Post-*Booker* Sentencing Issues for a Post-*Booker* Court

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Apprendi,[1] *Blakely*,[2] and *Booker*[3] represent a foray into sentencing practices long immune from constitutional scrutiny. In 1949 *Williams v. New York* invoked the medical model of penology to exempt sentencing from the most basic requirements of process otherwise due: the right to be apprised of, to rebut, and to challenge information upon which a decision—even a death penalty—would be based.[4] The medical model suffered a setback a quarter century later when it encountered a wave of sentiment that "nothing works."[5] The lack of any mechanism for challenge, otherwise the hallmark of the justice system, had spawned sentences generated by a mix of fad, diverse personal philosophy, folklore passing for judicial wisdom, agency budget strategies, and occasionally marshaled public outcry. No one had required any demonstration of crime reduction, and little occurred. Those who felt vindicated by this failure launched successful attacks on indeterminate sentences. Many who were disappointed by the decline of the medical model ironically joined them in devising "truth in sentencing" and guideline schemes whose primary virtue was some reduction in sentencing disparity.[6]

During the next quarter century, these schemes became rooted in modern criminal justice. But because they avoided pursuit of crime reduction, they yielded no public safety improvement. Attempting to address that failure, critics imposed three strikes, mandatory minimum, and other controls on judicial sentencing discretion.

The role of the Court in all of this is, of course, primarily reactive. It cannot fix what is wrong: most sentences for most crimes fail to prevent the offender's next crime; most offenders sentenced for serious crimes have been sentenced before without preventing those crimes; most sentencing involves no responsible effort at crime reduction and often yields avoidable victimizations and counterproductive oppression.[7]

But the new Court will surely be invited to define the post-*Blakely* paradigm along a wide range of issues. Will *Blakely*'s analysis for facts that raise a sentencing ceiling extend to facts that raise the floor? Does *Blakely* apply to some states' consecutive sentencing statutes?[8] What are *Blakely*'s implications for the role of juries in dangerous offender schemes? Will the Court modify the division between legislative and judicial functions or between judge and jury functions? Will the Court modernize the *Williams* approach to applying social science to individualized sentencing? Will the Court scrutinize sentencing based on predictions of future dangerousness? Will it revisit issues of protected classes and disparate treatment in sentencing?

If matters go well, the Court will address these issues with some understanding of what has become of the world since *William* and will avoid unintended and unnecessary damage. Although courts have largely ignored penology since Robert Martinson announced that "nothing works,"[9] our probation and corrections communities have learned a great deal about what works; they labor to apply that knowledge notwithstanding our lack of notice or encouragement.[10] Jail and prison are effective for responding to the high-risk offenders but work better on some than on others; when overused on medium- or low-risk offenders, incarceration can actually accelerate their criminal behavior.[11] Some cohorts of sex offenders do and others do not respond significantly to treatment programs.[12] Shock incarceration, shock probation, scared straight, D.A.R.E., and boot camp programs do *not* work and commonly do more harm than good.[13] Treatment programs that identify and responsibly address multiple criminogenic factors typically reduce recidivism by about 30 percent; they work far better than traditional punishment or treatment programs that do something other than address criminogenic factors, and substantially better than programs that only address one or two criminogenic factors.[14]

Problems remain, of course. Most members of the rehabilitation community are enthusiastic about programs and modalities that reduce recidivism but are not anxious to validate the effectiveness of incapacitation. That community is—probably for that reason—distrusted by many of the "spare the rod" school, which views prison as panacea and is itself rejected as punitivist by the rehabilitation community. This gulf has prevented both camps from recognizing that incapacitation and rehabilitation both belong as major components in an arsenal that ranges from reprimand to perpetual custody, with programs, alternatives, supervision, and many other responsive modalities in between. Any sentencing policy that understands social and criminological realities understands that public safety is best served by locking up some

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offenders and rehabilitating others, by aiming *custodial* programs first at those inmates likely to benefit from them, and by allocating resources according to proportionality, risk, harm reduction, and responsible exploitation of the best information that we can muster to know which is most appropriate for which offenders.

Forward-looking jurisdictions are beginning to emerge from the poverty of a sentencing mission whose highest goal is ordered just deserts. What will matter in the long run about the new Court's interaction with sentencing schemes is whether the Court unintentionally or otherwise thwarts the transformation of sentencing from archaic ritual to responsible pursuit of social health.

There is nothing about *Blakely* that threatens that transformation. Whether or not *Blakely* will apply to sentencing floors as well as to ceilings, to dangerous offender schemes or to some consecutive sentencing, juries are competent to find such facts. The *Blakely* issue merely addresses when the reasonable doubt standard and the right to a jury trial apply to a fact relevant to the range of available sentences. Attaching these accoutrements to a fact sacrifices nothing of the potential for the best sentencing choice *within whatever range of discretion results* from finding or not finding that fact. The issue is no different than when the question is the degree of robbery, theft, or homicide.

Nor is there any inherent risk to rational sentencing in shifting the interface between court and jury decision making. Juries are fully capable of addressing evidence provided to them, even scientific evidence, and the public safety track record of judicial sentencing discretion hardly enhances our claim to exclusive domain over sentencing choices. As between legislative and judicial authority over sentencing, judges are at least expected to exclude public clamor from a role in decision making, but the Court has already gone so far in accepting draconian sentencing schemes that this distinction is without much force. More importantly, we have every opportunity to earn back lost judicial discretion by accepting responsibility for the public safety outcomes of sentencing choices within whatever discretion remains to us and by demonstrating our ability to serve public safety. To do that, of course, we need to open our process to modern criminology and to pursue smarter sentencing[15] rigorously. That means we should invite advocates and probation departments to bring what criminologists are learning to sentencing and probation hearings, and insist that they also be prepared to discuss the practical considerations critical to the sentencing process.[16] We also should accept appropriate performance measures that include how our sentencing choices play out in subsequent recidivism.[17]

A reexamination of *Williams* could substantially assist us all. What's right about *Williams* is that correctional and criminological information and thought is different than most guilt-related evidence and should not be held to the same *evidentiary* thresholds. What is wrong about *Williams* is the notion that a judge can make the best use of that evidence without any meaningful engagement of the adversarial process. Recognizing due process rights above the *Williams* floor would not harm emerging sentencing practices or their impact and might well enhance both. Surely, "process that is due" plausibly includes notice to advocates of what information is under consideration and a meaningful opportunity to rebuttal through evidence and argument.

Only one field of inquiry seems plausibly susceptible to a catastrophic outcome—contentions that predicting future dangerousness is unconstitutionally unfair, imperfect, or classification-based.[18] Were the new Court to agree, criminal justice would remain trapped in archaic dysfunction for another generation. Sentencing judges, of course, commonly consider future dangerousness in a multitude of sentencing and release decisions, and no sentencing culture at all responsible to public safety could function without that consideration. Ironically, the issue would only arise when we consider future dangerousness expressly and attempt to involve risk assessment, expert opinion, and other tools in lieu of folklore, fad, and hubris. Advocates of a purely retributive criminal justice system and a minority of proponents of a pure treatment model ironically unite in urging us to eschew science. Business and government use equivalent science in functions as important as budget and finance forecasting, pricing insurance policies, and the allocation of flu shots. Yet those who prefer morality play to crime reduction insist that it is unconstitutional to recognize that offenders with psychopathy or other actuarial indicators of risk for violent recidivism should have a better chance of imprisonment.

Whatever may be necessary to find neutral alternatives to protective class membership while assessing risk, and even if supervening values require us on occasion to ignore some otherwise relevant variable such as ethnicity, we must be allowed responsibly to allocate resources based on risk. That in turn requires best efforts at predicting future dangerousness. The alternative—the present dance of ordered just deserts—is far less fair to victims, offenders, and society as a whole and is often itself driven by covert prediction and untested classifications.[19] Commendably, Virginia[20] and Missouri[21] have incorporated risk assessment into their guideline schemes, and Oregon is considering doing so.[22]

The new Court may well increase rights along the continuum between establishing eligibility for a maximum punishment (through guilt and sentencing enhancement facts) and the wide discretion available for deciding what sentence to impose subject to that maximum. What process is due does and should vary along that continuum. Ensuring that both sides have notice and an opportunity for meaningful advocacy should help rather than hinder the emergence of responsible sentencing, particularly if we are able to get the same attention to science from criminal attorneys as we get from personal injury and products liability practitioners. But it is essential that the Court continue to recognize that once an offender is convicted and any sentencing enhancement facts are decided, it is a *risk of harm* that we are managing, and that there is no constitutional impediment short of disproportionality or

protected class discrimination to allocating our devices for harm reduction based on our best *estimate* of that risk.

Notes

For further information, see http://www.smartsentencing.com.

1 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2 *Blakely v. Washington*, 542 U.S. 296 (2004).

3 *United States v. Booker*, 543 U.S. 220 (2005).

4 *Williams v. New York*, 337 U.S. 241 (1949).

5 Robert Martinson is generally charged with suggesting in 1974 that nothing works. Martinson himself retreated from this position, and it has been thoroughly debunked—at least as applied to the offender population as a whole. *See, e.g.*, James McGuire, What Works in Reducing Criminality (2000), and authorities cited at http://www.aic.gov.au/conferences/criminality/mcguire.pdf.

6 Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003, in* 32 Crime and Justice: A Review of Research 131-219 (Michael Tonry, ed. 2005); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 Fed. Sent. Rep. 69 (1999); Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998); Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 Int'l J. Punishment & Sent. 1 (2005); Kevin R. Reitz, Reporter, Model Penal Code: Sentencing Report 28-29 (American Law Institute, Apr. 11, 2003).

7 Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed .Sent. Rep. 76 (2003); Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 Am. J. Crim. L. 135 (2003) [hereinafter Marcus, *Comments on the Model Penal Code*]; Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 Ohio State J. Crim. L. 671 (2004).

8 Oregon, for example, forbids consecutive sentences for "separate convictions arising out of a continuous and uninterrupted course of conduct" absent specific findings. ORS 137.123.

9 Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 25 The Public Interest 25 (1974).

10 *See generally* Lawrence W. Sherman et al., National Institute of Justice, *Preventing Crime: What Works, What Doesn't, What's Promising, Research in Brief* (July 1998), and sources cited, available at http://www.ncjrs.org/pdffiles/171676.pdf; the full report is at http://www.ncjrs.org/works/wholedoc.htm; Michael H. Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Exchange (Spring 2004), available at http://www.smartsentencing.com under "Articles on Smart Sentencing"; Elyse Clawson, Brad Bogue, & Lore Joplin, *Implementing Evidence-based Practices in Corrections* (National Institute of Corrections 2005), available at http://www.nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/020174&ID=020174&TYPE=PDF&URL=http://www.nicic.org/pubs/2004/020174.pdf.

11 *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* (Oregon Department of Corrections Sept. 5, 2002), and authorities cited, available at http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf.

12 *See generally Recidivism of Sex Offenders, Center for Sex Offender Management* (Office of Justice Programs, U.S. Department of Justice) (May 2001), and authorities cited, available at http://www.csom.org/pubs/recidsexof.html; Office of the Solicitor General of Canada, *The Effectiveness of Treatment for Sexual Offenders*, 7(4) Research Summary (July 2002), and sources cited, available at http://www.sgc.gc.ca/publications/corrections/200207_e.asp.

13 Sherman et al., *supra* note 10.

14 See generally National Mental Health Association, *Treatment Works for Youth in the Juvenile Justice System* (2006), and sources cited, available at http://www.nmha.org/children/justjuv/treatment.cfm; Mark Gornik, U.S. Department of Justice, National Institute of Corrections, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, and sources cited, available at http://www.nicic.org/pubs/2001/017624.pdf. Gornik's meta-analysis of 154 studies found a 30% impact on recidivism for the 54 studies that assessed responsibly targeted and delivered treatment strategies.

15 "Smart sentencing" is sentencing, whether or not innovative, that exploits information and reasoning to achieve a disposition that is most likely to accomplish the desired result—most commonly, preventing the offender who is sentenced from re-offending. *See* http://www.smartsentencing.com, "Frequently Asked Questions."

16 Oregon has an online Criminal Benchbook that includes some 24 pages (presently 727-751) on practical sentencing considerations. It is available at http://www.ojd.state.or.us/osca/cpsd/documents/CrimLawBenchBook_051230_printable.pdf. In 1997 the Oregon Judicial Department adopted a resolution that concludes, in part, "judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct." *See Legislative, Judicial, and Criminal Justice Commission Materials*, available at http://www.smartsentencing.com.

17 The court performance measure movement generally promotes measures like time to trial and juror satisfaction, rather than impact on public safety. *See* National Center for State Courts, *CourTools: A Court Performance Framework*, available at http://www.ncsconline.org/D_Research/CourTools/CourToolsWhitePages-v4.pdf. Oregon has included recidivism related to juvenile drug courts and will consider recidivism performance measures more broadly in the near future.

18 Characteristic of this strain of thought are Noval Morris & Marc Miller, *Predictions of Dangerousness, in* 6 Crime and Justice: An Annual Review of Research 1-50 (Michael Tonry & Norval Morris, eds. 1985) and Allan Manson, Sentencing and Penal Policy in Canada (Toronto: Emond Montgomery, 2000).

19 *See* Marcus, *Comments on the Model Penal Code*, *supra* note 7, at 146-47.

20 Virginia Criminal Sentencing Commission, *Assessing Risk among Sex Offenders in Virginia* (Richmond: Virginia State Sentencing Commission, 2001), available at http://www.vcsc.state.va.us/sex_off_report; Brian J. Ostrom et al., *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (Williamsburg, VA: National Center for State Courts, 2002), available at http://www.vcsc.state.va.us/risk_off_rpt.pdf.pdf; Virginia Criminal Sentencing Commission, *2004 Annual Report* (Richmond: Virginia State Sentencing Commission, 2004), available at http://www.vcsc.state.va.us/risk_off_rpt.pdf.

21 *See* Missouri Sentencing Advisory Commission, *Automated Recommended Sentencing Information*, available at http://168.166.76.135/RSWeb/message.do?r_Command=view.

22 *See* 2005 Oregon Laws, chapter 474 (2005 Or SB 919), available at http://www.leg.state.or.us/05reg/measpdf/sb0900.dir/sb0919.en.pdf, which directs the Oregon Criminal Justice Commission to "conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines." To date, the major focus is risk assessment.