Constitutional Law—Defendant's Sixth Amendment Right Violated When Court's Sentencing Exceeds Statutory Maximum—*Blakely v. Washington*, 124 S. Ct. 2531 (2004)

The United States Constitution's Sixth Amendment protects a criminal defendant's right to a jury trial.[1] Although the Fourteenth Amendment's Due Process Clause demands that the state prove to a jury each element of the crime charged beyond a reasonable doubt, facts that bear exclusively on sentencing have historically not been subject to such a requirement.[2] This raises the inevitable question of whether any constitutional principle distinguishes an element of a crime from a sentencing factor.[3] Four years after the Supreme Court's landmark decision in *Apprendi v. New Jersey*,[4] in which the Court held that any fact that increases a criminal penalty beyond the prescribed statutory maximum is effectively an element and subject to the requirements of due process, the Court considered *Blakely v. Washington*[5] and faced the narrower issue of what, for *Apprendi* purposes, constitutes a "prescribed statutory maximum" for a given crime.[6] The Court concluded that the statutory maximum 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*."[7]

Howard and Yolanda Blakely married in 1973.[8] In 1995, Ms. Blakely filed

1. U.S. CONST. amend. VI. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." *Id.*

2. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding due process requires every fact of crime charged proved beyond reasonable doubt). The Court has described the principles of *Winship* as "firmly embedded in our jurisprudence through centuries of common-law decisions." Jones v. United States, 526 U.S. 227, 253 (1999) (Stevens, J., concurring).

3. *See infra* note 21 and accompanying text (suggesting Court's pre-*Apprendi* decisions failed to generate clear substantive constitutional rules). While the members of the Court appear to agree that the due process requirement is clear, they are decidedly less uniform as to when the *Winship* requirement is actually triggered, and as to what constitutional principles may a court avail itself in determining that a given fact is a defined element of a crime subject to due process, as opposed to a mere sentencing factor. *Id.*; *see also* Benjamin J. Priester, *Structuring Sentencing:* Apprendi, *the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 867 (2004) (suggesting little constitutional law exists to guide judicial decisions in sentencing).

4. 530 U.S. 466 (2000).

5. 124 S. Ct. 2531 (2004).

6. *Id.* at 2536 (identifying issue presented to Court).

7. *Id.* at 2537 (restating *Apprendi* definition of statutory maximum). Justice Scalia clarified the majority's holding in *Apprendi* by stating that the "'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* In the Court's view, the infliction of punishment based on facts neither found by the jury nor conceded by the defendant constitutes an abuse of judicial authority. *Id.*

8. State v. Blakely, 47 P.3d 149, 151 (Wash. Ct. App. 2002), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004).

for divorce, obtained a restraining order against her former husband, and instituted legal proceedings to challenge the validity of a family trust funded with considerable real property assets acquired during the course of the marriage.[9] Approximately two weeks prior to the start of litigation, Mr. Blakely abducted his former wife using threats of deadly violence in an apparent attempt to force her to dismiss the pending proceedings.[10] After Mr. Blakely drove her from Washington to Montana, Washington authorities arrested him without incident and charged him with second-degree domestic violence kidnapping with a deadly weapon enhancement.[11] Mr. Blakely agreed to plead guilty in exchange for a sentencing recommendation, within the standard range for his offense, of forty-nine to fifty-three months.[12]

After reviewing Ms. Blakely's testimony at a sentencing hearing, the court refused to abide by the prosecution's sentencing recommendation and instead levied an "exceptional" sentence of ninety months, citing the aggravating factors of "deliberate cruelty and commission of domestic violence in the presence of a minor child."[13] Despite Mr. Blakely's objections to the drastic increase, the court concluded that an exceptional sentence was appropriate.[14] Mr. Blakely appealed to Washington's Court of Appeals, claiming that the sentencing procedure used in the lower court violated his constitutional right "to have a jury determine beyond a reasonable doubt all facts legally essential

9. State v. Blakely, 47 P.3d 149, 151-52 (Wash. Ct. App. 2002) (describing events leading to litigation and detailing real estate assets acquired during marriage), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004).

10. State v. Blakely, 47 P.3d 149, 152 (Wash. Ct. App. 2002) (suggesting abduction constituted attempt to convince Ms. Blakely to dismiss proceedings), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004). Mr. Blakely surprised his former wife as she was walking back from her mailbox. *Id.* After pushing her to the ground and restraining her with duct tape, he told her to cooperate or he would kill her and their youngest son. *Id.* Mr. Blakely then forced her into his truck where he locked her in a "coffin-like plywood box." *Id.* On multiple occasions, Mr. Blakely opened the box to threaten his former wife by "press[ing] a knife blade to Ms. Blakely's neck or nose." *Id.* When confronted by his youngest son, he threatened to shoot the box with a shotgun. *Id.*

11. State v. Blakely, 47 P.3d 149, 152-53 (Wash. Ct. App. 2002) (recounting Mr. Blakely's peaceful surrender), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004). In Washington, second-degree kidnapping consists of "intentionally abduct[ing] another person under circumstances not amounting to kidnapping in the first degree." WASH. REV. CODE § 9A.40.030(1) (2005). Washington law defines kidnapping in the second degree as a class B felony, for which the statutory maximum punishment is ten years. WASH. REV. CODE § 9A.40.030(3)(a) (2005); WASH. REV. CODE § 9A.20.021(1)(b) (2005); 124 S. Ct. at 2535. Notwithstanding this statutory maximum, the "standard range" of punishment for Mr. Blakely's offense was only forty-nine to fifty-three months, approximately half the length of the maximum sentence prescribed by statute. 124 S. Ct. at 2535.

12. State v. Blakely, 47 P.3d 149, 153 (Wash. Ct. App. 2002) (explaining history of Mr. Blakely's negotiations with prosecutors), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004).

13. State v. Blakely, 47 P.3d 149, 154 (Wash. Ct. App. 2002) (describing trial court's rejection of prosecutors' suggested sentence), *rev'd sub nom.* Blakely v. Washington, 124 S. Ct. 2531 (2004). Under Washington law, a court may impose a non-standard sentence length if "there are substantial and compelling reasons justifying an exceptional sentence." WASH. REV. CODE § 9.94A.535 (2005).

14. 124 S. Ct. at 2535-36 (suggesting trial judge believed extraordinary sentence appropriate given Mr. Blakely's acts of "deliberate cruelty").

to his sentence."[15]

A Washington appellate court, relying on the Washington Supreme Court's recent statements in *State v. Gore*,[16] affirmed the lower court's decision.[17] After the Washington Supreme Court denied discretionary review, the United States Supreme Court granted certiorari.[18] After concluding that the holding in *Apprendi* would determine the outcome in this case and, by necessity, that any fact that enhances a criminal sentence beyond prescribed statutory maximums must be submitted to a jury, the Court focused on the resulting issue of what legally constitutes a "prescribed statutory maximum."[19] The Court significantly narrowed its holding in *Apprendi* by concluding that the prescribed statutory maximum is the sentence length that could be imposed on the basis of *only* those facts that have either been admitted by a criminal defendant or proved to a jury beyond a reasonable doubt.[20]

The Supreme Court's earliest attempts to elucidate the constitutional boundaries dividing an element of a crime from a sentencing factor failed to produce a clear line of demarcation.[21] In *Mullaney v. Wilbur*,[22] the Court overturned the homicide conviction of a Maine defendant who was charged under a statute that *presumed* malice aforethought, the mens rea for murder, upon a finding that a killing was both intentional and unlawful.[23] Relying strongly on a historical analysis of the role of malice aforethought in the crime

15. *Id.* at 2536 (describing petitioner's characterization of appeal based on denial of constitutional rights).

16. 21 P.3d 262 (Wash. 2001).

17. 124 S. Ct. at 2536 (stating appellate court concluded similarity to failed challenge in *State v. Gore* precluded further review). In *Gore*, the Washington Supreme Court held that a judge is free "to impose an exceptional sentence—still within the range determined by the Legislature and not exceeding the maximum—after considering the circumstances of an offense, and . . . it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt." *State v. Gore*, 21 P.3d 262, 277 (Wash. 2001).

18. 124 S. Ct. at 2536 (stating United States Supreme Court granted certiorari to resolve issue).

19. *Id.* at 2536-37 (suggesting resolution of case required reinterpretation of *Apprendi* rule).

20. *Id.* at 2537 (stating holding of majority).

21. *See* Derek S. Bentsen, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645, 649 (2004) (arguing Court has meandered between legislative deference and imposition of constitutional substance on criminal law); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236, 1236-41 (2004) [hereinafter *Determinate Sentencing*] (suggesting pre-*Apprendi* cases struggled to define constitutional rule separating elements from sentencing factors).

22. 421 U.S. 684 (1975).

23. Mullaney v. Wilbur, 421 U.S. 684, 686-87 (1975) (discussing jury instructions and presumption of murder upon concluding that killing was unlawful and intentional). Upon a finding by the jury that the charged killing was both intentional and unlawful, malice aforethought was presumed, shifting the burden of rebutting the presumption to the defendant. *Id.* at 686. To receive the lesser penalty associated with manslaughter, the defendant had to demonstrate "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.* In the view of the Maine Supreme Judicial Court, this did not amount to an attempt to evade the commands of *Winship* because murder and manslaughter were not considered separate offenses in Maine, but instead constituted "different degrees of the single generic offense of felonious homicide." *Id.* at 687-88. The presumed specific intent was therefore not an element, but merely a factor affecting sentencing, and the requirements of *Winship* were thus irrelevant. *Id.* at 688.

of homicide, the Court concluded that state courts had traditionally treated malice aforethought as an element, requiring that it be submitted to a jury.[24] In contrast, when faced with substantially the same issue seven years later in *Patterson v. New York*,[25] the Supreme Court deferred to New York's legislative decision to treat the presence or absence of extreme emotional disturbance as an affirmative defense rather than as an element of the crime.[26] While the Court's decision in *Patterson* clearly offered a level of deference to state legislatures that the *Mullaney* decision did not, the limits of that deference remained unclear, with the Court signaling only that "there are obviously constitutional limits beyond which the [s]tates may not go in this regard."[27]

With the rise of criminal codes that separated the definitions of *substantive offenses* from *sentencing factors*, the constitutional debate over due process and Sixth Amendment rights transitioned to a new factual battleground.[28] In *McMillan v. Pennsylvania*,[29] the Court considered a challenge to a Pennsylvania statute requiring a minimum sentence if a sentencing judge found

24. Mullaney v. Wilbur, 421 U.S. 684, 695-96 (1975) (stating clear historical trend requires prosecution to prove malice aforethought). In response to Maine's contention that the presence or absence of malice aforethought dealt exclusively with the length of sentencing and not with a defendant's guilt or innocence, the Court responded "[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." *Id.* at 698.

25. 432 U.S. 197 (1977).

26. Patterson v. New York, 432 U.S. 197, 205-06 (1977) (discussing Court's holding in terms of New York legislative intentions). Patterson was charged with second-degree murder. *Id.* at 198. In New York, second-degree murder requires a showing of intent to cause death and actual causation of the death of another person. *Id.* Proof of both establishes a prima facie case of second-degree murder unless the defendant can successfully raise the defense of extreme emotional disturbance. *Id.* In view of *Mullaney*'s reliance on historical analysis, it is perhaps ironic that the *Patterson* Court also employed historical reasoning to reach a functionally opposite result—a tone of legislative deference premised upon a finding that affirmative defenses have never been subjected to the requirements of due process. *See id.* at 210. The Court concluded that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *Id.*

27. Patterson v. New York, 432 U.S. 197, 210 (1977) (stating Court did not intend to upset balance established in previous cases). Recognizing the difficulty in reconciling the Court's decisions in these two cases, the dissent commented, "[t]he Court today, without disavowing the unanimous holding of *Mullaney*, approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's." *Id.* at 221 (Powell, J., dissenting); *see also* Derrick Bingham, *The Meaning of Fifth and Sixth Amendment Rights: Sentencing in Federal Drug Cases After* Apprendi v. New Jersey *and* Harris v. United States, 20 GA. ST. U. L. REV. 723, 730 (2004) (suggesting *Patterson* undid constitutional loophole *Mullaney* closed); Bentsen, *supra* note 21, at 649 (discussing failure of initial attempts by Court to create substantive area of constitutional criminal law).

28. *See* Priester, *supra* note 3, at 869 (suggesting "systematic change" in sentencing law began in 1980's); Kathryn M. Reinhard, *The Requirement of Proof Beyond a Reasonable Doubt for Increasing Sentences Beyond the Statutory Maximum: Why* Apprendi v. New Jersey *Should Be Upheld*, 27 HAMLINE L. REV. 571, 584-85 (2004) (detailing history of federal sentencing guidelines); *Determinate Sentencing*, *supra* note 21, at 1238 (stating increase in criminal codes separating offenses from sentencing factors responsible for change in debate); Bentsen, *supra* note 21, at 649 (suggesting nature of constitutional debate changed after *Mullaney* and *Patterson*).

29. 477 U.S. 79 (1986).

that a defendant previously convicted of certain felonies had committed the subsequent offense with a firearm.[30] Reasoning that the statute did not alter the maximum penalty allowed by law but merely limited the sentencing judge's discretion within previously prescribed statutory limits, the Court concluded that the Pennsylvania legislature had not transgressed the nebulous limit ordained in *Patterson*.[31] In a statement that would foretell the future of the Court's jurisprudence in this area, the majority commented that McMillan's claim of a due process violation "would have at least more superficial appeal if a finding of visible possession exposed [defendants] to greater or additional punishment."[32]

In *Apprendi v. New Jersey*, the Court addressed the constitutionality of sentencing factors that specifically enhance the length of a criminal penalty.[33] After convicting Charles Apprendi of unlawful possession of a firearm, the prosecution sought to increase his sentence on the basis of a hate-crime statute that authorized increased penalties for racially motivated crimes.[34] The Court distinguished its previous decision in *McMillan* by noting that, in *Apprendi*, the sentencing factor did not limit the length of possible sentences to pre-defined statutory limits, but instead actually increased the upper limit.[35] That increase "has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."[36] The Court concluded that a state must submit

30. McMillan v. Pennsylvania, 477 U.S. 79, 81-82 (1986) (detailing specific provisions of act at issue). The Court specifically noted that the Pennsylvania Mandatory Minimum Sentencing Act "operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense." *Id.*

31. McMillan v. Pennsylvania, 477 U.S. 79, 86-88 (1986) (suggesting act merely "ups the ante" within limits already available to sentencing judge). The Court noted that one of the purposes of the stated limit in *Patterson* was an outer boundary that states could not exceed in their efforts to distribute the burden of proof between the prosecution and the accused using elements and sentencing factors. *Id.* at 86. Finding the Pennsylvania statute to be well within that limit, the Court commented that "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88.

32. McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (stating operation of law merely restricts range within legally acceptable limits).

33. Apprendi v. New Jersey, 530 U.S. 466, 468-69 (2000) (questioning whether due process requires fact that lengthens sentence be proved beyond reasonable doubt).

34. Apprendi v. New Jersey, 530 U.S. 466, 468-70 (2000) (describing statutory penalties for possession of firearm in second degree crimes and hate crimes). The standard sentence length for a second-degree offense was between five and ten years. *Id.* at 468. The hate-crime law provided for an extended term "if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

35. *See* Apprendi v. New Jersey, 530 U.S. 466, 494-95 (2000) (suggesting practical effect of hate crime statute turns second-degree offense into first-degree offense). The Court further stated that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence . . . it fits squarely within the usual definition of an 'element.'" *Id.* at 494, n.19.

36. Apprendi v. New Jersey, 530 U.S. 466, 495 (2000).

and prove to a jury any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum.[37]

In *Blakely v. Washington*, the Court squarely confronted the question of what constitutes, for purposes of an *Apprendi* analysis, a maximum penalty allowed by statute.[38] In an effort to further refine the rule pronounced in *Apprendi*, the majority focused on "the need to give intelligible content to the right of jury trial."[39] In the majority's opinion, the Court noted that the Framers clearly intended that the Sixth Amendment right to a jury trial serve as an important check on the power of the judiciary.[40] For this check to constitute something more than a mere procedural safeguard, the Court declared, the judge's authority to sentence criminal defendants must emanate from the facts as proved to and found by a jury.[41] If the "statutory maximum" in *Apprendi* is to respect the boundaries of the Sixth Amendment, courts must interpret the phrase to mean that the maximum penalty that could be imposed upon a criminal defendant solely on the basis of the facts conceded by that defendant or proved to a jury beyond a reasonable doubt.[42]

Furthermore, the majority concluded that the dissent offered no discernible constitutional principle that could both reconcile relevant precedent and ensure that the right to a jury trial would remain a substantive check on the judiciary's power.[43] Rejection of *Apprendi* and the Court's decision in the case at bar necessarily implied the adoption of one of two competing standards, neither of which, the majority claimed, would further the intent of the Framers.[44] Sixth

37. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating holding of *Apprendi*); *see also* Priester, *supra* note 3, at 873-76 (explaining holding of *Apprendi* in greater detail). In his concurring opinion, Justice Scalia praised the emergence of a bright-line rule in an area of jurisprudence in which there had been none, commenting that the guarantee of a jury trial is meaningless unless all of the facts required to determine punishment must be found by a jury. Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).

38. 124 S. Ct. 2531, 2536 (stating case at bar requires application of *Apprendi* rule); *see also supra* note 37 and accompanying text (discussing rule in *Apprendi*).

39. 124 S. Ct. at 2538 (stating jury trial right much more than mere procedural safeguard); *see also supra* note 37 (offering Justice Scalia's concurring view in *Apprendi*). In Justice Scalia's view, the Sixth Amendment right to a jury trial means nothing if not that all predicate facts required for a given punishment must be proved to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).

40. 124 S. Ct. at 2538-39 (citing *Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (H. Storing ed., 1981)) (suggesting jury right intended to control judiciary just as suffrage intended to control legislature).

41. *Id.* at 2539 (reiterating *Apprendi* rule furthers Framers' intent by limiting judicial authority). The majority concluded that *Apprendi* carries out the constitutional design of limited judicial authority by affording the jury the substantive role of determining the *exclusive* set of facts upon which a judge must determine sentence length. *Id.*

42. *Id*. at 2537 (refining rule in *Apprendi* to include only facts conceded by defendant or proved to jury); *see also supra* text accompanying note 37 (stating ultimate holding in *Apprendi*).

43. *See infra* notes 44-46 and accompanying text (explaining why alternative approaches to Sixth Amendment jurisprudence fail to protect criminal defendants).

44. *See* 124 S. Ct. at 2539 (suggesting rejection of *Apprendi* means adoption of one of two unworkable

Amendment jurisprudence could return to a state of legislative deference, requiring proof beyond a reasonable doubt of only those facts that the legislature chose to explicitly define as elements.[45] Alternatively, in a less deferential approach, courts could presumptively accept a state's discretion in defining facts as elements or sentencing factors, provided that such discretion did not produce sentencing factors that become the "tail which wags the dog of the substantive offense."[46] Neither approach, the majority maintained, was adequate to ensure what the majority claimed to have done—protecting a defendant's right to insist that the state prove *each and every fact essential to the defendant's punishment* beyond a reasonable doubt.[47]

Though the majority stressed that their holding was consistent with the Framers' intent, it is clear that the legal history upon which the Framers relied is silent on the question at bar.[48] As Justice Breyer explained in his dissent, historical authorities have never disputed the proposition that judges have discretion to vary sentence lengths within ranges prescribed by statute.[49] More modern history affirms that judges have always maintained a broad authority to sentence, limited only by the boundaries pronounced by statute.[50] The majority's suggestion, therefore, that adherence to the Framers' vision *compels* the Court's conclusion therefore overstates the history upon which that conclusion purportedly rests.[51]

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alternatives); *see also infra* notes 45-46 and accompanying text (describing how alternative constitutional principles fail to guarantee meaningful right to jury trial).

45. *See* 124 S. Ct. at 2539 (describing potentially absurd results of total legislative deference). A state could, the majority postulated, convict a man of murder even though the jury only found him guilty of possessing a firearm. *Id.* The jury, concluded the majority, would have no substantive role and the Sixth Amendment would afford no qualitative protections in an environment in which the jury was "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.*

46. *See* 124 S. Ct. at 2539 (quoting McMillan v. Pennsylvania, 477 U.S. 79 (1986)) (outlining alternative, less deferential approach). Despite this approach's inherent recognition that an unchecked legislature and the substantive guarantees of the Sixth Amendment are incompatible in practice, the majority held that that approach still failed to provide any clear constitutional principle to determine when the state had transgressed its authority. *Id.* The proffered standard, the majority reasoned, is that the state should not go "too far" and "[w]ith *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them." *Id.* at 2540.

47. *See* 124 S. Ct. at 2540 (suggesting dissent's alternative approaches incompatible with intentions of Framers). The majority posited that the need for *Apprendi*'s bright-line rule is clear when considering that the Sixth Amendment exists because the Framers did not trust government to properly delineate the role of the jury. *Id.*

48. *See id.* at 2558 (Breyer, J., dissenting) (stating historical sources upon which majority relies do not compel its result); *see also infra* notes 49-50 (suggesting neither common law nor recent history prohibited judges from exercising discretion in sentencing).

49. *See* 124 S. Ct. at 2559 (Breyer, J., dissenting) (explaining common law historically did not preclude exercise of judicial discretion in sentencing).

50. *See id.* (Breyer, J., dissenting) (suggesting modern history similarly allowed broad judicial discretion in sentencing matters). As Justice Breyer further explained in his dissent, sentencing decisions are often made on the basis of "uncharged conduct," typically detailed in a presentence report. *Id.* (Breyer, J., dissenting).

51. *See* 124 S. Ct. at 2560 (Breyer, J., dissenting) (stating historical sources simply do not address

Moreover, the Court's decision does significant violence to the states' ability to rely on their own authority to define criminal behavior.[52] Previous decisions such as *Patterson* and *McMillan* fostered such reliance by suggesting that the Court would presumptively view the allocation of facts among elements and sentencing factors as a legislative task, subject only to the requirements of due process.[53] More than twenty years of state legislative reforms in sentencing now face the prospect of constitutional invalidity as a result of the Court's decision.[54]

Faced with the likelihood that the sentencing reforms of recent decades are unconstitutional, several states and the federal government now confront the monumental task of redesigning sentencing systems to respect the rule of *Apprendi* as construed by *Blakely*.[55] A charge offense or determinate sentencing system would produce uniform results by creating fixed sentences for specified conduct, but would do so at the expense of justice.[56] At the opposite end of the spectrum lies a return to the era of indeterminate sentencing schemes in which sentence lengths are left almost entirely to the discretion of judges, often producing unfair disparities based on constitutionally impermissible factors.[57] Both options undermine the substantive value of the

question at bar). In the words of Justice Breyer, "[h]istoric practice, then, does not compel the result the majority reaches. And constitutional concerns counsel the opposite." *Id.* (Breyer, J., dissenting); *see also id.* at 2548 (O'Connor, J., dissenting) (suggesting Framers never confronted with specific issue before Court).

52. *See id.* at 2560-61 (Breyer, J., dissenting) (arguing sentencing reforms came in wake of reliance on constitutional principles from *McMillan*).

53. *See* 124 S. Ct. at 2560-61 (Breyer, J., dissenting) (suggesting legislatures had discretion to determine elements and sentencing factors subject to due process requirements); *supra* note 26 (noting *Patterson*'s recognition that balancing society's interests with that of defendant's historically remained legislative role); *supra* note 31 and accompanying text (discussing *McMillan*'s reliance on *Patterson* and Court's conclusion that state did not transgress its authority). *McMillan*'s presumption of legislative deference and the limited nature of the Court's judicial inquiry are best reflected by the *McMillan* court's statement that the sentencing factor at issue did not appear to be "a tail which wags the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

54. *See* 124 S. Ct. at 2548-49 (O'Connor, J., dissenting) (explaining Washington one of many states to have implemented structured sentencing systems). The practical effect of the Court's decision, Justice O'Connor argues, is to threaten the validity of all such systems and the "untold number of criminal judgments" which employed them. *Id.* at 2549 (O'Connor, J., dissenting). Justice Breyer, apparently motivated by fear of constitutional invalidation of more than twenty years of legislative reform, states that he cannot believe that the Constitution prohibits states from implementing such criminal systems. *Id.* at 2560-61 (Breyer, J., dissenting).

55. *Id.* at 2552 (Breyer, J., dissenting) (suggesting majority ignores adverse consequences of its opinion).

56. *See* 124 S. Ct. at 2552-53 (Breyer, J., dissenting) (arguing uniform results offset by intolerable costs). By imposing the same penalty for some proscribed conduct, determinate sentencing schemes fail to allow for the fact that different people commit the same crimes in different ways. *Id.* at 2553 (Breyer, J., dissenting). As such, Justice Breyer concluded that "[w]hen dramatically different conduct ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating cases alike, but it simultaneously fails to treat different cases differently." *Id.* (Breyer, J., dissenting).

57. *See* 124 S. Ct. at 2553-54 (Breyer, J., dissenting) (highlighting discretionary authority under such systems and recalling resulting criticism); *see also id.* at 2544 (O'Connor, J., dissenting) (stating disparities in sentence lengths resulted from unguided judicial discretion). Justice O'Connor suggested that the length of a defendant's sentence under an indeterminate sentencing scheme is likely to be as indicative of the idiosyncrasies of the sentencing judge as of the conduct for which the defendant is sentenced. *See id.* at 2545

right to a jury trial, suggesting that the majority's decision actually harms the very protections that it seeks to defend.[58]

In *Blakely v. Washington*, the Court reassessed the rule that emerged from its decision in *Apprendi*. Writing for the majority, Justice Scalia clarified that the "statutory maximum" of *Apprendi* is the maximum sentence that a court could impose on the basis of only those facts that had been proved to a jury beyond a reasonable doubt or conceded by the defendant himself. In so ruling, the Court misinterpreted the historical traditions that informed the vision of the Framers, invalidated the precedents upon which state and federal legislatures have relied when passing sentencing reforms, and foreshadowed a return to the inequities of indeterminate sentencing schemes.

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(O'Connor, J., dissenting). In Washington, for example, the move away from indeterminate sentencing and toward "guided discretion" has substantially reduced disparities in sentence lengths based on factors such as race. *Id.* (O'Connor, J., dissenting); *see also* Reinhard, *supra* note 28, at 584 (suggesting main goal of federal sentencing guidelines to eliminate "disparity and discrimination").

58. *See* 124 S. Ct. at 2552 (Breyer, J., dissenting) (suggesting adverse practical effects of Court's decision inhibits correct decisions); *see also id.* at 2543-44 (O'Connor, J., dissenting) (predicting return to greater judicial discretion and less-uniform sentence lengths). Warning of the possibility of a post-*Blakely* future in which defendants are once again faced with the inequities of broad judicial discretion in sentencing matters, O'Connor suggested that she found it "implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and . . . [likely that] the practical consequences of today's decision may be disastrous." *Id.* (O'Connor, J., dissenting).