked exercise of their discretion. Thus, it would appear that *Blakely* permits legislatures or sentencing commissions to create entirely *advisory* guidelines suggesting additional non-element facts that judges should take into account in imposing sentences below the statutory maximum. But *Blakely* does not seem to permit a system in which a post-conviction

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judicial finding of non-element facts can generate even a presumptive sentencing range lower than the theoretical maximum.

In short, *Blakely* creates a world in which defendants have a constitutional right to a jury trial on facts that generate a theoretical maximum sentence they almost certainly will not receive, but no right to a jury trial on facts that impose a minimum sentence they absolutely must serve. Further, it permits legislatures either to take all sentencing discretion away from judges by creating single-penalty crimes, or to give judges nearly absolute sentencing discretion by creating crimes associated with sentencing ranges that can legally stretch from probation to decades of imprisonment. But *Blakely* seemingly denies the power of the legislature or any other body to place any legally enforceable constraint on the exercise of judicial sentencing discretion within a statutorily specified range.

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The two basic arguments Justice Scalia advances for his interpretation of the Sixth Amendment are: (1) That it flows ineluctably from "principles . . . acknowledged by courts and treatises since the earliest days of graduated sentencing,"[24] and reflects "respect for longstanding precedent,"[25] and (2) that it is necessary "to give intelligible content to the right of jury trial."[26] A detailed dissection of Justice Scalia's historical argument will have to wait for another day, but even he doesn't seem to have much confidence in it. His response to Justice O'Connor's attack on his historical sources gives away the game. He sidesteps the merits of her argument and instead drops a footnote tacitly admitting its force by saying, in effect, "Well, my sources may be weak, but yours are weaker."[27]

So Justice Scalia's real project is not upholding precedent. Nor, as we have already seen, is it an effort to construct a constitutional model of criminal sentencing that is fair and efficient. Rather, this is a judicial academician's exercise in "giving content to the jury trial right" undertaken with insufficient attention to the place of that right in the overall institutional and procedural structure of criminal prosecution and punishment.

An Alternative Approach

Despite my disagreements with Justice Scalia, the broad concerns underlying *Blakely* require serious attention, and there are points on which Scalia's approach to addressing those concerns is clearly on the right track. *Blakely* confronts one aspect of a fundamental problem of criminal justice: What roles should the institutions of the criminal law — legislatures, judges, juries, prosecutors, probation officers, parole boards, and (more recently) sentencing commissions — fill in defining, adjudicating, and punishing crime? This fundamental problem has two interlocking components: first, the question of what each institution is best suited by history and inherent capacity to do, and second, the question of whether the country's fundamental law, the federal constitution, places any limits on the role each institution will be permitted to perform.

In our system, the legislature has very nearly plenary authority to define conduct as a "crime," and to assign penalties for crime.[28] The central insight of *Blakely*, the point on which Justice Scalia is plainly right, is that these are not separate functions, but halves of the same whole. Defining a "crime" means designating a list of facts we call "elements" that, if proven, correlate to a designated punishment or punishments. Justice Scalia is also plainly correct in associating the jury trial right of the Sixth Amendment with the legislative power to define crime and by doing so to designate punishment. That is, both as a matter of precedent and of theory the legislative designation of a fact as an "element" of a "crime" carries with it a right to jury determination of that fact. The harder questions (which Justice Scalia, in my view, gets wrong) are: (1) What connection between the finding of a fact and the imposition of a particular punishment is necessary to make the fact an "element," as opposed to merely one among many considerations in deciding on appropriate punishment for a particular defendant? (2) What roles does the Constitution permit institutional actors other than legislatures and juries to play in imposing punishment on persons convicted of crime? (3) More particularly, in situations where the legislature has defined a crime by identifying facts that correlate to a range of possible punishments, is it constitutionally permissible for the legislature, or other official bodies such as sentencing commissions or courts, to designate facts that, if found, impose any degree of constraint on the discretion of the sentencing judge to choose a punishment within the range?

Rather than attempting to answer the foregoing questions in the abstract and then describing a constitutional sentencing model that conforms to the answers, I thought it simpler to reverse the order. So in the following paragraphs, I sketch the outlines of a constitutional sentencing

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model that seems to me more sensible, more in tune with the history and capacities of the institutions involved in sentencing, and a better reading of the constitution as a whole than that presented in *Blakely*. Thereafter, I offer a few preliminary observations about why this model is an improvement both on Justice Scalia's inconsistent formalism and on the pre-*Blakely* void in constitutional sentencing theory.

Outline of a Constitutional Theory

Legislatures define crimes in terms of the punishments authorized or commanded by law upon proof of a bundle of facts. Defendants have a Sixth Amendment right to a jury trial on each and every fact in the bundle that constitutes a "crime." A legislature has the authority to assign either a single punishment or a range of punishments to a specified bundle of facts. A range by definition is bounded by a minimum required penalty and a maximum authorized penalty. Therefore, I suggest that a "crime" for purposes of the Sixth Amendment jury trial right has certain characteristics:

I suggest that a 'crime' for purposes of the Sixth Amendment jury trial right has certain characteristics.

(1) It must be defined by statute (which could mean either a bill whose language is drafted and approved by the legislature or a bill ratifying and giving legislative sanction to the work of some sub-legislative body like a sentencing commission).

(2) Within a family of offense types (e.g., homicides, assaults, property crimes, drug offenses, etc.), a "crime" is defined as the smallest bundle of facts that must be proven in order to expose a defendant to a particular maximum sentence.

(3) A "crime" can also be defined as the smallest bundle of facts that must be proven to require a defendant to suffer either the single penalty designated by the legislature or the minimum sentence of a legislatively designated range. In short, *Harris* must be overruled.

These basic characteristics of a "crime" are accompanied by certain corollaries:

(a) Any statute that purports to allow a judge to increase a defendant's sentence above the applicable statutory maximum sentence (as defined above) based upon post-conviction judicial findings of fact is either void or must be interpreted as defining a different and more serious crime, all of whose elements must be proven to a jury. Or to put it another way, the result in *Apprendi* was correct.

(b) Unlike Justice Scalia's definition of statutory maximum sentence in *Blakely*, if a legislature (or a sentencing commission legislatively authorized to do so) attaches two sentences to a particular bundle of facts — a high maximum possible sentence and a lower presumptive maximum sentence — the higher maximum is the "statutory maximum." Putting it another way, legislatures are permitted to establish both maximum possible sentences and lower presumptive sentences as legal incidents of proof of the same bundle of facts. The lower presumptive sentences can take the form either of a single presumptive sentence (as is now the case in Indiana),[29] or of a presumptive range of sentences (as is the case in many states). This corollary of the basic definition would require that the Court reverse its holding in *Blakely*.

(c) Facts in addition to those in the bundle that defines a crime which, if proven, create a presumptive maximum lower than the statutory maximum are *sentencing factors* which are not elements of the crime and need not be proven to a jury. The key distinction is between a presumptive maximum within the statutory range and an actual hard statutory maximum. A presumptive maximum is one that can be exceeded by the judge on his own motion through the exercise of judicial discretion. A hard statutory maximum cannot be exceeded based on the judge's discretion or be raised based on a post-conviction judicial finding of fact. Under the constitutional model proposed here, it would be perfectly acceptable to create a system of rules or guidelines that depend on post-conviction fact findings to designate a *presumptive* sentencing range for a defendant within the statutory minimum and maximum. But the judge must retain some meaningful authority to go outside the presumptive range based on the facts of the particular case or the individual circumstances of the defendant. It would even be appropriate for a legislature or commission to designate a list of factors that would justify such a "departure," so long as the list is not so short or restrictive as to amount to nothing more than another "element" of a "crime." Indeed, the Court might adopt a rule similar to the one it has employed in the capital sentencing arena requiring that the list of permissible mitigating factors be non-exclusive.[30] The line here is inevitably and designedly somewhat imprecise. It would both require some degree of case-by-case elaboration from the Court and permit the development and co-existence of varying sentencing models in the state and federal systems.

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(d) Minimum sentences are subject to the same analysis. Any bundle of facts that generates a minimum sentence below which the sentencing judge cannot go on his own motion or upon the request of the defendant as an exercise of discretion is a "crime." Facts generating minimum mandatory sentences for which there is no mechanism of reduction, or for which the only mechanism is triggered by a government motion such as a substantial assistance motion under 18 U.S.C. §3553(e), define a "crime." The caveat regarding government motions flows from a view of the proper role of the branches of government. It is the job of the government to charge and prove "crimes," which under the definition proposed here are bundles of facts that, if proven, generate absolute limits on the discretionary sentencing authority of judges. Under this definition, the bundle of facts producing the low end of guideline ranges of the federal type would not constitute a "crime" because the judge could sentence lower by exercising his departure power. However, the quantity-based minimum drug sentences in the federal code do create "crimes" and minimum-triggering quantities become elements to be proven to juries because judges applying these provisions have no independent power to depart downward from the quantity-based minimum. The fact that a judge can depart downward from such sentences upon a government substantial assistance motion does not render them any the less mandatory or any the less "crimes" in need of jury scrutiny. The government's post-conviction motion for downward departure should be considered akin to a post-trial motion to dismiss certain charges — an action within the power of the government to initiate and of the court to grant, but not one that affects definition of what is and is not a crime.

The key difference between Justice Scalia's definition of an "element" and that proposed here is the role played by judicial sentencing discretion.

The key difference between Justice Scalia's definition of an "element" and that proposed here is the role played by judicial sentencing discretion. If the objective is to give "intelligible content to the right of jury trial,"[31] the way to do it is to reserve to the jury facts that the legislature designated as setting absolute limits on what sentences judges can impose. A real, pre-*Blakely*, statutory maximum sentence is such a limit because no exercise of discretion or post-conviction finding of fact can empower a judge to impose a sentence any higher than that maximum. A real minimum mandatory sentence is also such a limit because no exercise of discretion or post-conviction finding of fact can empower the judge to impose a sentence lower than that minimum. Yet *Blakely*, when read together with *Harris*, denies to juries the power to determine facts that absolutely require a judge to impose a particular minimum sentence, while conferring on juries the power to decide facts like the deliberate cruelty determination in *Blakely* itself that, even if found, do not require the judge to do or refrain from doing anything at all. A fact that places an absolute limit on judicial sentencing discretion should be an "element." A fact that merely guides the judge in the exercise of his discretion should not.

Defining crime in this way leaves traditional structures of offense grading within crime categories intact. For example, assume a state were to subdivide homicides into first degree murder, defined as intentional and premeditated killing and punishable by life imprisonment, second degree murder, defined as knowing killing and punishable by up to twenty years in prison, and manslaughter, defined as reckless killing and punishable by up to ten years in prison. In each instance, the smallest bundle of facts that would expose the defendant to ten years, twenty years, or life in prison would be a killing accompanied by the requisite mental state.

Likewise, the definition proposed here is consistent with the Court's prior rulings on subjects such as affirmative defenses. It would not, for example, require disturbing the holding of *Mullaney v. Wilbur*[32] that in a homicide case in which a defendant claims to have committed, at most, heat of passion manslaughter the prosecution bears the burden of proving the absence of heat of passion. Under the definition of crime proposed here, Maine's life sentence for murder, defined as the unlawful intentional killing of another human being, was a statutory maximum sentence because proof of a killing and intentionality exposed the defendant to the life sentence. Presence or absence of heat of passion was also, by the proposed definition, an element of a crime because proof of that fact generated a maximum sentence of twenty years which could not be exceeded either in a pure exercise of judicial discretion or be authorized by a post-conviction judicial finding of some other fact.

However, the definition of "crime" advanced here would not include federal guidelines factors as elements. In every federal case, conviction of the underlying offense creates a hard statutory maximum and a base offense level corresponding to a range of punishment. That base offense level and the high end of the corresponding range can be raised and lowered by post-conviction findings of aggravating or mitigating factors triggering discrete guidelines adjustments. But the

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resulting range is nothing more than a presumptive sentence from which the judge may depart in either direction in the exercise of his or her discretion. The real statutory maximum remains the true upper limit on judicial sentencing authority. It is a mistake to look at all the different upward and downward adjustments in a complex guidelines system as "elements" — they are merely procedural steps that take the judge to a final range. If that range is one from which the judge has no power to deviate, then the facts that determined the range are elements. If the range is instead simply the position from which the judge begins to exercise his discretion to assign a sentence within the hard upper and lower statutory limits, then the facts that brought him there are not elements.

Giving the exercise of judicial sentencing discretion constitutional status as an essential component of the definition of crimes has a number of desirable consequences beyond providing a more coherent Sixth Amendment theory than the Court has articulated in *Blakely* and its predecessors. First among these is that it permits the Court to address legislative limitations on judicial sentencing discretion as a question subject to constitutional regulation. Before *Blakely*, the essential position was that legislatures could give judges no sentencing discretion, unlimited sentencing discretion, or anything in between. *Blakely* goes to another extreme and declares, in effect, that legislatures can give judges either no sentencing discretion, unlimited sentencing discretion, or nothing in between. The model proposed here permits legislatures to provide a considerable amount of direction to sentencing judges, but requires as a constitutional matter that legislatures either reserve to courts a significant measure of discretion or be willing to pay Justice O'Connor's "constitutional tax" in the form of providing jury trials on facts that set hard boundaries on a judge's sentencing authority.[33] Moreover, by conceding that legislatures may designate facts that guide, even if they may not eliminate, the exercise of judicial sentencing discretion, the model proposed here allows courts to engage in a more nuanced conversation with legislatures over the limits of institutional sentencing authority. Rather than banning, or at least markedly distorting, all presumptive sentencing systems as *Blakely* seemingly does, this model would permit courts to examine individual systems with deference to legislative judgment, but retaining the power to ensure that the legislature did not trench too far into judicial prerogatives.

Giving the exercise of judicial sentencing discretion constitutional status as an essential component of the definition of crimes has a number of desirable consequences.

For example, the model proposed here might have entirely transformed the debate over certain provisions of last year's PROTECT Act.[34] If a substantial measure of judicial sentencing discretion is necessary to avoid transforming guidelines ranges into statutory maximum and minimum sentences requiring jury trials, then the degree of constraint Congress or the Sentencing Commission place on the judicial departure power takes on a constitutional dimension. Even the standard of appellate review for guideline departures may assume constitutional implications, rather than being, as it was in *Koon v. United States*,[35] merely a question of statutory interpretation subject to congressional override.

Judicial Discretion and Due Process

A persistent critique of the Supreme Court's sentencing jurisprudence in the structured sentencing era has been its failure to address the due process implications of sentencing systems that give legal significance to proof of non-element facts. As I remarked several years ago, the architects of structured sentencing built "the new superstructure of substantive sentencing law right over the procedural foundation of the old discretionary, non-adjudicatory system."[36] Chief among the many flaws in *Blakely*'s Sixth Amendment-centered formalism is the implicit endorsement of an either-or paradigm for sentencing due process. Facts that meet Justice Scalia's new definition of an element must be tried to juries, but *Blakely* has nothing else to say about how sentencing proceedings should be conducted. Apparently, in sentencing matters defendants can have jury trials or no procedural protections at all.

Giving constitutional status to the exercise of judicial sentencing discretion would provide both an impetus and a template for a new jurisprudence of sentencing due process. The theory advanced here suggests that judicial sentencing discretion and procedural due process are inextricably related. That is, those facts which are "elements" of a "crime" because they set absolute limits on the exercise of judicial sentencing discretion must be subjected to the most extensive form of procedural due process known to American law — the criminal jury trial. On the other hand, if the legislature gives judicial sentencing discretion free rein by setting ranges within which judges may sentence without any fact-based constraint, little or no process is required with respect to proof of the facts on which judges may elect to rely.

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But if the legislature creates or sanctions a scheme that constrains judicial discretion within minima and maxima based on a system of fact-based guidelines, the proof process for facts that trigger constraints on judicial sentencing discretion should be subjected to a revitalized due process analysis. That is, the structured sentencing revolution must be accompanied by a due process revolution which confers on defendants appropriately expanded due process rights. The model of constitutional sentencing process proposed here would require the Court to create intermediate levels of due process protection for the proof of sentencing factors. The model suggests that the Court should create a sliding scale of procedural protections for the proof of facts, depending on the degree to which the facts in question constrain judicial discretion. Such a scale would run from few procedural protections for broadly discretionary schemes to greater protections for voluntary guidelines systems, to still greater protections for advisory guidelines systems, to very substantial procedural due process in systems like the federal guidelines in which proof of facts has a substantial cabining effect on the exercise of trial court sentencing discretion.

The model of constitutional sentencing process proposed here would require the Court to create intermediate levels of due process protection for the proof of sentencing factors.

Reviving the Eighth Amendment

In *Blakely,* Justice Scalia expresses concern that legislatures will evade the Sixth Amendment by redefining crimes as very small groups of elements carrying very high sentences and then recategorizing all mitigating factors as sentencing factors that need not be presented to a jury. I agree with Justice O'Connor that there are significant structural political constraints preventing legislatures from taking such steps.[37] In any case, there are precious few, if any, examples of legislatures actually behaving in the way Scalia fears. Nonetheless, the constitutional tool to prevent such behavior is not the jury trial clause of the Sixth Amendment, but the cruel and unusual punishment clause of the Eighth Amendment read in conjunction the with the due process and jury clauses. Put plainly, the Court has to be willing to bite the bullet and declare that a statute which set a maximum sentence of life imprisonment for shoplifting or making an illegal lane change or simple assault violates the constitution because imposition of the maximum sentence based upon proof of the statutorily enumerated elements alone would plainly be cruel and unusual punishment.

Concluding Observations

The fundamental advantage of the model proposed here is that it recognizes important differences in institutional roles. Legislatures are at their best when defining the basic parameters of criminal liability and punishment, but they lack the capacity for making case-by-case determinations of punishment and perhaps even of making more than a few ex ante fine distinctions between classes of defendants. Juries, too, probably do best when not overwhelmed with numerous factual issues. Moreover, their constitutional role has traditionally been to represent the community's judgment about whether to expose individual defendants to criminal liability at all and, through finding core facts, to make the first rough cut at categorizing the severity of the crime and appropriate punishment. Prosecutors, for their part, have traditionally exercised largely unreviewable power to choose the crimes with which a defendant is charged. They also have the responsibility to prove facts necessary to conviction and to allocute in favor of sentences they deem in the public interest. More recently, they have assumed the responsibility of proving facts essential to the operation of guideline systems, both advisory and presumptive.

The traditional role of a judge in the American criminal trial system, other than ensuring procedural fairness in the process of adjudicating guilt, has been to assist in making a more refined judgment about the appropriate punishment for particular offenders. I say "assist" because the degree of judicial control over sentencing outcomes has obviously varied from era to era and place to place. Nonetheless, few observers would disagree that some degree of judicial sentencing discretion has been a hallmark of the American criminal process. This assertion is not to deny the power of legislatures to dictate sentencing outcomes. It is merely to reaffirm the undeniable historical reality that American law has traditionally provided space for the exercise of judicial sentencing discretion. The theory advanced here gives the exercise of judicial sentencing discretion a place in the constitutional order, not by mandating it, but by linking legislative constraints upon it to the definition of crime, the jury trial right, and the due process clause.

The constitutional functionalist approach to criminal sentencing offered here also allows a role for the sub-constitutional institution of sentencing commissions. Such commissions provide

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a degree of expertise and sustained attention to criminal justice policy at the systemic level that neither legislatures, nor judges, nor juries, nor prosecutors can offer. So long as commissions do not supplant or unduly intrude on the constitutional roles and prerogatives of the constitutional actors, they should be permitted to serve their beneficial function. Accordingly, sentencing commissions that generate either voluntary or purely advisory guidelines encounter no constitutional impediment. But the model suggested here also permits sentencing commissions to perform a rule-making function, so long as the legislature retains ultimate authority over the commission's product, and so long as the rules do not cross the line from creating presumptive sentencing ranges to setting hard maxima and minima from which judges have no meaningful discretion to depart.

The practical consequence of the model proposed here is not to alter the historical constitutional balance, but to reaffirm it and to provide a framework within which the various institutional actors in criminal law can carry on the conversation that Justice Kennedy correctly perceives as essential to the health of American criminal justice policy.[38]

Notes

1 124 S. Ct. 2531 (2004).

2 My good friend Doug Berman suggests that I should say that *Blakely* struck down only "one part of" the Washington guidelines. I take his point but have left the text as is because to my way of thinking when the Court struck down the part of the Washington guidelines that it did, the remaining rump was no longer a real guidelines system, but something closer to a criminal code containing more crimes and more elements than the Washington legislature thought it had enacted.

3 Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 42 AM. CRIM L. REV. __ (forthcoming 2004).

4 Ian Weinstein & Nathaniel Z. Marmur, *Federal Sentencing During the Interregnum: Defense Practice as the* Blakely *Dust Settles*, 17 FED. SENT. REP. 51–59 (2004).

5 Jane L. McClellan & Jon Sands, *The Hedgehog, the Fox, and the Guidelines:* Blakely's *Possible Implications for the "Safety Valve,"* 17 FED. SENT. REP. 40–45 (2004).

6 United States v. Booker, Case No. 04–104.

7 United States v. Fanfan, Case No. 04–105.

8 Albert W. Alschuler, *To Sever or Not to Sever? Why* Blakely *Requires Action by Congress*, 17 FED. SENT. REP. 11 (2004).

9 Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of* Blakely v. Washington, 17 FED. SENT. REP. 28–39 (2004).

10 For my own increasingly pessimistic take on the state of federal sentencing, see *Pour Encourager les Autre? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. LAW 373, 435–40 (2004), and *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary* (2004) (testimony of Frank O. Bowman, III), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647 (last visited Aug. 16, 2004).

11 *Blakely*, 124 S. Ct. at 2543.

12 Even considerations of "efficiency" have their place in constitutional analysis. A rule so productive of inefficiency that it cannot accomplish its purpose for most of the cases to which it nominally applies is not much of a constitutional accomplishment.

13 *See* WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2000).

14 *See* § 9.94A.320 (seriousness level V for second-degree kidnapping); App. 27 (offender score two based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of thirteen to seventeen months); § 9.94A.310(3)(b) (thirty-six-month firearm enhancement).

15 *See* § 9.94A.390(2)(h)(iii).

16 *Blakely*, 124 S. Ct. at 2535.

17 *Id.* at 2543.

18 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

19 *See* Nancy J. King & Susan R. Klein, *Apres* Apprendi, 12 FED. SENT. REP. 331 (2000); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103–23 (2001).

20 *Apprendi*, 530 U.S. at 468–69.

21 *Id.* at 491–97.

22 *Blakely*, 124 S. Ct. at 2537 (emphasis in the original).

23 536 U.S. 545, 567 (2002).

24 *Blakely*, 124 S. Ct. at 2536.

25 *Blakely*, 124 S. Ct. at 2538.

26 *Blakely*, 124 S. Ct. at 2536.

27 "Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers." *Blakely*, 124 S. Ct. at 2537 n. 6 (emphasis in the original).

28 Chapman v. United States, 500 U.S. 453, 467 (1991).

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[29] IND. CODE ANN. § 35-50-2.
[30] Lockett v. Ohio, 438 U.S. 586 (1978).
[31] *Blakely*, 124 S. Ct. at 2536.
[32] 421 U.S. 684 (1975).
[33] *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting).
[34] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108–21, 117 Stat. 650 (2003).
[35] 518 U.S. 81 (1996).
[36] Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT. REP. 187 (2000).
[37] *Blakely*, 124 S. Ct. at 2548 (O'Connor, J., dissenting).
[38] *Blakely*, 124 S. Ct. at 2550–51 (Kennedy, J., dissenting).

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