DISTINGUISHING OFFENSE CONDUCT AND OFFENDER CHARACTERISTICS IN MODERN SENTENCING REFORMS

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INTRODUCTION

The universe of sentencing considerations can be divided between offense conduct and offender characteristics. Historically, offense conduct (e.g., harms to victims, whether a weapon was used, the amount of money stolen or drugs trafficked) and offender characteristics (e.g., an offender's prior criminal history, employment record, family circumstances) have both played a significant role in sentencing decisionmaking, and both types of considerations remain central in modern sentencing systems. But the distinctive import and impact of offense conduct and offender characteristics at sentencing have not often been carefully and systematically examined.

This Article will explore, both historically and normatively, the consideration of offense conduct and offender characteristics at sentencing. Part I outlines the shifts in sentencing theory and offense/offender focus, while Part II analyzes the Supreme Court's recent sentencing jurisprudence. These Parts spotlight numerous important and illuminating connections between the offense/offender distinction and sentencing theory, constitutional jurisprudence,

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and modern sentencing reforms. They also highlight that federal sentencing reforms, when examined with a particular focus on offense/offender issues, exhibit some disconcerting attributes. Part III offers a few basic recommendations that would enable the federal sentencing system to strike a sounder balance, as have many state sentencing systems, in the consideration of offense conduct and offender characteristics at sentencing.

I. SHIFTS IN SENTENCING THEORY AND OFFENSE/OFFENDER FOCUS

A. *Background*

The "rehabilitative ideal," which dominated sentencing theory and practice for nearly one-hundred years before modern reforms, focused sentencing decisionmaking principally on offender considerations. Born of a deep belief in the possibility for personal change and improvement, the rehabilitative ideal was often conceived and discussed in medical terms with offenders described as "sick" and punishments aspiring to "cure the patient."[1] Judges and parole officials were given broad and essentially unregulated sentencing discretion to consider offenders' personal history and characteristics to facilitate the individualized tailoring of sentences to the rehabilitative prospects and progress of each offender.[2]

In 1949, the Supreme Court constitutionally endorsed this philosophical and procedural approach to sentencing in *Williams v. New York*.[3] The *Williams* Court explained 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."[4] The Court in *Williams*, rejecting a claim that traditional trial procedures should be applicable at sentencing, stressed the importance of judges having "the fullest information possible concerning the defendant's life and characteristics."[5] According to the *Williams* Court, the value of "modern concepts individualizing punishments" meant that sentencing judges should "not be denied an opportunity to obtain pertinent

1. *See, e.g.*, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 163 (1968) (describing offenders as "patients"); *see also* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016-18 (1991) (discussing the medical model and its "powerful sway within the criminal justice system").

2. *See, e.g.*, Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (Andrew von Hirsch et al. eds., 1987) ("[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment.").

3. 337 U.S. 241 (1949).

4. *Id.* at 247-48.

5. *Id.* at 247.

information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[6]

Significantly, the *Williams* Court suggested that the rehabilitative model of sentencing, with its distinctive offender-focused approach and less formal procedures, had benefits for offenders as well as for society. The Court stressed that "modern changes" justified by the rehabilitative model of sentencing "have not resulted in making the lot of offenders harder."[7] Rather, explained the Court, "a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."[8]

But starting in the 1960s, the "modern philosophy of penology" began to change quite rapidly, and it has continued to evolve over the last four decades. Through the 1960s and 1970s, the rehabilitative model and highly discretionary sentencing systems were reexamined and became the target of significant criticism.[9] Researchers and commentators contended that efforts to rehabilitate offenders had proved largely ineffective and that broad judicial sentencing discretion produced unjustifiable differences in the sentences meted out to similar defendants.[10] Troubled by the apparent disparity resulting from highly discretionary sentencing practices—and fueled by concerns over increasing crime rates and powerful assertions about the ineffectiveness of the entire rehabilitative model of punishment and corrections—many criminal justice experts proposed reforms in order to bring greater certainty and consistency to the sentencing enterprise.[11]

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6. *Id.*

7. *Id.* at 249.

8. *Id*.

9. *See* AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); JAMES Q. WILSON, THINKING ABOUT CRIME (1975). *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 7-20 (1981) (discussing "wide and precipitous decline of penal rehabilitationism" as a foundational theory for the criminal justice system).

10. U.S. District Judge Marvin Frankel's powerful insights and criticisms concerning federal sentencing practices are rightly credited for fueling the modern sentencing reform movement over three decades ago. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); *see also* Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 650 n.21 (1993) (calling Frankel's criticisms the "most influential work of criminal scholarship in the last 20 years . . . [which] charted the general outline of sentencing reform through the 1980s and into the 1990s").

11. *See, e.g.*, DAVID FOGEL, ". . . WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL FOR CORRECTIONS (1976); NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (1979); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); VON HIRSCH, *supra* note 9; *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974)

An integral component of this sentencing reform movement was a repudiation of rehabilitation as a dominant sentencing purpose and a far greater concern for increased sentencing uniformity. Enhanced concerns about more consistently imposing "just punishment" and deterring the most harmful crimes prompted structured-sentencing reforms that focused sentencing determinations principally on offense conduct and limited judicial consideration of "the defendant's life and characteristics." Consider, as but one example, the Pennsylvania Mandatory Minimum Sentencing Act of 1982, which was at issue in the Supreme Court case of *McMillan v. Pennsylvania*.[12] That Act provided for the imposition of a five-year mandatory minimum sentence if a judge found, by a preponderance of evidence, that an offender visibly possessed a firearm during the commission of certain offenses.[13] The Act clearly was not enacted in service to the rehabilitative model of sentencing; rather, in the words of the Pennsylvania Supreme Court, the state legislature was seeking "to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns."[14] Tellingly, the Pennsylvania Mandatory Minimum Sentencing Act tied specific sentencing consequences to specific-offense conduct (i.e., visible firearm possession triggered the mandatory minimum sentence), and the Act did not incorporate any consideration of offender characteristics (i.e., an offender's personal history was of no relevance to the mandatory minimum sentence).

B. *Federal Sentencing Reforms*

Modern federal reforms reflect these broad shifts in sentencing philosophy and goals. Prior to recent reforms, the federal sentencing system had been organized around the rehabilitative ideal for nearly a century.[15] But the Sentencing Reform Act of 1984 (SRA) rejected rehabilitation as the central principle for sentencing and corrections: the SRA expressly called for judges to impose sentences that would provide just punishment, deter, and incapacitate. The goal of providing "the defendant with needed educational or vocational training, medical care, or other correctional treatment" was relegated to only

(stressing the need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment). *See generally* RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 126-42 (Alfred Blumstein et al. eds., 1983) (describing forces behind early reforms).

12. 477 U.S. 79 (1986).

13. *See id.* at 81-82 & n.1 (quoting the provisions and describing the operation of Pennsylvania's Mandatory Minimum Sentencing Act, 42 PA. CONS. STAT. § 9712 (1982)).

14. Commonwealth v. Wright, 494 A.2d 354, 362 (Pa. 1985).

15. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 14-22 (1998) (reviewing the modification of federal sentencing doctrines and practices in service to the rehabilitative ideal and discretionary sentencing practices).

one of a broader set of sentencing purposes.[16] The SRA also instructed judges to recognize that prisons were poorly suited to promote "correction and rehabilitation,"[17] and it instructed the U.S. Sentencing Commission to develop sentencing guidelines that would avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[18] Congress has also purportedly been pursuing similar goals through its enactment of statutory mandatory sentences over the past two decades: advocates of mandatory sentencing statutes have claimed that these laws deter, incapacitate, and punish offenders, as well as foster more uniform sentencing practices.[19]

The new sentencing philosophies and goals reflected in the Federal Sentencing Guidelines and mandatory sentencing statutes have emphasized offense conduct at sentencing and have limited judges' opportunity to consider offender characteristics. Most of the mandatory sentencing provisions that Congress has enacted over the last two decades are triggered by particular offense conduct—e.g., a five-year mandatory sentencing enhancement arises from use of a firearm in certain crimes[20] and mandatory minimum penalties for drug trafficking are pegged to drug quantities.[21] These statutory provisions

16. In full text, the statement of purposes set forth in 18 U.S.C. § 3553(a)(2) provides that federal sentences should be crafted:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (2005).

17. *See* 18 U.S.C. § 3582(a) (2005) (instructing courts to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation"); 28 U.S.C. § 994(k) (2005) (instructing the U.S. Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a term of imprisonment for the purpose of rehabilitating the defendant").

18. 28 U.S.C. § 991(b)(1)(B) (2005).

19. *See, e.g.*, H.R. REP. NO. 109-74, at 15-17 (2005) (extolling, in conjunction with a bill including many mandatory sentencing provisions, the purported "benefits to the law-abiding public" from mandatory minimum sentences). The actual efficacy of mandatory sentencing laws has long been questioned by the U.S. Sentencing Commission and many other researchers and commentators. *See, e.g.*, JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). *See generally* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 99-100 (1999).

20. *See* Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 456 (1986), *amending* 18 U.S.C. § 924(c); Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207, 3207-39 (1986), *amending* 18 U.S.C. § 924(e)(1).

21. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986). The 1986 Anti-Drug Abuse Act provided, for example, that a first-time drug-distribution offense involving one kilogram or more of heroin (or at least five kilograms of powder cocaine or fifty grams of crack) would

entail that many federal sentencing outcomes will be driven by one aspect of offense conduct, and they thereby necessarily diminish the significance of offender characteristics in federal sentencing.

The relative roles of offense conduct and offender characteristics within the Federal Sentencing Guidelines are a bit more nuanced, but similarly emphasize offense conduct relative to offender characteristics. The bulk of the Guidelines' intricate sentencing instructions to judges focuses on various aspects of offense conduct, and the Federal Guidelines' sentencing process revolves around the determination of which of forty-three possible "offense levels" should apply in a particular case.[22] Moreover, for many federal offenses—particularly drug crimes and financial crimes—the seriousness of the offense within the Guidelines is assessed through quantitative measures: for drug crimes, the severity of the punishment is determined by the type and quantity of the drugs involved;[23] for financial crimes, the severity of the punishment is determined by the amount of monetary loss.[24] Larger quantities of drugs or larger financial losses mean a more severe sentence, and the extent of such "quantified harm" can have a dramatic impact on sentence length, often eclipsing the impact of all other sentencing factors.[25]

Because "quantified harm" is so central to determining sentence lengths, the Guidelines' rules on drug amounts and financial loss calculations have generated much litigation and numerous doctrinal splits within the federal

trigger a ten-year mandatory minimum sentence, while 100 grams of heroin (or 500 grams of powder cocaine or five grams of crack) would trigger a five-year minimum. *See* 21 U.S.C. § 841(b)(1)(A)-(B) (2005). The Act further provided that a second conviction for these offenses would double the minimum sentencing terms. *See id.* § 841(b)(1)(A). The Omnibus Anti-Drug Abuse Act of 1988 extended these mandated minimum penalties to drug conspiracies, doubled the minimum sentence for drug enterprises, and created a five-year minimum sentence for simple possession of five or more grams of crack. *See* Pub. L. No. 100-690, §§ 6371, 6470(a), 6481, 102 Stat. 4181, 4377 (1988), *amending* 21 U.S.C. §§ 844(a), 846, 848(a).

22. Tellingly, the first four steps in the sentencing process described in the Guidelines Manual are concerned exclusively with offense conduct. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004).

23. *See id.* § 2D1.1(c).

24. *See, e.g.*, *id.* § 2B1.1(b).

25. For example, even for a first-time offender, the amount of drugs involved in a drug-distribution offense could mean the difference between a sentence of life imprisonment (for very large quantities) or a sentence of merely probation (for very small quantities). *See id.* § 2D1.1(c). The use of quantity measures for assessing the seriousness of drug offenses has proved most controversial in the context of cocaine offenses. Federal statutes and guidelines incorporate a "100-to-1 ratio" between powder cocaine and crack—e.g., an offense must involve 500 grams of powder cocaine, but only five grams of crack, to trigger a five-year minimum penalty. This 100-to-1 ratio has been the subject of heated debate for a number of years, primarily because of its disparate impact on minority defendants. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); *see also* Douglas A. Berman, *Windows into Sentencing Policy and Practice: The Crack/Cocaine Ratio and Appeal Waivers*, 10 FED. SENT'G REP. 179, 179-80 (1998).

circuits.[26] Moreover, and more importantly, commentators and courts have long questioned whether the Guidelines' efforts to precisely quantify offense harms serve as an effective measure of offenders' true culpability. Especially in drug cases, couriers with a relatively small role in a drug conspiracy may receive a severe sentence based on drug-quantity calculations that are not an appropriate proxy for the relative severity of their crimes.[27]

Furthermore, the consideration of offense conduct within the Guidelines is not confined to offenses charged and proven at trial or to those resulting from a guilty plea. Because of the Federal Guidelines' rules for considering so-called "relevant conduct" in the determination of applicable sentencing ranges, judges are required to take into account certain offense conduct that was never formally charged or proven.[28] Sometimes even evidence of offense conduct that related to a charge on which a defendant was acquitted at trial will, under the Guidelines' relevant conduct rules, require the enhancement of the defendant's sentence.[29] Applicable offense levels within the Guidelines, and in turn applicable sentencing ranges, can often be increased dramatically by uncharged or even acquitted offense conduct that qualifies as relevant conduct.

Offender characteristics do play a role in Federal Guidelines sentencing, but their most tangible impact is as an aggravating factor through the consideration of a defendant's criminal history. The Federal Guidelines set forth intricate rules for converting prior criminal records into a criminal history score,[30] and these calculations combine with offense-level determinations to establish defendants' applicable sentencing ranges. Judges can consider other offender characteristics when selecting a specific sentence within the Federal

26. *See, e.g.*, Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 FED. SENT'G REP. 247, 247-51 (1994) (detailing some lower court litigation over "fairly arbitrary questions about how the drugs involved in an offense are to be classified or quantified"); Frank O. Bowman, III, *Coping with "Loss": A Re-examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 464 (1998) (noting that loss calculations under the Guidelines are "one of the most frequently litigated issues in federal sentencing law" and that there were at one time "splits of opinion between the federal circuits on at least eleven analytically distinct issues concerning the meaning and application of the 'loss' concept").

27. *See, e.g.*, Berman, *supra* note 26, at 251; Stephen J. Schulhofer, *Excessive Uniformity—And How To Fix It*, 5 FED. SENT'G REP. 169 (1992); Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT'G REP. 63 (1990).

28. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004).

29. *See, e.g.*, United States v. Watts, 519 U.S. 148 (1997) (holding that the Constitution did not bar the Guidelines' mandates that could require an increase in a defendant's punishment based on "conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); *see also* Laurie P. Cohen, *How Judges Punish Defendants for Offense Unproved in Court*, WALL ST. J., Sept. 20, 2004, at A1 (discussing individual federal cases in which defendants received large sentence increases based on unproved offense conduct).

30. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4 (2004) (discussing "Criminal History and Criminal Livelihood").

Guidelines' ranges, but these ranges are relatively narrow, and the overall severity of Federal Guidelines sentences may lead many judges to sentence at the bottom of applicable Guidelines ranges even before considering offender characteristics.[31]

Furthermore, since the outset of the Federal Sentencing Guidelines era, the U.S. Sentencing Commission has declared through a series of policy statements that many potentially mitigating offender characteristics—such as a defendant's education and vocational skills, mental and emotional conditions, previous employment record, and family and community ties—are either "not ordinarily relevant" or entirely irrelevant to whether a defendant should receive a departure below the Guidelines sentencing range.[32] Moreover, a number of early Sentencing Commission amendments declared off-limits certain offender factors that courts had started to rely upon for Guidelines departures; in this way, the Commission essentially overruled some initial judicial efforts to consider particular offender characteristics at sentencing.[33]

In light of these realities, it is perhaps unsurprising that, since the very start of the Federal Guidelines era, judges have assailed the Guidelines as "a mechanistic administrative formula,"[34] which made sentencing a task of "filling in the blanks."[35] The Federal Guidelines' inordinate focus on

31. *See* U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.29 (indicating that nearly sixty percent of all sentences are imposed at the Guidelines minimum).

32. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.1-1.6 (2004) (providing that age, education and vocational skills, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are "not ordinarily relevant in determining whether a [Guidelines] departure is warranted . . ."); *id*. § 5H1.4 (providing that drug dependence or alcohol abuse "is not a reason for a downward departure").

33. *See id.* § 5H1.12 (providing that "[l]ack of guidance as a youth" and other "similar circumstances indicating a disadvantaged upbringing are not relevant" to a departure determination). Section 5H1.12 was added to the Guidelines after the Ninth Circuit upheld youthful lack of guidance as a basis for a downward departure in *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991). *See also id.* § 5H1.4 (providing that "[p]hysical condition or appearance, including physique, is not ordinarily relevant" to a departure determination). Section 5H1.4 followed from the decision in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), in which a downward departure was allowed based on the likelihood that a slightly built bisexual defendant would suffer abuse in prison. *See generally* Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec. 1991, at 45 (reviewing Commission amendments that seemed to overrule judicial efforts to consider offender characteristics).

34. United States v. Bogle, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring); *see also* United States v. Justice, 877 F.2d 664, 666 (8th Cir. 1989) (suggesting that, under the Guidelines, sentencing has been relegated to a "mechanical process").

35. United States v. Russell, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988); *see also* United States v. Swapp, 719 F. Supp. 1015, 1026 (D. Utah 1989) (complaining that Guidelines sentencing is "[s]entencing by the numbers"); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (criticizing the Commission's "sentencing by the numbers approach" as "too depersonalized, too

determining and quantifying offense conduct led many judges—particularly those judges that had prior experiences with offender-oriented sentencing systems—to complain that the Federal Guidelines converted them into "rubber-stamp bureaucrats" and "judicial accountants" in a sentencing process that had been drained of its humanity.[36] Moreover, these realities also make it unsurprising that many federal district judges have utilized the new discretion they possess under the current advisory Guidelines system created by the Supreme Court in *United States v. Booker*[37] to give greater attention to offender characteristics at sentencing.[38]

II. THE SUPREME COURT'S RECENT SENTENCING JURISPRUDENCE AND THE OFFENSE/OFFENDER DISTINCTION

The greater focus on offense conduct in structured-sentencing reforms has transformed modern sentencing decisionmaking into a more trial-like enterprise. Under the rehabilitative ideal, judges were to exercise judgment and discretion while exploring various offender characteristics in order to tailor punishments to individual offenders. Under modern structured-sentencing provisions, judges are typically required to follow legislatively prescribed directives while adjudicating particular offense conduct in order to apply predetermined punishment levels for certain criminal conduct. In a recent commentary, U.S. District Judge Nancy Gertner has effectively spotlighted this modern transformation in sentencing decisionmaking:

> 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

complicated, too punitive, and too burdensome of application").

36. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); *see also* John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551-52 (1993) (discussing judicial complaints that "the Guidelines have eliminated the human element from the sentencing process").

37. 125 S. Ct. 738, 756 (2005).

38. *See, e.g.*, United States v. Clay, No. 2:03-CR-73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005); United States v. Moreland, 366 F. Supp. 2d 416 (S.D. W. Va. 2005); United States v. Person, 377 F. Supp. 2d 308 (D. Mass. 2005); United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. 2005); United States v. Marinaro, No. CR-03-80-B-W, 2005 WL 851334 (D. Me. Apr. 13, 2005); United States v. Carmona-Rodriguez, No. 04-CR-667RWS, 2005 WL 840464 (S.D.N.Y Apr. 11, 2005); Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005); United States v. Carvajal, No. 04-CR-222AKH, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

> "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.[39]

Given this transformation of the sentencing enterprise, the Supreme Court's rulings in *Apprendi v. New Jersey*,[40] *Blakely v. Washington*,[41] and *United States v. Booker*[42] can be seen and defended as a reasonable reaction to the new substance of modern sentencing decisionmaking. Responding to the reality that structured-sentencing reforms have made sentencing determinations more offense oriented and fact driven, the Supreme Court in its *Apprendi* line of cases has now come to require traditional trial procedures for factual determinations that increase a defendant's potential punishment.[43]

The offense/offender distinction not only provides insight into the development of the *Apprendi* line of cases, but it also suggests an important conceptual limit for the principles articulated in *Apprendi*, *Blakely*, and *Booker*. The Constitution frames the jury trial right in terms of "crimes" that are the basis for a "prosecution" of "the accused";[44] this language connotes that the jury trial right should attach to all offense conduct for which the state seeks to impose criminal punishment, but it also suggests that the jury trial right should not attach to any offender characteristics which the state may deem relevant to criminal punishment. That is, one sensible understanding of the principles articulated in *Apprendi* and *Blakely* is that only those facts relating to offense conduct that the law makes the basis for criminal punishment should trigger the jury trial right.

I have explained more fully in a recent article why I believe the jury trial

39. Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT'G REP. 83, 83-85 (2002) (footnotes omitted).

40. 530 U.S. 466 (2000).

41. 124 S. Ct. 2531 (2004).

42. 125 S. Ct. 738 (2005).

43. For a fuller articulation of this point, see Douglas A. Berman, *Appreciating* Apprendi*: Developing Sentencing Procedures in the Shadow of the Constitution*, 67 CRIM. L. BULL. 627 (2001). *See also* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1; Douglas A. Berman, *The Roots and Realities of* Blakely, CRIM. JUST., Winter 2005, at 5; Kyron Huigens, *Solving the* Williams *Puzzle*, 105 COLUM. L. REV. 1048, 1068-81 (2005) (defending the *Apprendi* line of cases by stressing that, as a result of structured-sentencing reforms, "the sentencing process more and more resembles the trial process").

44. As stated in the Federal Constitution, "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *Id.* amend. VI.

right should be understood to concern only offense conduct and not offender characteristics.[45] In short form, my claim is that the jury trial right entitles a defendant to demand that a jury determine whether the defendant committed whatever alleged offense conduct the state believes merits a criminal sanction and seeks to punish. However, once this offense conduct has been properly established—either through a jury trial or a defendant's admission—a judge should be able to 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 as a defendant's criminal history, 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's personal history 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.

In short, I believe the offense/offender distinction helps inform the jury trial right that the Supreme Court is applying in the *Apprendi* line of cases.[46] Perhaps even more importantly for purposes of planning future sentencing reforms, I believe the 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 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 in order to impose a just and effective punishment. Juries can reasonably be expected to determine all offense conduct at a (presentencing) trial, and the State can reasonably be required to prove to a jury at trial all the specific-offense conduct for which the it 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 in punishment determinations.

To paraphrase Justice Scalia's opinion for the Supreme Court in *Blakely*, we can "give intelligible content to the right of jury trial" by providing that juries must find all the "facts of the *crime* the State *actually* seeks to punish."[47] Though jurisdictions are certainly permitted to provide for jury consideration of offender characteristics, the Constitution's jury trial right does not demand as much. Of course, other constitutional provisions and concepts—some of which

45. *See* Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT'G REP. 89 (2004).

46. Perhaps to be more faithful to the constitutional text, this key idea ought to be described in terms of a "crimes"/criminals distinction. But the offense/offender nomenclature seems to be a linguistically better way to capture the same substantive point.

47. Blakely v. Washington, 124 S. Ct. 2531, 2538-39 (2004) (first emphasis added).

are raised, but not clearly discussed, in the *Apprendi* line of cases[48]—may further impact the consideration of offense conduct and offender characteristics at sentencing. Moreover, though the offense/offender distinction suggests what matters should go to a jury and what matters can go to a judge, the offense/offender distinction may not be central to the interpretation of other constitutional provisions.[49] One could develop an argument, especially in the wake of *Blakely*, that the Due Process Clause requires effective notice and a high burden of proof for all matters—whether based in offense conduct or offender characteristics—which can have significant punishment consequences for a defendant.[50]

The doctrinal specifics and future development of the Supreme Court's still-evolving sentencing jurisprudence must, of course, be a primary concern to all institutions and individuals involved in the development and application of the federal sentencing system. And only time will tell if the Supreme Court may come to articulate the reach of the jury trial right in offense/offender terms. But, regardless of the future direction of the constitutional jurisprudence, policymakers can and should (1) reflect on how this jurisprudence arose in response to the modern transformation of sentencing decisionmaking and (2) more broadly and more systematically examine the distinct nature of offense conduct and offender characteristics at sentencing.

III. CHARTING FUTURE FEDERAL REFORMS IN OFFENSE/OFFENDER TERMS

In the continued evolution of modern sentencing systems, the distinction between, and distinctive nature of, offense conduct and offender characteristics can and should directly inform the consideration of sentencing purposes and procedures. In the federal system, Congress, the U.S. Sentencing Commission, judges, prosecutors, defense attorneys, and probation officers should be attentive to the offense/offender distinction in the development and application of federal sentencing doctrines and practices.

Ultimately, no matter what theories or goals are pursued within a sentencing system, both offense conduct and offender characteristics should play a significant role in sentencing decisionmaking. Different aspects of offenses and offenders may be of greater significance once a sentencing system has committed itself to pursuing particular goals, but every type of sentencing

48. *See generally* Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 654 (2005).

49. *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 refusing to address 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).

50. *See generally* Berman, *supra* note 48, at 676-88.

system is well served by incorporating both offense and offender considerations into the sentencing process. Proponents of backward-looking retributivist theories of punishment typically contend that both offense conduct and offender characteristics should play a central role in meting out punishment based on an offender's culpability; likewise, proponents of forward-looking utilitarian theories of punishment typically view both offense conduct and offender characteristics as central considerations when seeking to predict and prevent future criminal behavior.

Consequently, it is not surprising that both a historical and a modern review of various sentencing systems reveal a broad consensus that punishment schemes and sentencing practices should generally be attentive to both the nature of the offense and the character of the offender. But, as indicated above, the relative balance of these considerations and their impact at sentencing has evolved considerably over time. And this balance should continue to evolve as policymakers define what theories and goals should come to dominate modern sentencing decisionmaking.

Though the federal sentencing system incorporates both offense conduct and offender characteristics in various ways, the previous Parts of this Article have documented that existing federal doctrines and practices have some distinctive and disconcerting qualities. First, offense conduct—and especially quantifiable harms such as the amount of drugs or money involved in an offense—has an extraordinary and arguably disproportionate impact on sentencing outcomes. Allegations at sentencing that an offense involves a large amount of drugs or monetary loss can often render functionally insignificant a host of seemingly important offender characteristics. Second, the Federal Guidelines require federal judges to enhance sentences based not only on offense conduct for which a defendant was convicted, but also on all related "relevant conduct."[51] Third, only one aggravating offender characteristic—namely, the defendant's criminal history—plays a central and regularized role in federal sentencing decisionmaking. A broad array of potentially mitigating offender characteristics have been formally or functionally rendered "not ordinarily relevant" or largely inconsequential to federal sentencing determinations. Collectively, these distinctive features of federal law make for a particularly imbalanced sentencing decisionmaking process. Even after a defendant has been convicted or has pled guilty, prosecutors and defense attorneys must still dicker over the particulars of offense conduct, and they have little reason or opportunity to explore potentially mitigating personal attributes of offenders.[52]

51. These issues are more fully explored in David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267 (2005) (in this Issue).

52. Tellingly, the standard presentencing worksheets that probation officers use to help judges determine applicable Guidelines sentences devote numerous pages to offense-conduct determinations and only one section to offender characteristics other than criminal history.

Interestingly, in *Koon v. United States*,[53] the Supreme Court spoke in grand terms that it "has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[54] However, before *Booker*, when the Guidelines operated as mandatory sentencing rules, and even after *Booker* in cases involving mandatory minimum sentencing provisions, federal sentencing judges have had relatively little opportunity to "consider every convicted person as an individual." Though the *Koon* decision endorsed federal judges' authority to give effect to potentially mitigating offender characteristics, the structure and specifics of modern federal sentencing have often worked to severely undermine that authority.

Significantly, state sentencing guidelines systems have typically achieved a much better overall balance in the consideration and application of a range of sentencing factors. In most state systems, only the offense for which a conviction is obtained and not a broad range of "relevant conduct" determines the applicable offense level. In addition, state sentencing systems typically do not seek to intricately quantify all offense harms. Through the use of broader sentencing ranges, more liberal departure criteria, and other formal and informal mechanisms, state sentencing structures typically provide judges with far greater discretion to consider potentially mitigating offender characteristics at sentencing.

To some extent, a guidelines sentencing system which is centered around number-driven calculations that map onto a number-driven sentencing grid will necessarily prompt the development of sentencing rules that (over)emphasize certain types of offense conduct. Offense harms in general, and drug and monetary loss amounts in particular, are more readily quantified and calibrated in a sentencing calculus. Offender characteristics, in contrast, are difficult to measure systematically and cannot be easily plotted on a sentencing chart. Nevertheless, the experiences of many state guidelines systems, even those relying on detailed sentencing grids, demonstrate that it is possible to achieve a better balance in the consideration and application of offense conduct and offender characteristics than currently exists in the federal system. Even without a fundamental restructuring of the current federal sentencing system, a few relatively simple changes to the existing Federal Sentencing Guidelines would help achieve a better balance in the consideration of offense conduct and offender characteristics in federal sentencing: e.g., (1) moving away from efforts to precisely quantify offense harms, (2) limiting the consideration of nonconviction conduct, (3) developing rules for the consideration of offender characteristics other than criminal history within the context of Guidelines calculations, and (4) expanding departure authority or applicable sentencing

53. 518 U.S. 81 (1996).

54. *Id.* at 113.

ranges so that judges have a greater opportunity to take into account hard-to-quantify offender circumstances.

CONCLUSION

As noted before, many federal district judges have started to use the new discretion they possess in the wake of the Supreme Court's decision in *Booker* to consider and give effect to offender characteristics at sentencing. Congress and the U.S. Sentencing Commission should give particular attention to those offender characteristics (such as age and family circumstances) that are now being most frequently discussed by sentencing courts after *Booker*. As a result of the unique remedy developed by the Supreme Court in *Booker*, federal sentencing judges, guided by the sentencing mandates of section 3553(a) of the Sentencing Reform Act, are now able to develop a "common law of sentencing" through their fact-specific, case-by-case consideration of federal sentencing policy and practices. In keeping with both the original spirit and goals of the Sentencing Reform Act, Congress and the Sentencing Commission should seek to integrate the common law wisdom being developed in the courts into all future federal sentencing reforms.[55]

Though legislatures and sentencing commissions, considering crimes in the abstract, are inevitably likely to focus sentencing rulemaking on the particulars of offense conduct, sentencing judges must necessarily consider and pass judgment on the individuals that have engaged in such conduct. Sentencing judges have a unique and uniquely important case-specific perspective on the real persons who actually commit offenses, and the significance of offender characteristics and the human realities of sentencing are especially significant for district judges who interact with defendants firsthand. Because sentencing judges are uniquely well positioned, in the words of the Supreme Court in *Koon*, "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue,"[56] their post-*Booker* discussion of offender characteristics should play an especially important role in future sentencing debate and reforms.

55. *See generally* Berman, *supra* note 19.

56. 518 U.S. at 113.