MANDATORY SENTENCING GUIDELINES BY ANY OTHER NAME: WHEN "INDETERMINATE STRUCTURED SENTENCING" VIOLATES *BLAKELY V. WASHINGTON*

*Bradley R. Hall**

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> The humorist who invented trial by jury played a colossal practical joke upon the world, but since we have the system we ought to try to respect it.
>
> - Mark Twain[1]

I. INTRODUCTION

In *Apprendi v. New Jersey*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] Four years later, in *Blakely v. Washington*, the Court extended this rule to account for mandatory sentencing guidelines, holding that, for constitutional purposes, the term "statutory maximum" refers to "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"—even if that is the severest possible sentence under the sentencing guidelines rather than the statute of conviction.[3] The Court made clear that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment . . .' and the judge exceeds his proper authority."[4]

Conversely, the Court approved of sentencing schemes that do not employ mandatory sentencing guidelines based on judicial fact-finding, but instead vest judges with full sentencing authority at the moment of

* Federal Defender Office, Legal Aid and Defender Association, Detroit, Michigan; B.A., Michigan State University, 2001; J.D., Northwestern University School of Law, 2005. This Article draws upon the work of several talented Michigan attorneys who have persistently raised similar arguments in the courts. For these contributions and for many thoughtful comments on earlier drafts of this Article, I wish to thank Andrew Wise, Miriam Siefer, David Moran, Christine Pagac, Jonathan Sacks, Michael Mittlestat, Desiree Ferguson, and Kimberly Thomas. I also thank W. David Ball for his insightful feedback.

1. Mark Twain, Letter to the Editor, N.Y. TRIB., Mar. 10, 1873, *reprinted in* MARK TWAIN SPEAKS FOR HIMSELF 75, 76 (Paul Fatout ed., 1978).

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

3. Blakely v. Washington, 542 U.S. 296, 303 (2004) (citing Ring v. Arizona, 536 U.S. 584, 602 (2002)) (emphasis omitted).

4. *Id.* at 304 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, (2d ed. 1872)).

conviction, i.e., schemes in which judge-found facts are not "essential to the punishment."[5]

The Court imprecisely referred to these schemes, however, as "indeterminate," apparently borrowing from another characteristic common to the nonguideline sentencing schemes that were widespread prior to the 1980s: the idea that a defendant's actual time in custody is not "determined" solely by the sentencing judge, but depends in part upon nonjudicial factors, typically an executive branch parole board.[6]

A careful examination of its earlier precedents reveals that the Supreme Court has never been concerned with the existence of a parole board when it has used the term "indeterminate." Rather, the Court's sole concern has been whether a sentencing scheme employs mandatory sentencing guidelines that narrow a judge's sentencing discretion.

Buoyed by the Supreme Court's acceptance of "indeterminate sentencing" in an otherwise confusing post-*Blakely* landscape, but without the least bit of thought as to what the Court actually meant by the term, some state courts have found that any sentencing regime employing a parole board—and therefore meeting the dictionary definition of "indeterminate"—withstands constitutional scrutiny. The Michigan and Pennsylvania courts have led the way.[7] Those states employ what Steven Chanenson has aptly called "Indeterminate Structured Sentencing" (ISS) schemes because they include both a parole component (they are "indeterminate") and a sentencing guidelines component (they are "structured").[8]

In upholding these schemes, the state courts' primary concern has been the "indeterminate" side of this equation, but this Article argues that it is the form of the "structure," rather than the presence of a parole board, that governs the *Blakely* analysis. Specifically, when indeterminate (parolable) sentencing involves mandatory sentencing guidelines, as in

5. *Id.*

6. "Prior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. . . . Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation . . . ." *Id.* at 315 (O'Connor, J., dissenting) (citations omitted).

7. *See, e.g.*, People v. Drohan, 715 N.W.2d 778, 791–92 (Mich. 2006); Commonwealth v. Smith, 863 A.2d 1172, 1179 (Pa. Super. Ct. 2004).

8. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 432–33 (2005).

Michigan, it runs afoul of *Blakely*. But when the same scheme involves only advisory guidelines, as in Pennsylvania, it passes constitutional muster.

While the argument depends in large part on a historical account of the Supreme Court's misuse of the terms "indeterminate" and "statutory maximum," this only explains the post-*Blakely* confusion that has misshaped the law. Putting aside the question of how so many courts and commentators have gone astray, and instead focusing simply on what *Blakely* really meant, the novel argument is actually quite obvious, as the following hypothetical illustrates.

A sentence in an ISS scheme consists of two numbers: a parole-eligibility date and a mandatory-release date. Under Michigan's scheme,[9] the judge selects the parole-eligibility date from within a mandatory guideline range based on facts not admitted or proved to the jury beyond a reasonable doubt; the mandatory-release date is set by statute.[10] Thus, for example, if the facts reflected in a jury verdict expose a defendant to a guideline range of two to four years and a statutory mandatory-release date of ten years, the effective sentencing guideline range is two to ten years to four to ten years, with four to ten years being "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict"—or, in the Supreme Court's terminology, the "statutory maximum."[11] This is because the judge may not "impose" a sentence of ten years any more than he may "impose" a sentence of four years; the judge may only impose a sentence range within which the parole board is given an additional layer of discretion.

But after the judge makes factual findings not supported by the jury verdict, the effective sentencing guideline range might increase, requiring the judge to impose a sentence between five to ten years and seven to ten years. Even a sentence of five to ten years—the most lenient under the mandatory guidelines—would not be supported by the jury verdict. By imposing such a sentence, the judge would "inflict punishment that the jury's verdict alone does not allow . . . and . . . exceed his proper authority."[12] Though it was declared unconstitutional in *Blakely*, this is precisely what Michigan's mandatory ISS scheme demands.

9. Pennsylvania's sentencing scheme works slightly different. *See infra* Part II.C.

10. *See* MICH. COMP. LAWS ANN. §§ 769.8(1), 769.34 (West 2006).

11. Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis omitted).

12. *Id.* at 304 (citations omitted).

Although this Article focuses primarily on Michigan's and Pennsylvania's sentencing schemes, which represent the most obvious attempts to shoehorn "indeterminate" sentencing schemes into the *Blakely* exception bearing that inapt name, its implications may be more widespread. Respected commentators have endorsed the ISS model,[13] and a number of other jurisdictions have enacted similar statutes in various contexts.[14] Yet there has been startlingly little serious discussion about the constitutional implications of mandatory sentencing guidelines within such schemes. This Article attempts to fill that void.

Part II briefly defines several key terms used to describe various sentencing schemes, paying particular attention to the traditional meaning of the term "indeterminate sentencing." Part III is a historical account of the line of Supreme Court cases demanding a jury finding as to all elements of an offense and, subsequently, to any fact which increases a sentence. This discussion focuses primarily on what the Court has intended to protect with this line of cases and what it has meant by its imprecise use of the terms "indeterminate sentencing" and "statutory maximum." Part IV scrutinizes the state courts' application of the *Blakely* line of cases to indeterminate sentencing schemes, concluding that where sentencing guidelines are mandatory, as in Michigan, indeterminate sentencing does not pass constitutional muster. Part V is a brief conclusion.

II. INDETERMINATE STRUCTURED SENTENCING

A. *"A Common Descriptive Language"*[15]

Black's Law Dictionary defines "indeterminate sentencing" as "[t]he practice of not imposing a definite term of confinement, but instead prescribing a range for the minimum and maximum term, leaving the precise term to be fixed in some other way, usu[ally] based on the

13. Professor Chanenson, for example, describes ISS as possibly "the best bet" among "*Blakely*-compliant" sentencing schemes and offers Michigan and Pennsylvania as model sentencing systems. Chanenson, *supra* note 8, at 432; *see also* Kathleen H. Morkes, Note, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 278–79 (2006) ("Michigan and Pennsylvania use indeterminate sentencing schemes . . . . This type of sentencing scheme does not seem to violate *Blakley*.").

14. *See, e.g.*, State v. Clarke, 134 P.3d 188, 191–92 (Wash. 2006).

15. Chanenson, *supra* note 8, at 381 ("To discuss sentencing systems effectively, a common descriptive language is essential.").

prisoner's conduct and apparent rehabilitation while incarcerated."[16] *Black's* defines an "indeterminate sentence" as a "sentence of unspecified duration, such as one for a term of 10 to 20 years," or a "maximum prison term that the parole board can reduce, through statutory authorization, after the inmate has served the minimum time required by law."[17]

Conversely, *Black's* defines a "determinate sentence" as a "sentence for a fixed length of time rather than for an unspecified duration."[18] Although determinate sentencing schemes do not utilize parole, they may involve some form of sentence reduction such as "good time" in the federal system.[19] A determinate sentence is typically referred to as a "flat" sentence.[20]

Thus, according to traditional definitions, "[t]he key difference between indeterminate and determinate sentencing systems is uncomplicated. Indeterminate systems use discretionary parole release while determinate systems do not."[21]

Among both indeterminate and determinate sentencing schemes are several additional levels of distinction, the characteristics of which guide the *Blakely* analysis.[22] Whether indeterminate or determinate, a sentencing scheme may be either discretionary or nondiscretionary.[23] In a discretionary sentencing scheme, a judge selects a sentence based on typical sentencing considerations about the defendant or the facts of the case.[24] In a nondiscretionary scheme, the legislature has predetermined the appropriate sentence based solely on the offense of conviction.[25]

Among discretionary schemes, there are both structured (or "guided") and unstructured (or "unguided") systems. Structured systems

16. BLACK'S LAW DICTIONARY 786 (8th ed. 2004).

17. *Id.* at 1394.

18. *Id.*

19. *See* 18 U.S.C. § 3624(b)(1) (2006) (allowing "credit toward the service of the prisoner's sentence" if the prisoner has "displayed exemplary compliance with institutional disciplinary regulations").

20. BLACK'S LAW DICTIONARY, *supra* note 16, at 1394.

21. Chanenson, *supra* note 8, at 382–83.

22. With one significant exception, this Article relies primarily on the terminology provided in Professor Chanenson's article, which recognizes that "[t]o discuss sentencing systems effectively, a common descriptive language is essential." *Id.* at 381.

23. *Id.* at 383.

24. *Id.* at 384.

25. *Id.*

utilize sentencing guidelines or similar statutory measures that seek to constrain judges' discretion by tying the severity of sentences to factors personal to the defendant or unique to the offense circumstances.[26] Unstructured systems allow judges freely to impose any sentence within the applicable statutory range.[27]

Finally, structured schemes may be characterized as either mandatory or advisory.[28] In a mandatory scheme, a sentencing judge must impose a sentence within the applicable guidelines range (or depart from the range based on a specific factor found within the guidelines themselves). In an advisory scheme, the judge only needs to consider the guidelines when imposing a sentence within the broader statutory range. An obvious example of this distinction is the pre- versus post-*United States v. Booker*[29] Federal Sentencing Guidelines, which exist in a determinate system.[30]

The focus of this Article is what Professor Chanenson has called "Indeterminate Structured Sentencing" (ISS). Unlike prior scholarship, this Article will also concentrate on the distinction between advisory and

26. *See id.*

27. *See id.*

28. At this level of distinction, Professor Chanenson and others have used the terms "presumptive" and "voluntary" which appear to be synonymous with "mandatory" and "advisory," respectively. Professor Chanenson explains "there can be many variations under these labels," but generally, "[p]resumptive sentencing guidelines require judges to follow the guidelines' sentencing recommendations or justify their deviation from them," whereas "[f]ully voluntary guidelines . . . are true recommendations; they rely on reason and moral suasion to encourage compliance." *Id.* at 384. A postscript notes that as the article was being prepared for printing, the Supreme Court decided *United States v. Booker*, 543 U.S. 220, 233 (2005), which first clarified the constitutional significance of the mandatory/advisory distinction. Chanenson, *supra* note 8, at 460. It is unlikely, therefore, that Professor Chanenson fully considered whether, after *Booker*, "voluntary" and "presumptive" remained apt descriptive terms for the two types of guided sentencing schemes.

In another pre-*Booker* article, Jon Wool used the same terms. Jon Wool, *Aggravated Sentencing:* Blakely v. Washington: *Legal Considerations for State Sentencing Systems*, 17 FED. SENT. REP. 134, 143 (2004). In his view, presumptive sentencing guidelines are "sentencing guidelines that require a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence." *Id.* Voluntary sentencing guidelines, on the other hand, are "sentencing guidelines that do not require a judge to impose a recommended sentence, but may require the judge to provide justification for imposing a different sentence." *Id.*

29. *Booker*, 543 U.S. at 220.

30. *See infra* Part III.E.

mandatory guidelines in ISS systems, which is critical for purposes of constitutional review.

B. *The Michigan Model: Mandatory Guidelines in an ISS Scheme*

The Michigan sentencing statute provides in part that "the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term . . . . The maximum penalty provided by [statute] shall be the maximum sentence . . . ."[31] In fixing the minimum term, a sentencing judge must adhere to the Michigan Sentencing Guidelines, often relying on facts not proven to the jury beyond a reasonable doubt.[32] The maximum term is not established pursuant to the Guidelines but rather is set by the statute of conviction.[33] When a defendant reaches the "minimum" date, he becomes eligible for parole.[34] When he reaches the "maximum" date, he must be released from custody. In other words, a Michigan sentence consists of two numbers: a parole-eligibility date and a mandatory-release date.

A Michigan sentencing court therefore cannot typically "impose" a flat sentence of a definite term of years.[35] Rather, it is the parole board that decides exactly when to release a defendant from custody. Thus, for example, if the Michigan Sentencing Guidelines provide a range of five to seven years and the statute of conviction provides a mandatory-release date of ten years, the sentencing judge may only "impose" a sentence accounting for both of these variables, such as five to ten years or seven to ten years.

The Michigan Sentencing Guidelines establish "sentencing ranges that do require adherence" by sentencing courts,[36] and absent a legislative basis, any departure from the Michigan Sentencing Guidelines is prohibited.[37] In other words, the Guidelines are mandatory.[38]

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31. MICH. COMP. LAWS ANN. § 769.8(1) (West 2000).
32. *See id.* § 769.34.
33. *See id.* § 769.8(1).
34. *Id.* § 791.233(1)(b).
35. There are exceptions to this general rule. *See infra* note 228.
36. People v. Hegwood, 636 N.W.2d 127, 131 (Mich. 2001).
37. *See* MICH. COMP. LAWS ANN. § 769.34(2). Specifically, sentencing courts are permitted to depart from the otherwise mandatory guidelines only where there is a "'substantial and compelling reason'" for the departure and the court explains the reason on the record. *Hegwood*, 636 N.W.2d at 132 (quoting MICH. COMP. LAWS § 769.34(3)).
38. Comparing the state's previous advisory guidelines scheme with its

C. *The Pennsylvania Model: Advisory Guidelines in an ISS Scheme*

Pennsylvania uses a sentencing scheme "bearing a strong resemblance to Michigan's,"[39] though there are two important differences. First, Pennsylvania sentencing courts have discretion as to both the parole-eligibility date and the mandatory-release date.[40] As to the former, the Pennsylvania Sentencing Guidelines provide mitigated ranges, standard ranges, and aggravated ranges, within which sentencing courts are advised to select a parole-eligibility date.[41] As to the latter, the Guidelines are silent. Although statutes themselves set "statutory maximum" sentences,[42] which serve as a ceiling on sentencing courts' discretion, these maximums need not coincide with the mandatory-release dates. Unlike their Michigan counterparts, therefore, Pennsylvania sentencing courts may set mandatory-release dates significantly lower than those allowed by statute. The only limit on judges' discretion in setting the mandatory-release date is that it must be at least twice the parole-eligibility date.[43]

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current mandatory guidelines scheme, the Michigan Supreme Court has explained,

> Sentencing guidelines in Michigan have existed through two distinct eras. From 1983 though [sic] 1998, Michigan's courts employed guidelines crafted by this Court and promulgated by administrative order. . . .
>
> This Court's sentencing guidelines were "mandatory" only in the sense that the sentencing court was obliged to follow the procedure of "scoring" a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring. However, . . . a sentencing judge was not necessarily obliged to impose a sentence within those ranges.
>
> Effective January 1, 1999, the state of Michigan embarked on a different course. By formal enactment of the Legislature, Michigan became subject to guidelines with sentencing ranges that *do* require adherence. . . .
>
> . . . .
>
> Because the guidelines are the product of legislative enactment, a judge's discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature.

Hegwood, 636 N.W.2d at 131–32 (citations omitted).

39. People v. Drohan, 715 N.W.2d 778, 788 (Mich. 2006).

40. 42 PA. CONST. STAT. ANN. § 9756(a), (b) (West 2007).

41. *See* 204 PA. CODE §§ 303.1–303.18 (2008).

42. *E.g.*, 18 PA. CONS. STAT. ANN. §§ 1103, 1104; 42 PA. CONS. STAT. ANN. § 9714 (a.1).

43. Commonwealth v. Kleinicke, 895 A.2d 562, 572 (Pa. Super. Ct. 2006).

A Pennsylvania sentencing court therefore cannot typically "impose" a sentence of any definite term of years but must impose a sentence consisting of two numbers between which the parole board decides when to release a defendant. If the Pennsylvania Sentencing Guidelines recommend a "standard range" of between two and four years and the statute of conviction provides a statutory maximum of ten years, the sentencing court may, consistent with the guidelines, impose any sentence consisting of a parole-eligibility date between two and four years and a mandatory-release date at least twice as long as the parole-eligibility date, but no greater than ten years. Typical examples of guideline-consistent sentences would include two to four years, three to six years, or four to eight years, but the guidelines would also allow sentences such as two to eight years, two to ten years or four to ten years.

The second, and more constitutionally significant, distinction between the Pennsylvania and Michigan sentencing schemes is that in Pennsylvania, "[t]he Sentencing Guidelines are not mandatory . . . , so trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines."[44] Sentencing courts simply must consider the Guidelines and explain their sentencing decision on the

44. Commonwealth v. Mouzon, 812 A.2d 617, 621 (Pa. 2002) (citing 42 PA. CONS. STAT. ANN. § 9721(b); Commonwealth v. Ellis, 700 A.2d 948, 958 (Pa. Super. Ct. 1997)). "If a court departs from the sentencing recommendations contained in the Sentencing Guidelines, it must 'provide a contemporaneous written statement of the reason or reasons for the deviation.'" *Id.* (quoting 42 PA. CONS. STAT. ANN. § 9721(b)).

In *Commonwealth v. Walls*, 926 A.2d 957 (Pa. 2007), the Pennsylvania Supreme Court noted "the advisory, nonbinding nature of the guidelines," and explained that "the guidelines are but 'one factor among the many enumerated in the Sentencing Code as a whole . . . .'" *Id.* at 964 (quoting Commonwealth v. Sessoms, 532 A.2d 775, 781 (Pa. 1987)). The court went on to explain,

> Consultation of the guidelines will assist in avoiding excessive sentences and further the goal of the guidelines, viz., increased uniformity, certainty, and fairness in sentencing. Guidelines serve the laudatory role of aiding and enhancing the judicial exercise of judgment regarding case-specific sentencing. Guidelines may help frame the exercise of judgment by the court in imposing a sentence. Therefore, based upon the above, we reaffirm that the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors—they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence.

Id. at 964–65.

record.[45] Thus, in a case involving the hypothetical guidelines above, a court may impose a nonguideline sentence consisting of any other parole-eligibility date, so long as there is room within the statutory maximum for the mandatory-release date. In other words, the court may impose a nonguideline sentence of one to two years, one to ten years, or five to ten years—but not six to ten years because the parole-eligibility date is greater than half the mandatory-release date.

In sum, while there are some restrictions on possible sentences, Pennsylvania sentencing judges have far greater sentencing discretion than Michigan sentencing judges. Because Pennsylvania's guidelines are advisory whereas Michigan's are mandatory, Pennsylvania sentencing judges have full authority to "impose" any sentence within the statutory range notwithstanding the guidelines computation. Michigan sentencing judges, on the other hand, may not "impose" any sentence outside the guidelines.

III. EVOLUTION OF THE CONSTITUTIONAL RIGHT TO A JURY FINDING OF ALL FACTS NECESSARY FOR IMPOSITION OF THE PUNISHMENT

As noted above and explained in greater detail below, *Blakely* established that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority."[46] A full understanding of whether this principle implicates ISS requires a discussion of several earlier Supreme Court precedents.

A. *A Divergent Definition of "Indeterminate Sentence"*

Initially, although *Black's Law Dictionary* and most literature define an "indeterminate sentence" as a "parolable sentence," a separate and fully distinct definition has developed in several important Supreme Court cases.[47] While the ramifications of this divergent terminology may not always have been apparent, *Blakely* has changed the landscape considerably by recognizing the constitutionality of what it referred to as "indeterminate" sentencing regimes.[48] To classify and assess a sentencing

45. *See id.*; 42 PA. CONST. STAT. ANN. § 9721(b).

46. Blakey v. Washington, 542 U.S. 296, 304 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872)).

47. BLACK'S LAW DICTIONARY, *supra* note 16, at 1394.

48. *Blakey,* 542 U.S. at 308–09.

scheme, one must fully understand what the Court meant by the term.[49]

The confusion appears to have taken hold in the 1949 case of *Williams v. New York*,[50] which represents an earlier sentencing era but commenced "[t]he modern line of precedents marking the Supreme Court's hands-off jurisprudence concerning sentencing . . . ."[51] There, a jury convicted the defendant of murder and recommended a sentence of natural life imprisonment, but the sentencing judge, relying on facts not proven to the jury beyond a reasonable doubt, instead imposed a sentence of death.[52] The defendant challenged the constitutionality of the New York sentencing scheme, which the Supreme Court described as follows:

> Within limits fixed by statutes, New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants. Here, for example, the judge's discretion was to sentence to life imprisonment or death. To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. The sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine.[53]

In upholding the death sentence, the Court ironically embraced "[m]odern changes in the treatment of offenders,"[54] focusing on the need to tailor an appropriate sentence for the individual offender, rather than applying a "one size fits all" approach to sentencing:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information

49. While a meaningful and productive dialogue would be easier with a consistent vernacular, this Article recognizes that for the time being, at least, "indeterminate" means different things in different contexts.

50. *See* Williams v. New York, 337 U.S. 241, 251–52 (1949).

51. Douglas A. Berman, *Foreword: Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 662 (2005).

52. *Williams*, 337 U.S. at 244–45.

53. *Id.*

54. *Id.* at 248.

possible concerning the defendant's life and characteristics.[55]

Critical to the Court's reasoning was the fact that the sentencing judge's discretion was restricted only by "limits fixed by statute[]."[56] Although the judge was encouraged to "consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities,"[57] the consideration of these factors is not what allowed the judge to impose a more severe punishment—i.e., death. Rather, the judge had the authority all along. It was this characteristic that led the Court to describe New York's sentencing scheme as "indeterminate":

> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . Indeterminate sentences the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of the old rigidly fixed punishments.[58]

In the Supreme Court's view, therefore, an "indeterminate" sentence was one for which the sentencing judge enjoyed wide discretion within statutes—but not further restrictions, such as sentencing guidelines—to impose an appropriate sentence to "fit" a particular defendant.[59] *Williams*, which "epitomized the indeterminate ideal,"[60] is "frequently cited for its statement on the breadth of factfinding at sentencing available to trial courts in indeterminate sentencing structures."[61]

Although the Court recognized that "the ultimate termination" of indeterminate sentences is "*sometimes* decided by non-judicial agencies"[62] such as parole boards, its reasoning did not hinge on this characteristic. In fact, *Williams* involved a scheme in which the sentencing judge had only two choices, and the defendant faced only two possible sentences: death or imprisonment for natural life.[63] The Court therefore had no occasion to

55. *Id.* at 247.
56. *Id.* at 244.
57. *Id.* at 245.
58. *Id.* at 247–48.
59. *Id.*
60. Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 272 (2005).
61. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1095 (2005).
62. Williams, 337 U.S. at 248 (emphasis added).
63. *Id.* at 242 n.2 (citing N.Y. PENAL LAW §§ 1045, 1045(a)).

consider what effect, if any, the existence of a parole board might have on its reasoning.

In sum, the Supreme Court viewed "indeterminate sentencing systems" as those in which "trial judges are allowed but not required to engage in freeform factfinding before selecting punishment within broad statutory ranges."[64] In *Williams*, the sentence was upheld because the "indeterminate" sentencing scheme gave the judge all the authority necessary even without the challenged factual findings.

This understanding of "indeterminate sentencing" has permeated the Court's most important sentencing cases in the years since. *Mistretta v. United States*, for example, which in 1989 upheld the constitutionality of the Federal Sentencing Guidelines, describes the pre-Guidelines system as follows:

> For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion . . . . This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer.[65]

Hence, the Court continued to use the term "indeterminate" simply to mean wide judicial discretion, viewing parole as a complementary but unnecessary component.[66]

The discrepancy between the Supreme Court's definition and *Black's Law Dictionary*'s definition of "indeterminate" has affected much of the scholarly literature as well, which has in turn created greater confusion. [67]

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64. Reitz, *supra* note 61, at 1094–95.

65. Mistretta v. United States, 488 U.S. 361, 363 (1989).

66. *See id*. ("*Both* indeterminate sentencing *and* parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.") (emphasis added).

67. Relying on the Supreme Court's language, several leading commentators have also used the word "indeterminate" to refer to nonguidelines sentencing schemes, particularly given the historical context in which nonguidelines sentencing was most prevalent. Douglas Berman, for example, explains,

> [T]he overall transformation of the sentencing enterprise throughout the United States over the past three decades has been remarkable. The highly-discretionary indeterminate sentencing systems that had been dominant for

"Too frequently . . . courts and commentators apply those terms imprecisely or improperly, leading to confusion. This problem, which apparently has been brewing for some time, has become more acute in the immediate aftermath of *Blakely*."[68]

Perhaps the most illustrative example is the following, in which Stephanos Bibas acknowledges and accepts the discrepancy between the traditional understanding and the Supreme Court's "modern parlance" definition:

> The term "indeterminate sentences" used to refer to broad

> nearly a century have been replaced by an array of sentencing structures that govern and control sentencing decision-making.

Berman, *supra* note 51, at 658–59. Similarly, Michael Tonry states,

> In 1970, the highly discretionary and individualized punishment systems encapsulated in the phrase "indeterminate sentencing" were ubiquitous in the United States. In every state and the federal system (and in the Model Penal Code's prescriptions), statutes seldom did more than define crimes and set maximum penalties. Mandatory penalties were few in number and modest in scope, prosecutors had unaccountable power over charging and plea bargaining, judges' sentencing discretion was constrained only by statutory sentencing maximums, and parole boards had broad or plenary authority to release prisoners subject, usually, only to the maximum prison term set by the judge or the legislature.

Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1234 (2005).

68. Chanenson, *supra* note 8, at 381–82. *See also supra* note 22 and accompanying text; *infra* Part III. Professor Chanenson correctly recognizes the Supreme Court's imprecise use of the term "indeterminate," and notes the subsequent confusion in both the academic literature and the case law. *See id.* at 381–83 & nn.17–21 (citing Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 Am. J. COMP. L. 623, 634, 638–39 (2002); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 n.12 (2004); United States v. Hakley, 2004 U.S. Dist. LEXIS 15784, at *21 (W.D. Mich. Aug. 12, 2004); United States v. Agett, 327 F. Supp. 2d 899, 906 (E.D. Tenn. 2004); United States v. Sisson, 326 F. Supp. 2d 203, 205 (D. Mass. 2004); United States v. Lockett, 325 F. Supp. 2d 673, 677–78 (E.D. Va. 2004)). Interestingly, however, while Professor Chanenson rightly points out that "after *Blakely*, the distinction between a true indeterminate and a true determinate sentencing system[] matters," he fully fails to appreciate how this implicates his argument in favor of ISS schemes. *Blakely*'s acceptance of unstructured sentencing under the moniker of "indeterminate" had no bearing on the constitutionality of a "true indeterminate" system, which Professor Chanenson incorrectly describes as "*Blakely*-compliant" notwithstanding the mandatory nature of its guidelines. *See infra* Part IV.

> ranges set by judges (for example, five to ten years). Within these broad ranges, parole boards often determined the ultimate release dates. Determinate sentences, in contrast, were precise sentences set by judges (for example, eight years). In more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges.[69]

While the tendency to accept the existence of two separate definitions is understandable—the Supreme Court and *Black's Law Dictionary* are both fairly prominent sources—it poses a problem when one attempts to characterize a sentencing scheme that relies on both a parole board and sentencing guidelines.[70] Thus, while recognizing the Supreme Court's competing definition—which will illuminate much of the discussion below and allow for serious comparison—this Article uses (and urges further recognition of) the *Black's Law Dictionary* definition of an "indeterminate sentence" as simply a parolable sentence.[71]

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69. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 n.12 (2004). In his article, Professor Bibas "use[s] the more modern parlance. In other words, [the author] use[s] 'indeterminate' to mean unfettered judicial discretion up to the statutory maxima and 'determinate' to mean judicial discretion constrained by sentencing guidelines or mandatory minima." *Id*.

70. Moreover, "[t]he use of this shorthand approach promotes confusion in both the academic literature and the case law" and

> ignores that approximately half of American jurisdictions actually maintain an indeterminate sentencing system—some guided or structured and others not . . . . While precision frequently eludes us all, it is easy enough to use more precise words like 'structured' or 'guided' to mean judicial discretion restricted, guided, or channeled by some form of sentencing guidelines or rules.

Chanenson, *supra* note 8, at 382 n.18.

71. *See also* W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, COLUM. L. REV. (forthcoming 2009) (manuscript at 17, on file with author) (citations omitted) ("Clarifying this terminology immediately resolves some of the muddier parts of the *Apprendi* doctrine, as the Supreme Court has often conflated these types of discretion, using 'indeterminate' to mean 'advisory' and 'determinate' to mean 'binding' (i.e., determinative of the outcome).").

B. *The Initial Recognition of Constitutional Trial Rights for the "Elements of the Offense"*

The foundation of the Supreme Court's modern constitutional sentencing jurisprudence is *In re Winship*, a 1970 case establishing that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[72]

In *Mullaney v. Wilbur*, the Court applied *Winship* to a Maine homicide law that distinguished between murder and manslaughter, but placed the burden on the defendant to prove that the defendant acted without malice aforethought, and was therefore guilty only of manslaughter.[73] The Court invalidated the Maine law because it allowed a conviction for murder even absent proof beyond a reasonable doubt of all elements of that offense, noting that "[u]nder this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence."[74]

Two years later, in *Patterson v. New York*, the Court was again asked to apply *Winship* to a state's allocation of burdens in homicide prosecutions.[75] *Patterson* involved a challenge to New York's second-degree murder statute.[76] Although the statute provided two straightforward elements of the offense: "(1) 'intent to cause the death of another person'; and (2) 'caus[ing] the death of such person or of a third person,'" it also allowed a defendant to raise the affirmative defense of having "'acted under the influence of extreme emotional disturbance for

72. *In re* Winship, 397 U.S. 358, 364 (1970). *Winship* was not a sentencing case but rather "present[ed] the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." *Id.* at 359 (quoting *In re* Gault, 387 U.S. 1, 30 (1967)). In fact, the Supreme Court continued to hold in a number of later cases that within the correct statutory range, a sentencing judge "'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" United States v. Grayson, 438 U.S. 41, 50 (1978) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). *Winship*'s focus on the elements of an offense was nevertheless critical in the development of current sentencing law because the Court's definition of "elements" would evolve to include many facts not defined as such by legislatures.

73. Mullaney v. Wilbur, 421 U.S. 684, 684–85 (1975).

74. *Id.* at 703–04.

75. *See* Patterson v. New York, 432 U.S. 197 (1977).

76. *Id.* at 198.

which there was a reasonable explanation or excuse,'" in which case he could be convicted of the lesser offense of manslaughter.[77] The Court upheld the New York law, reasoning that the state need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree or culpability or the severity of the punishment."[78] Distinguishing between elements and affirmative defenses, the Court left it within the discretion of legislatures to decide how to define crimes, and did not disturb New York's decision not to undertake the burden of proving the defendant's emotional state beyond a reasonable doubt.[79]

In *McMillan v. Pennsylvania*, the Court "consider[ed] the constitutionality, under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, of Pennsylvania's Mandatory Minimum Sentencing Act," under which certain felonies subjected defendants to mandatory five-year prison sentences upon a sentencing judge's finding, by a preponderance of the evidence, that they "'visibly possessed a firearm' during the commission of the offense."[80]

The petitioners argued principally "that visible possession of a firearm is an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under *In re Winship* . . . ."[81] The Court disagreed, thus "reject[ing] the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt."[82] "[I]n determining what facts must be proved beyond a reasonable doubt," the Court stated, "the state legislature's definition of the elements of the offense is usually dispositive."[83]

The primary basis for the Court's holding was that the Pennsylvania law did not increase the maximum penalty "which may be imposed" based upon a finding of visible possession of a firearm:

77. *Id.* at 198 (quoting N.Y. PENAL LAW §§ 125.25, 125.20(2) (McKinney 1975)).
78. *Id.* at 207.
79. *Id.*
80. McMillan v. Pennsylvania, 477 U.S. 79, 80–81 (1986).
81. *Id.* at 83 (citations omitted).
82. *Id.* at 84 (quoting Patterson v. New York, 432 U.S. 197, 214 (1977)).
83. *Id.* at 85.

> [The Mandatory Minimum Sentencing Act] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; *it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it* without the special finding of visible possession of a firearm. [The statute] "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The 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. Petitioners' claim . . . would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . but it does not.[84]

The Court pointed out a significant distinction between the Maine statutory scheme struck down in *Mullaney* and Pennsylvania's Mandatory Minimum Sentencing Act: whereas under Maine's scheme, defendants "faced 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence'" based on judge-found facts,[85] similarly situated defendants under Pennsylvania's scheme faced no increase in the maximum penalty "which may be imposed."[86]

In other words, the Court upheld the statute because although it raised the "floor" in a judge's sentencing discretion, it did not raise the "ceiling." The rule from *McMillan* is that if a sentencing court can impose the same sentence absent the existence of a sentencing factor as it must impose when that factor is present, there is no constitutional problem.[87] In this regard, the holding is a natural extension of *Williams*, which similarly said that the judge's ability to impose a certain sentence must not depend on judicially found facts.[88]

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84. *Id.* at 87–88 (emphasis added) (citations omitted).

85. *Id.* at 87 (quoting Mullaney v. Wilbur, 421 U.S. 684, 700 (1975)).

86. *Id.* at 87–88.

87. *Id.* at 84–91.

88. Williams v. New York, 337 U.S. 241, 247–48 (1949). As Professor Berman points out, *McMillan*'s deferential tone shaped legislative sentencing schemes for many years to come:

> Rendered in 1986 when many legislatures and sentencing commissions were starting to explore and develop sentencing reforms, *McMillan* could have had a profound impact, both conceptually and practically, on modern sentencing laws if . . . the Court's opinion had suggested that the Constitution imposed some significant requirements on the sentencing process. But, with the *McMillan* Court stressing the importance of "tolerance for a spectrum of state procedures" at sentencing, legislatures and commissions could, and typically

In *Almendarez-Torres v. United States*, although still refusing to "simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement," the Court created an exception to the principle it had explained in *McMillan*.[89] The Court upheld an increase in the maximum possible flat sentence (the ceiling) from two to twenty years based solely on a court's finding of a particular sentencing factor by a preponderance of the evidence.[90] While recognizing the tension between *Almendarez-Torres* and *McMillan*, the Court "nonetheless conclude[d] that these differences do not change the constitutional outcome for several basic reasons," the most important being that "the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[91] As the Court would later explain:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.[92]

Although the Court in *Almendarez-Torres* ultimately upheld a sentencing scheme against a constitutional challenge (as it had in *McMillan*), Justice Scalia's vigorous dissent for four justices raised considerable constitutional questions relating to sentencing practices.[93] The dissenters appeared ready to answer in the affirmative "the difficult question whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as

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> did, neglect procedural matters when reforming the substance of sentencing laws.
>
> In the wake of *McMillan* . . . progressively more jurisdictions adopted forms of structured sentencing through guideline systems or mandatory sentencing statutes . . . .

Berman, *supra* note 51, at 666–67 (quoting *McMillan*, 477 U.S. at 90).

89. Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998).
90. *Id.* at 226–27.
91. *Id.* at 243 (citations omitted).
92. Apprendi v. New Jersey, 530 U.S. 466, 488 (2000).
93. *Almendarez-Torres*, 523 U.S. at 248 (Scalia, J., dissenting).

an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury."[94]

C. *"The* Apprendi *Revolution"*[95]

In *Jones v. United States*, the Court signaled a dramatic shift in its sentencing jurisprudence when it stated in a footnote that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[96] *Jones* was ultimately decided on grounds of statutory construction, thereby avoiding '"grave and doubtful constitutional questions.'"[97]

The following year, in *Apprendi*, the Court carried through on this shift.[98] *Apprendi* involved a New Jersey statute under which a defendant's statutory maximum sentence was increased from ten to twenty years based on the sentencing judge's finding, by a preponderance of the evidence, that the defendant had "'acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'"[99]

After an exhaustive review of its own cases and "the history upon which they rely,"[100] the Court rejected the New Jersey statute.[101] With one exception—"the fact of a prior conviction"—the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[102] Put differently, "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'"[103]

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94. *Id.*

95. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 1238 (2d ed. 2003).

96. Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

97. *Id.* at 239 (quoting United States *ex rel.* Attorney General v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

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

99. *Id.* at 468–69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 1999 & Supp. 2000)).

100. *Id.* at 490.

101. *Id.* at 497.

102. *Id.* at 490. This holding left *Almendarez-Torres* intact. *See id.*

103. *Id.* (quoting Jones v. United States, 526 U.S. 227, 252–53 (1999) (Stevens,

The Court rejected "the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors,'" which, based on *Winship*, had been the touchstone of its earlier cases.[104] Instead, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[105]

Although *Apprendi* appeared to raise constitutional doubt about *McMillan*, the Court explained that it was not overruling that case but merely "limit[ing] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself."[106]

In 2002, the Court decided *Harris v. United States*, in which the "principle question" was "whether *McMillan* stands after *Apprendi*."[107] In other words, in light of *Apprendi*'s holding that facts increasing the ceiling on a judge's discretion must be proven to a jury beyond a reasonable doubt, must the facts increasing the floor also satisfy these requirements?[108]

Harris involved 18 U.S.C. § 924(c)(1)(A), a federal statute making it a crime to use or possess a firearm during and in relation to a violent crime or a drug-trafficking crime.[109] The statutory minimum penalty for the crime is a flat sentence of five years, but if the sentencing court finds by a preponderance of the evidence that the gun was brandished or discharged, the statutory minimum increases to seven or ten years, respectively.[110] The petitioner was not indicted for brandishing a weapon and the jury made no

J., concurring)). This holding endorsed the concurring opinions of Justices Stevens and Scalia in *Jones*. *See Jones*, 526 U.S. at 252–53 (Stevens, J., concurring); *id.* at 253 (Scalia, J., concurring).

104. *Apprendi*, 530 U.S. at 494 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)); *see also In re* Winship, 397 U.S. 358, 368 (1970) (holding that in a case against a juvenile the state must still prove every element of the alleged crime beyond a reasonable doubt).

105. *Apprendi*, 530 U.S. at 494.

106. *Id.* at 487 n.13.

107. Harris v. United States, 536 U.S. 545, 550 (2002) (plurality opinion).

108. *Id.* at 568. The Court treated the *McMillan* indeterminate (parolable) scheme and the *Harris* determinate (nonparolable) scheme identically, lending even further support to the conclusion that the Court has never found parole to be a constitutionally relevant feature in any sentencing scheme. *Id.*

109. *Id.* at 550–51. *See* 18 U.S.C. § 924(c)(1)(A) (2006).

110. 18 U.S.C. § 924(c)(1)(A)(i)–(iii).

findings as to this fact.[111] Nevertheless, at the sentencing hearing, the district court "found by a preponderance of the evidence that petitioner had brandished the gun, and sentenced him to seven years in prison."[112]

A plurality of the Court upheld *McMillan* and the sentencing provisions of § 924(c)(1)(A),[113] with four Justices distinguishing between mandatory minimums and statutory maximums:

> *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.[114]

Justices O'Connor, Scalia, and Chief Justice Rehnquist joined this opinion.[115]

Four dissenting Justices—Thomas, Stevens, Souter, and Ginsburg—opined that *Apprendi* was controlling even as to mandatory minimum sentences, and that *McMillan* should be overruled.[116] Justice Thomas reasoned for these Justices as follows:

> It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." Whether one raises the floor or raises the ceiling it is

111. *Harris*, 536 U.S. at 551.

112. *Id.*

113. Initially, the five-Justice majority concluded as a matter of statutory interpretation that § 924(c)(1)(A) "defines a single offense" and "regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." *Id.* at 556.

114. *Id.* at 557.

115. *Id.* at 549.

116. *Id.* at 572–83 (Thomas, J., dissenting).

> impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.[117]

Justice Breyer cast the deciding vote. Although he could "[]not easily distinguish *Apprendi* . . . in terms of logic," and therefore could "[]not agree with the plurality's opinion insofar as it finds such a distinction," Justice Breyer continued to believe that *Apprendi* had been wrongly decided, and that "the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum . . . or the application of a mandatory minimum . . . ."[118]

Much of the plurality opinion attempts to reconcile *McMillan* and *Apprendi*, and despite failing to attract five votes, serves as a useful barometer in determining how far *McMillan* might extend today. For example, the plurality concludes that the statute at issue withstands scrutiny because "the jury's verdict has authorized the judge to impose the minimum with or without the finding" of additional facts.[119] This phrase implicitly recognizes that a system allowing a judge to "impose" a "minimum" that is not supported by the jury verdict would violate *Apprendi*. The plurality opinion also offers a concise distillation of the cases: "Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, *and of the judicial power to impose it*, are the elements of the crime for the purposes of the constitutional analysis."[120] In other words, constitutional trial rights apply to the facts necessary to support the outer limits of a judge's authority—though perhaps not the outer limits of a sentence as affected only by nonjudicial factors.

D. *The* Blakely *Earthquake*[121]

In the cases discussed above, the Supreme Court addressed the

117. *Id.* at 579 (quoting Apprendi v. New Jersey, 530 U.S. 466, 483, n. 10 (2000)) (citations omitted).

118. *Id.* at 569 (Breyer, J., concurring).

119. *Id.* at 557 (plurality opinion). Similarly, the plurality states that "*[w]ithin the range authorized by the jury's verdict* . . . the political system may . . . requir[e] defendants to serve minimum terms after judges make certain factual findings," and that "[j]udicial factfinding in the course of selecting a sentence *within the authorized range* does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.* at 558, 567 (emphasis added).

120. *Id.* at 567 (emphasis added).

121. *See* Berman, *supra* note 51, at 670 (adopting Justice O'Connor's metaphor of the *Blakely* decision as an earthquake).

applicability of constitutional trial rights to statutory sentence enhancements. In *Blakely*, the Court took a leap forward, solidifying the rule of *Apprendi* and applying it to the state of Washington's sentencing guideline scheme. [122]

In *Blakely*, the petitioner pled guilty to second-degree kidnapping, which involved a statutory maximum penalty of ten years but, pursuant to Washington's mandatory sentencing guidelines, also involved a "standard range" sentence of forty-nine to fifty-three months.[123] At sentencing, the judge determined—without an admission or a jury finding—that the petitioner had acted with "'deliberate cruelty,'"[124] a permissible ground for departure, and therefore imposed an "exceptional sentence" of ninety months.[125]

The Court did not hesitate to "apply the rule . . . expressed in *Apprendi*. 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"[126] In an effort to harmonize *Blakely* with *Apprendi*, however, the Court tweaked the meaning of the term "statutory maximum" to mean something slightly different than what common parlance might suggest:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.[127]

Thus, the Court found that under the *Apprendi* line of cases, a "defendant's constitutional rights [are] violated [when] the judge . . . impose[s] a sentence greater than the maximum he could have imposed

122. Blakely v. Washington, 542 U.S. 296, 303–05 (2004).

123. *Id.* at 299.

124. *Id.* at 300 (quoting WASH. REV. CODE ANN. §9.94A.390(2)(h)(iii)). This was a "statutorily enumerated ground for departure in domestic-violence cases." *Id.*

125. *Id.*

126. *Id.* at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

127. *Id.* at 303–04 (citations omitted).

under state law without the challenged factual finding."[128] In *Blakely*, the Court noted, "[h]ad the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."[129]

In several enlightening comparisons between the Washington sentencing system at issue in *Blakely* and other systems addressed in previous cases, the Court made perfectly clear that "indeterminate" sentencing schemes were not implicated by its decision.[130] A close inspection of these discussions demonstrates, however, that just as in *Williams* and *Mistretta*, the Court was using the term "indeterminate" to mean "unstructured."

For example, responding to the State of Washington's attempt to defend its sentencing scheme "by drawing an analogy to those . . . upheld in *McMillan* and *Williams*," the Court found "[n]either case . . . on point":[131]

> *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. The judge could have "sentenced [the defendant] to death giving no reason at all." Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.[132]

The majority was not alone in its understanding of indeterminate sentencing. To support her dissenting argument—joined by Justice Breyer—Justice O'Connor examined "the history leading up to and following the enactment of Washington's guidelines scheme . . . ."[133] "Prior to 1981," she explained, "Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. . . .

128. *Id.* at 303.

129. *Id.* at 304.

130. *See id.* at 308–09.

131. *Id.* at 304 (citations omitted).

132. *Id*. at 304–05 (citations omitted). Interestingly, therefore, the Court viewed *Williams* as representing an exception for "indeterminate-sentencing regime[s]," though that case did not involve a parolable sentence, but the Court did not use the same term when describing *McMillan*, which actually did address a parolable sentencing scheme. *Id*.

133. *Id.* at 314–15 (O'Connor, J., dissenting).

Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation . . . ."[134] Justice O'Connor decried the preguidelines "system of unguided discretion [that] inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories," and feared a return to such unchecked discretion based on the majority's holding.[135] She believed that "[t]he consequences of [*Blakely*] will be as far reaching as they are disturbing" because "[n]umerous other States have enacted guidelines systems, as has the Federal Government."[136] "Today's decision," she observed, "casts constitutional doubt over them all," and she specifically counted Michigan's and Pennsylvania's parolable sentencing guidelines among them.[137]

There is little question, therefore, that in *Blakely*, the Supreme Court understood an indeterminate sentencing regime to be one in which the sentencing judge enjoys "unfettered discretion"[138] within statutory and constitutional limits, and that a mandatory sentencing guidelines system, even when used in conjunction with a parole board, is fundamentally inconsistent with this definition of indeterminate sentencing.[139] Instead of using *Black's Law Dictionary's* "parolable" definition,[140] the Supreme Court was defining indeterminate as "unstructured" or "unguided."[141]

Blakely cogently analyzes why unstructured sentencing passes constitutional muster, whereas structured sentencing might not. For

134. *Id.* at 315 (citations omitted).

135. *Id.* (citation omitted).

136. *Id.* at 323.

137. *Id.* (citing MICH. COMP. LAWS ANN. § 769.34 (West 2000 & Supp. 2004); 204 PA. CODE § 303 (2004)). Justice Breyer's dissenting opinion was only slightly more accurate. He noted that "[u]nder indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner." *Id.* at 332 (Breyer, J., dissenting). While this suggests an evolving understanding of "indeterminate" that recognizes the typical existence of a parole board, it appears to rely primarily on the unguided "discretion of the judge" as the most important feature.

138. *Id.* at 315 (O'Connor, J., dissenting).

139. Not surprisingly, the Supreme Court has never suggested that a scheme such as Michigan's or Pennsylvania's might be "indeterminate" for constitutional purposes. In fact, the only two Justices to have specifically considered these schemes expressed exactly the opposite opinion. *Id.* at 323 (O'Connor, J., dissenting).

140. BLACK'S LAW DICTIONARY, *supra* note 16, at 786.

141. *Blakely*, 542 U.S. at 315 (O'Connor, J., dissenting).

instance, responding to Justice O'Connor's dissenting argument that "because determinate [structured] sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate [unstructured] schemes, the constitutionality of the latter implies the constitutionality of the former,"[142] the majority explained:

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate [unstructured] sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate [unstructured] schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.[143]

While recognizing that a parole board might also have a discretionary role in an unstructured sentencing scheme, the Court clarified that what matters for constitutional purposes is that the increase in a judge's sentencing discretion in an unstructured scheme does not impede the jury's constitutional duty to find the facts necessary to the punishment. This reasoning simply reiterates the rule of *McMillan* and *Harris*: it does not matter whether judicial fact-finding leads to a harsher sentence so long as the sentencing court could have imposed the same sentence based solely on the facts reflected in the jury verdict.

Unstructured schemes are acceptable because no factual findings beyond the jury's verdict are required for the imposition of a more severe sentence. Structured schemes, on the other hand, are impermissible—at least where mandatory—because they strip the jury of its fact-finding role.[144] *Blakely*'s holding is unequivocal on this point: "When a judge

142. *Id.* at 308 (majority opinion).

143. *Id.* at 308–09. If the Court had been using a "parolable" definition, this paragraph would have made little sense. A parolable sentencing scheme does not necessarily "increase[] judicial discretion," but more likely decreases judicial discretion. *Id.*

144. Of course, where a structured scheme does not strip the jury of its fact-finding role—such as where the jury must find all facts beyond a reasonable doubt, including not only the elements of the offense but also the facts necessary to apply the

inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[145] As the Court stated in concluding its opinion, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[146]

In *Cunningham v. California*, a recent case applying *Blakely*, the Court reiterated that its concern with "determinate" sentencing is based not on the presence or absence of parole but rather on the existence of structures limiting sentencing judges' discretion.[147] *Cunningham* addressed California's "determinate sentencing law,"[148] which "replaced an indeterminate sentencing regime"[149] by "fix[ing] the terms of imprisonment for most offenses[] and eliminat[ing] the possibility of early release on parole."[150] "For most offenses . . . [t]he statute defining the offense prescribes three precise terms of imprisonment—a lower, middle, and upper term sentence."[151] Sentencing courts are directed "to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense."[152]

Although California's appropriately-named "determinate" scheme involves parole as a key feature, the Supreme Court's opinion contains only a passing reference to that aspect.[153] The Court instead focuses on the concept that to impose an upper-term sentence, a judge must rely on facts not proven to the jury and must adhere to the "structure" provided by California's Penal Code and the Judicial Council's rules governing the implementation of the scheme.[154] In other words, unlike the schemes at issue in *Williams* and *McMillan*, the California scheme is "structured" to

sentencing guidelines—it survives *Blakely*. *Id.* at 309. Like unstructured judicial fact-finding, structured jury fact-finding does not withhold from the jury its "traditional function of finding the facts essential to lawful imposition of the penalty." *Id.*

145. *Id.* at 304 (citations omitted).

146. *Id.* at 313 (emphasis removed).

147. Cunningham v. California, 549 U.S. 270, 292–94 (2007).

148. *Id.* at 274.

149. *Id.* at 276.

150. *Id.* at 277.

151. *Id.*

152. *Id.* at 279.

153. *Id.* at 277 n.3.

154. *Id.* at 278–81 (citing CAL. PENAL CODE § 1170.3(a)(2) (West 2004); CAL. JUDICIAL COUNCIL R. §§ 4.405(d), 4.408(a), 4.420(a), 4.420(b), 4.420(d), 4.420(e), 4.421(a), 4.421(b), 4.421(c) (2006)).

limit a judge's discretion unless additional judge-found facts support a harsher sentence. The Court explained,

> [A]n upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum.[155]

Cunningham thus confirms that any fact necessary to support the imposition of the defendant's sentence must be found by the jury beyond a reasonable doubt.

E. *The* Booker *Aftershock*[156]

Just as most commentators and judges expected,[157] the Supreme Court soon applied *Blakely* to the Federal Sentencing Guidelines. The Court explained in *Booker* that there is "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]."[158] Thus, a five-Justice majority of the Court found the Federal Sentencing Guidelines unconstitutional as written.[159]

In a separate majority opinion by a different five-Justice bloc, the Court faced the issue of how to remedy this constitutional infirmity.[160] Rather than simply invalidating the Guidelines, the Court sought to determine "what 'Congress would have intended' in light of the Court's constitutional holding."[161] There were two possible remedial approaches:

155. *Id.* at 288 (citations omitted).

156. Berman, *supra* note 51, at 670 (adopting the metaphor of *Blakely* as an earthquake and *Booker* as the resulting aftershock).

157. "[N]early all observers were prepared for the Court to declare *Blakely* applicable to the federal system and thereby find unconstitutional the federal sentencing guidelines' reliance on judicial fact-finding at sentencing." *Id.* at 675.

158. United States v. Booker, 543 U.S. 220, 233 (2005).

159. *Id.* at 244.

160. *Id.* at 245.

161. *Id.* at 246 (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion)).

> One approach . . . would retain the . . . Guidelines[] as written, but would engraft onto the existing system today's Sixth Amendment "jury trial" requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).
>
> The other approach . . . would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.[162]

The Court settled on the second of these options. It did not reject the Guidelines in their entirety, but held that sentencing judges must account for the properly calculated guidelines as only one factor among several enumerated in 18 U.S.C. § 3553(a).[163] Subject to consideration of that factor, sentencing judges are now free to select any sentence within the applicable statutory range.[164] On appeal, sentences are reviewed for "reasonableness."[165]

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162. *Id.*

163. *Id.* at 259.

164. *Id.* at 259, 264.

165. *Id.* at 261–63. In several recent cases, the Court has further explained this "reasonableness" standard. In *Rita v. United States*, for example, the Court held that when reviewing sentences, federal appeals courts may apply a "presumption of reasonableness" when the sentence imposed by the district court in a "mine run" case falls within the Federal Sentencing Guidelines range. Rita v. United States, 127 S. Ct. 2456, 2462–65 (2007).

In *Gall v. United States*, the Court rejected "proportionality review," whereby appellate courts' scrutiny of district courts' sentences was directly proportional to the extent of variation from the Guidelines. Gall v. United States, 128 S. Ct. 586, 591 (2008). The Court held that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Id.* Following up on a question left unanswered by *Rita*, the Court further explained, "If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness." *Id.* at 597 (citation omitted).

Finally, in *Kimbrough v. United States*, the Court held that in determining an appropriate sentence, district courts are entitled to disagree with provisions of the Federal Sentencing Guidelines as a matter of policy. Kimbrough v. United States, 128

Booker's remedial opinion rendered an otherwise problematic sentencing scheme valid because sentencing judges would no longer obtain their authority from judge-found facts, but would instead be vested with full authority at the moment of conviction. Under the post-*Booker* advisory scheme, because sentencing courts may vary from the guidelines, their authority to impose sentences does not "depend" on the guidelines; a sentence imposed in an advisory guideline scheme is one that could have been imposed based on the facts reflected in the jury verdict alone.

"[T]he Supreme Court in *Booker* . . . found a way to surprise and confound legal observers by devising an unexpected remedy for the federal system," though the Court's "fix" was not entirely original.[166] Although *McMillan* dealt only with a Pennsylvania mandatory minimum sentence, the entirety of the state's advisory ISS scheme lurked in the background.[167]

S. Ct. 558 (2007). The district court varied downward from the Guidelines based on its disagreement with the "powder-crack disparity," whereby the defendant faced a far more severe Guidelines range because his offense involved crack cocaine rather than solely powder cocaine. *Id.* at 565. The Supreme Court found this acceptable, reasoning:

> A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing. In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses.

Id. at 564 (citation omitted).

166. Berman, *supra* note 51, at 675.

167. Although it is not obvious from the opinion, *McMillan* involved the application of a mandatory minimum sentence within the same ISS scheme discussed above and still employed in Pennsylvania. *See* Commonwealth v. Kleinicke, 895 A.2d 562, 568 (Pa. Super. Ct. 2006) ("*McMillan* . . . dealt with a Pennsylvania mandatory minimum sentencing statute virtually indistinguishable from the current statute under review."). Thus, the five-year mandatory minimum was in fact the lowest possible parole-eligibility date, not merely the low end of the range within which the sentencing court could select a flat sentence. The Court did not treat the indeterminate mandatory minimum any differently than it would have treated a determinate mandatory minimum, however. *See* Harris v. United States, 536 U.S. 545, 556 (2002) (explicitly reconsidering *McMillan* in a case not involving an indeterminate scheme). In fact, the Court did not even mention that *McMillan* involved parolable sentences; the only clue that Pennsylvania employed indeterminate sentencing is found in footnote two of the opinion, which refers to the petitioners' sentences as "terms" of "3 to 10 years," "2 1/2 to 5 years," "1 to 6 years," "6 to 18 months," and "11 1/2 to 23 months," respectively. McMillan v. Pennsylvania, 477 U.S. 79, 82 n.2 (1986).

It is not clear whether a five-year parole-eligibility date would have fallen within

While the Court did not mention the guidelines, its reasoning depended on their advisory nature, at least when viewed from a post-*Blakely* perspective.[168]

In sum, the Supreme Court's constitutional sentencing cases establish that a defendant's Sixth Amendment rights are violated when the sentencing judge "impose[s] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding."[169] While this may leave some room for structured sentencing schemes imposing harsher sentences based on judge-found facts, such schemes must be advisory only.[170]

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the otherwise-applicable guidelines of the three consolidated cases, but the fact that one of the petitioners had initially received a substantially lower sentence—eleven and one-half to twenty-three months—suggests that at least in his case, the five-to-ten-year sentence fell outside the advisory guidelines. *Id*. This inference, coupled with the Court's statement that the mandatory minimum statute at issue "operates solely to limit the sentencing court's discretion in selecting a penalty within the range *already available to it*," strongly suggests that the Court was either entirely unconcerned with the guidelines or was well aware of their general advisory nature (with the exception of the mandatory minimum at issue). *Id*. at 88 (emphasis added). Otherwise, a five-to-ten-year sentence would not have been "available to" the sentencing court absent the challenged factual finding because it would have been above the "ceiling" in the judge's discretion.

168. *McMillan*'s logical weight would have evaporated if, while rejecting a mandatory minimum sentencing statute, the Supreme Court had found no problem with a functionally equivalent mandatory minimum sentencing guideline.

169. Blakely v. Washington, 542 U.S. 296, 303 (2004) (citations omitted).

170. On January 14, 2009, a sharply divided Supreme Court issued an opinion in *Oregon v. Ice*, 129 S. Ct. 711 (2009). As the Court put it,

> The question here presented concerns a sentencing function in which the jury traditionally played no part: When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?

Id. at 714. The Court held that it does not, explaining,

> [T]win considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that "extends down centuries into the common law." Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures.

Id. at 717 (quoting *Apprendi*, 530 U.S. at 477). While *Ice* may fairly be viewed as the first sign of restraint in the post-*Apprendi* era, the Court took great pains to make clear that it was not retreating from *Apprendi* but merely limiting its holding to the

IV. APPLICATION OF *BLAKELY* TO ISS SCHEMES

Although the United States Supreme Court has yet to apply *Blakely* to an ISS scheme, a number of state courts and commentators have explored the issue. With few exceptions, prior analysis has settled on the idea that ISS is immune to *Blakely* because *Blakely* itself made clear that "indeterminate" sentences pose no constitutional problem and because a "statutory maximum" in an indeterminate scheme is the mandatory-release date, rather than "the maximum sentence a judge may impose."[171] Both contentions are deeply flawed, and these authorities have embarked on a misguided effort to carve an unsupported exception out of the principles firmly established by *Blakely* and its progeny.

A. *Prior Analysis*

1. *Michigan*

The Michigan Supreme Court responded swiftly and aggressively to the emerging federal caselaw respecting constitutional trial rights at sentencing. Less than a month after *Blakely*, it included the following sweeping language in a footnote:

> *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge . . . .
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a

infringement upon the traditional role of the jury:

> Members of this Court have warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." The jury-trial right is best honored through a "principled rationale" that applies the rule of the *Apprendi* cases "within the central sphere of their concern." Our disposition today—upholding an Oregon statute that assigns to judges a decision that has not traditionally belonged to the jury—is faithful to that aim.

Id. at 719 (quoting *Cunningham*, 549 U.S. at 295). *Ice*'s reach is therefore quite limited. It does not purport to alter the existing *Apprendi/Blakely* line of authority, but merely holds that the decision whether to impose consecutive rather than concurrent sentences, as one traditionally belonging to judges rather than juries, is not subject to *Apprendi*'s analysis.

171. *Blakely*, 542 U.S. at 303 (emphasis added).

> maximum. The maximum is not determined by the trial judge but is set by law. The minimum is based on guidelines ranges. . . . The trial judge sets the minimum but can never exceed the maximum . . . . Accordingly, the Michigan system is unaffected by the holding in *Blakely* . . . .[172]

Two years later, in *People v. Drohan*, the same court explicitly reaffirmed and elaborated upon this conclusion in a case squarely presenting a *Blakely* challenge to the Michigan Sentencing Guidelines.[173] The court described *Drohan* as a case addressing an indeterminate sentencing scheme,[174] which it described as follows:

> An indeterminate sentence is one "of an unspecified duration, such as one for a term of 10 to 20 years." In other words, while a defendant may serve a sentence of up to 20 years, the defendant may be released from prison at the discretion of the parole board at any time after the defendant serves the ten-year minimum. In contrast, a determinate sentence is "[a] sentence for a fixed length of time rather than for an unspecified duration." *Id.* Such a sentence can either be for a fixed term from which a trial court may not deviate, or can be imposed by the trial court within a certain range.[175]

The *Drohan* court noted that a sentence imposed in Michigan is "indeterminate" because "[t]he maximum sentence is not determined by the trial court, but rather is set by law. Michigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely*, create a range within which the trial court must set the minimum sentence."[176]

Thus, *Drohan* distinguishes between indeterminate and determinate sentencing schemes according to the generally accepted definitions in *Black's Law Dictionary*,[177] but ignores the characteristic upon which the United States Supreme Court has focused: whether a sentencing judge enjoys "unfettered judicial discretion up to the statutory maxima"[178]—in other words, whether the system is "unstructured."

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172. People v. Claypool, 684 N.W.2d 278, 286–87 n.14 (Mich. 2004) (citation omitted). *Claypool* addressed the permissibility of certain downward sentencing departures under Michigan law. *Id.* at 280.

173. People v. Drohan, 715 N.W.2d 778 (Mich. 2006).

174. *Id.* at 780.

175. *Id.* at 786 n.10 (citations omitted).

176. *Id.* at 790.

177. *See* BLACK'S LAW DICTIONARY, *supra* note 16, at 786, 1394.

178. Bibas, *supra* note 69, at 2468 n.12.

The *Drohan* court went on to consider the argument that regardless of how one defines "indeterminate," Michigan's sentencing scheme requires the imposition of sentences not authorized by jury verdicts based on judge-found facts—appearing to recognize that "*Blakely* applies only to bar the use of judicially ascertained facts to impose a sentence beyond that permitted by the jury's verdict . . . ."[179] The defendant argued that the "maximum-minimum" under Michigan law—the high end of the range within which the sentencing judge can set the parole-eligibility date—"constitutes the 'statutory maximum' for *Blakely* purposes because a trial court is required to depart on the basis of a finding of aggravating factors that, as a practical matter, will subject the defendant to an increase in the actual time the defendant will be required to serve in prison."[180] The court rejected this argument, finding that "the trial court's exercise of discretion in imposing a sentence greater than the 'maximum-minimum,' but within the range authorized by the verdict, fully complies with the Sixth Amendment."[181]

The court reasoned that the range authorized by the verdict is not merely the range of the jury's authority but also includes the range of the parole board's authority:

> [T]here is no guarantee that an incarcerated person will be released from prison after the person has completed his or her minimum sentence. Ultimately, the parole board retains the discretion to keep a person incarcerated up to the maximum sentence authorized by the jury's verdict. Accordingly, because a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated, that maximum sentence constitutes the "statutory maximum" as set forth in *Blakely*.[182]

Consequently, the court found Michigan's "indeterminate sentencing scheme" immune from a *Blakely* challenge:

> Michigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely*, create a range within which the trial court must set the [parole-eligibility date]. However, a Michigan trial court may not impose a sentence greater than the [mandatory-release date]. . . . Thus, the trial court's power to impose a sentence is always derived

179. *Drohan*, 715 N.W.2d at 789.
180. *Id.* at 790–91.
181. *Id.* at 791.
182. *Id.* at 791.

> from the jury's verdict, because the [parole-eligibility date] will always fall within the range authorized by the jury's verdict.[183]

In the Michigan Supreme Court's view, therefore, under the peculiar characteristics of indeterminate (parolable) sentencing schemes, *Blakely* does not protect a defendant from being *sentenced* to a longer term than the jury verdict has authorized, but merely "ensures that a defendant will not be *incarcerated* for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt."[184]

2. *Pennsylvania*

In *Commonwealth v. Smith*, another leading case decided shortly after *Blakely*, a panel of the Pennsylvania Superior Court rejected a challenge to the Pennsylvania Sentencing Guidelines with a short argument mirroring that of the Michigan Supreme Court:

> Pennsylvania utilizes an indeterminate sentencing scheme with presumptive sentencing guidelines which limit the judge's discretion only concerning the minimum sentence. . . . *Blakely* is only implicated in Pennsylvania to the extent that an enhanced minimum term leads to a longer period of incarceration by extending the date at which the defendant is eligible to be released. Yet, because there is no limit, other than the statutory maximum, on the maximum term a judge may set, and due to the discretion vested in the parole board, the Pennsylvania sentencing scheme and guidelines evade even these *Blakely* concerns. The *Blakely* Court, itself, noted that indeterminate guidelines do not increase judicial discretion "at the expense of the jury's function of finding the facts essential to a lawful imposition of penalty," and judicial (or parole board) factfinding does not infringe on a defendant's "legal right to a lesser sentence."[185]

Two years later, the same court reaffirmed this conclusion in *Commonwealth v. Kleinicke*, an en banc case providing a much more detailed analysis of the *Blakely* line of cases and a more thorough explanation of why, in that court's opinion, the Pennsylvania Sentencing Guidelines withstand constitutional scrutiny.[186]

183. *Id.* at 790 (citations omitted).

184. *Id.* at 791 (emphasis added).

185. Commonwealth v. Smith, 863 A.2d 1172, 1178–79 (Pa. Super. Ct. 2004) (quoting *Blakely*, 124 S. Ct. at 2540).

186. Commonwealth v. Kleinicke, 895 A.2d 562 (Pa. Super. Ct. 2006).

Significantly, although the court briefly mentioned the same line of reasoning as *Smith*,[187] the *Smith* court relies primarily on a separate rationale: the fact that Pennsylvania's sentencing guidelines are advisory, rather than mandatory.[188] The *Kleinicke* court explained that although "[s]entencing courts must consider the Pennsylvania guidelines," the Pennsylvania Supreme Court has "stated that the guidelines are advisory."[189] It went on:

> Guideline departure in Pennsylvania is permitted under a much more relaxed standard than the one employed in Washington or the federal system evaluated in *Blakely* and *Booker*. . . . [D]eviation is upheld if supported by reasons indicating that the deviation is not unreasonable in light of the [statutory] factors a sentencing court considers . . . which include the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. In fact, the *Booker* Court ruled that the federal guidelines could operate constitutionally as long as they, like Pennsylvania's guidelines, were voluntary in nature.[190]

Thus, although Pennsylvania courts initially subscribed to the Michigan courts' position that indeterminate (parolable) sentences do not implicate *Blakely*, they have since recognized the greater constitutional significance of a feature that Pennsylvania does not share with Michigan: the advisory nature of Pennsylvania's ISS scheme.

B. *A Closer Inspection of ISS*

Blakely makes it abundantly clear that defendants have a constitutional right to a jury finding on "all facts legally essential to the punishment,"[191] and that a sentencing court may not "inflict[] punishment that the jury's verdict alone does not allow . . . ."[192] The presence or absence of a parole mechanism has never been a determinative or even

187. The *Kleinicke* court noted that "what sets Pennsylvania's scheme further apart from those under consideration in *Blakely*/*Booker* is that Pennsylvania's sentencing guidelines delineate minimum sentencing ranges. Under the Pennsylvania guidelines, the potential maximum sentence is always coextensive with the statutory maximum authorized by the jury verdict or the guilty plea." *Id.* at 573.

188. *Kleinicke*, 895 A.2d at 572–73.

189. *Id.*

190. *Id.* at 573 (citations omitted).

191. Blakely v. Washington, 542 U.S. 296, 313 (2004).

192. *Id.* at 304 (citations omitted).

relevant factor in the constitutional equation, the Supreme Court's imprecise use of "indeterminate" notwithstanding.

Contrary to the authorities discussed above, neither *Blakely* nor any other Supreme Court precedent provides a sanctuary for ISS schemes. The relevant inquiry is whether a sentencing court could have imposed the same sentence based only on the facts reflected in the jury verdict—i.e., whether the court was vested with full authority at the moment of conviction. *Booker* instructs that in a scheme involving guidelines—such as ISS—the determination depends on whether the guidelines are advisory or mandatory.[193]

1. *Revisiting the Two Definitions for "Indeterminate" Sentencing*

The Michigan Supreme Court has been quick to point out that *Black's Law Dictionary* defines an "indeterminate sentence" as "one 'of an unspecified duration, such as one for a term of 10 to 20 years.'"[194] Like the Pennsylvania Supreme Court, it has been equally quick to recognize that *Blakely* explicitly approved of "indeterminate" sentencing schemes.[195] Yet neither of these courts has bothered to query whether they were using the term "indeterminate" in the same manner as the Supreme Court did in *Blakely*.

As discussed above, the term "indeterminate sentence" first crept into the Supreme Court's lexicon in *Williams*, a case in which the sentencing judge faced only two possible sentencing alternatives: death or imprisonment for natural life.[196] The Court described New York's scheme as indeterminate because the sentencing judge enjoyed wide discretion within "limits fixed by statute[] . . . ."[197] Obviously, given the range of possible sentencing outcomes, the "indeterminate" nature of the sentence in *Williams* had nothing to do with an unfixed release date or the role of a parole board.

193. United States v. Booker, 543 U.S. 220, 233 (2005).

194. People v. Drohan, 715 N.W.2d 778, 786 n.10 (Mich. 2006) (quoting BLACK'S LAW DICTIONARY 868 (8th ed. 2004)).

195. *Id.* at 786. *See also* Commonwealth v. Smith, 863 A.2d 1172, 1179 (Pa. Super. Ct. 2004).

196. *See* Williams v. New York, 337 U.S. 241, 242 n.2 (1949) (citing N. Y. PENAL LAW § 1045).

197. *Id.* at 244–45. *See also Blakely*, 542 U.S. at 305 (citing *Williams*, 377 U.S. at 242–43); Reitz, *supra* note 61, at 1094–95 (asserting that in an indeterminate scheme, a judge is "allowed but not required to engage in freeform factfinding before selecting punishment within broad statutory ranges.").

For the same reason, the Court's discussion of indeterminate sentencing schemes in *Blakely* has nothing to do with parole discretion. In fact, when discussing *McMillan* and *Williams* in the same paragraph, the Court specifically referred to *Williams* as "involv[ing] an indeterminate-sentencing regime," even though parole was not an option.[198]

Simply put, the Supreme Court's references to indeterminate sentencing schemes within this line of cases have invariably meant "unstructured"—the "virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range"—and have had absolutely nothing to do with the existence or discretion of a parole board.[199]

This makes perfect sense in light of *Blakely*'s reasoning and holding. *Blakely* established that a sentencing judge may not "inflict[] punishment that the jury's verdict alone does not allow . . . ."[200] An unstructured scheme complies because it does not withhold judicial sentencing discretion until after a sentencing guideline analysis involving judicial fact-finding. Because factual determinations by the judge do not affect the available options, the judge is vested with full sentencing authority at the moment of conviction.

The same cannot be said of an ISS scheme. Although one salient feature of ISS is a parole board—the existence of which comports with most traditional indeterminate sentencing schemes and the *Black's Law Dictionary* definition—the second prominent feature, sentencing guidelines, is wholly inconsistent with the unstructured schemes the Supreme Court has endorsed.[201] One cannot say that a sentencing judge in

198. *Blakely*, 542 U.S. at 305 (citations omitted). The Court referred to *McMillan*, however, as simply involving "a sentencing scheme that imposed a statutory *minimum*," although *McMillan* actually involved parolable sentences. *Id.* at 304.

199. *Id.* at 315 (O'Connor, J., dissenting).

200. *Id.* at 304 (majority opinion).

201. To be sure, guidelines promote uniformity in criminal sentencing. This feature, as Justice O'Connor noted in her *Blakely* dissent, alleviated a problem common to most sentencing systems—"unguided discretion [that] inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories." *Id.* at 315 (O'Connor, J., dissenting) (citation omitted). The Michigan Supreme Court has similarly explained:

> [B]efore the 1999 effective date of the legislative sentencing guidelines, the Legislature provided sentencing discretion that in many instances was virtually without limit.

Michigan is "not compel[led] . . . to rely on facts outside the trial record" at sentencing,[202] or is "allowed but not required to engage in freeform factfinding before selecting punishment within broad statutory ranges."[203]

It should be beyond dispute, therefore, that when the United States Supreme Court has referred to "indeterminate" sentencing schemes in the relevant context, it has never envisioned a system anything like mandatory ISS. At best, it has been intellectually lazy to proclaim Michigan's and Pennsylvania's sentencing schemes constitutional based simply on their status as "indeterminate" under an incomplete understanding of that term.

That the constitutionality of parolable sentencing was not specifically recognized in *Blakely* does not end the inquiry. *Blakely* did not declare structured judicial fact-finding schemes per se unconstitutional, but instead held that structured sentencing is impermissible if it allows a sentencing judge to impose a sentence more severe than that allowed by the jury verdict (or guilty plea) alone.[204] Thus, given a sentencing judge's unquestionable reliance on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt, the remaining question is whether there exists a possibility that he may "impose[] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding."[205] If so, an ISS scheme is unconstitutional.[206]

> . . . [With the guidelines,] the Legislature plainly implemented a comprehensive sentencing reform. The evident purposes included reduction of sentencing disparity, elimination of certain inappropriate sentencing considerations, . . . encouragement of the use of sanctions other than incarceration in the state prison system, and resolution of a potential conflict in the law.

People v. Garza, 670 N.W.2d 662, 664 (Mich. 2003). By relying on guidelines, however, ISS rejects a key component of the traditional indeterminate sentencing scheme: unstructured discretion. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 364–65 (1989) (stating that "Congress delegated almost unfettered discretion to the sentencing judge . . . under the intermediate-sentence system"); Berman, *supra* note 51, at 654–55, 662 (explaining the view that "broad judicial discretion" is necessary to ensure rehabilitation); Tonry, *supra* note 67, at 1234–35 (discussing "the highly discretionary and individualized punishment systems encapsulated in the phrase 'intermediate sentencing'").

202. *Blakely*, 542 U.S. at 305 (citing *Williams*, 337 U.S. at 242–43 & n.2).

203. Reitz, *supra* note 61, at 1094–95.

204. *Blakely*, 542 U.S. at 303–05.

205. *Id.* at 303.

206. *Id.* at 303–04.

2. *The Meaning of "Statutory Maximum" in an ISS Scheme*

"Indeterminate" is not the only term that has been misused in the *Blakely* line of cases. The Supreme Court has also given new meaning to the term "statutory maximum," though at least here it recognized its odd use of the term and provided plenty of guidance as to what it meant.[207] Despite this guidance, however, the Michigan and Pennsylvania courts have misapplied the term as it relates to indeterminate sentencing schemes.[208]

The misunderstanding has its roots in *Apprendi*, in which the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt."[209] This language made sense, as the defendant would have faced a "statutory maximum" sentence of only ten years absent the challenged judicial fact-finding, but instead faced a maximum of twenty years.[210]

The Supreme Court's reasoning in *Apprendi* transferred easily to the mandatory sentencing guideline system at issue in *Blakely*, as the guidelines required the functional equivalent of statutory sentence enhancements.[211] Sadly, however, *Apprendi*'s language was not so amenable to the extension. Thus, in *Blakely*, the Court departed somewhat from the common understanding of a "statutory maximum," stating that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[212] In a mandatory guidelines sentencing scheme, the term "statutory maximum" refers to the most severe sentence "a judge may impose" within the guideline range supported by a jury verdict.[213]

The Michigan and Pennsylvania courts have had difficulty applying this straightforward definition to ISS schemes, likely because the most severe guidelines sentence supported by the jury verdict—the "statutory

207. *Id.*

208. *See, e.g.*, People v. Drohan, 715 N.W.2d 778, 787 (Mich. 2006); Commonwealth v. Smith, 863 A.2d 1172, 1178–79 (Pa. Super. Ct. 2006).

209. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

210. *Id.* at 468–69.

211. *See Blakely*, 542 U.S. at 299–303 (describing Washington's sentencing guidelines and then applying the reasoning used in *Apprendi*).

212. *Id.* at 303 (emphasis removed).

213. *Id.* at 303–04.

maximum"—is defined primarily by the parole-eligibilty date, i.e., the minimum amount of time that the defendant will actually serve in prison.[214] Hence, when applied to ISS, *Blakely*'s definition of "statutory maximum" yields a confusing and idiosyncratic (yet entirely accurate) result.

Rather than adopting the United States Supreme Court's puzzling definition of "statutory maximum," the Michigan and Pennsylvania courts have settled on a textually uncomplicated (but analytically incorrect) meaning of "statutory maximum": the maximum possible sentence provided in the statute of conviction.[215]

This definition mirrors the argument that the Supreme Court rejected in *Blakely*, and is also patently inconsistent with the Court's reference to "the maximum sentence a judge may impose"—the pinnacle of the sentencing judge's discretion.[216] Sentencing judges in an ISS scheme enjoy discretion within a range of severity, but that range does not include the mandatory-release date, because judges cannot order defendants incarcerated until that date. Rather, they must account for a two-dimensional sentence consisting of both a parole-eligibility date and a mandatory-release date.[217] Therefore, the "upper bound on a judge's . . . discretion"[218] and the "outer limits of . . . the judicial power"[219] is a sentence containing a parole-eligibility date.[220]

214. Further confusing the issue, this is sometimes referred to as the "maximum-minimum." *See* People v. Drohan, 715 N.W.2d 778, 790–91 (Mich. 2006).

215. *See Drohan*, 715 N.W.2d at 790. W. David Ball refers to this as the "'taxonomic statutory maximum' (the maximum laid out in a given criminal statute)," which he contrasts (at least where the two do not intersect) with "the 'functional statutory maximum' (the maximum for *Apprendi* purposes)." Ball, *supra* note 71 (manuscript at 88, on file with author).

216. *Blakely*, 542 U.S. at 303 (citing WASH. REV. CODE ANN. § 9A20.021(1)(b) (West 2000)). Just like a Washington state court judge in *Blakely* had no discretion to "impose" the statutory maximum flat sentence absent judicial fact-finding, a Michigan state court judge cannot order a defendant incarcerated until his statutory mandatory-release date; that is the province of the parole board. *See id.* at 304–05.

217. Indeed, the parole-eligibility date is the primary component of the "sentence" that a Michigan judge "imposes." *See* MICH. COMP. LAWS ANN. § 769.8(1) (West 2000) ("[T]he court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, [which is the parole-eligibility date]."); *Drohan*, 715 N.W.2d at 790 ("Michigan's sentencing guidelines . . . create a range within which the trial court must set the minimum sentence.").

218. *Blakely*, 542 U.S. at 318 (O'Connor, J., dissenting).

219. Harris v. United States, 536 U.S. 545, 567 (2002).

220. In a forthcoming article, W. David Ball relies on a markedly different conceptualization of "statutory maximum" in the indeterminate sentencing setting.

While he agrees that the "'functional statutory maximum' (the maximum for *Apprendi* purposes)" might not be the same as the "'taxonomic statutory maximum' (the maximum laid out in a given criminal statute)," he argues that the functional statutory maximum consists of only the "enumerated term" (the parole-eligibility date). Ball, *supra* note 71 (manuscript at 88–89, on file with author). In California, for example, "the functional statutory maximum sentence in a fifteen-years-to-life sentence is not life"—as most courts would conclude—or "fifteen-years-to-life," as this Article would argue, but rather is simply "fifteen years." *Id.* at 89.

> Confusion over *Apprendi*'s definition of the (functional) statutory maximum means that *Apprendi*-based parole challenges get rejected out of hand. Judges fail to look at the operation of the parole statute, note simply that the indeterminate sentence includes the phrase "to life," and conclude that a parole board cannot increase the maximum punishment to which a prisoner is subjected. . . .
>
> But the statutory maximum punishment for *Apprendi* purposes is the functional statutory maximum, not the taxonomic statutory maximum. Under the California parole statute, release into parole is presumptive. A parole board has to provide reasons for denying suitability, thereby extending a sentence, after a prisoner has served his enumerated term of years. This evidence takes the form of "aggravating facts *beyond the minimum elements of that offense*." Absent any threat to public safety, the board "shall set a release date." Only if the parole board were preauthorized to deny parole without finding any additional facts at all would the functional statutory maximum be life. Thus, the functional statutory maximum in a fifteen-years-to-life sentence is fifteen years.

Id. at 92–93 (citations omitted). Ball therefore argues that the parole board's denial of parole—rather than the sentencing judge's imposition of the sentence—may constitute an *Apprendi* violation because it extends the defendant's sentence beyond the "enumerated term" based on nonjury fact-finding.

Recognizing that parole release plays a useful role in our criminal justice system, however, Ball allows that parole boards should maintain the power to make decisions relating to future dangerousness:

> While *Apprendi* bars a parole board from encroaching on the jury, its application should be limited only to those facts which justify continued punishment. A mechanical application of *Apprendi*—one which failed to distinguish between retributive and rehabilitative incarceration—would require a jury to find all facts justifying a finding of parole unsuitability, including those related to public safety. This would upset well-established principles of deference in areas in which the parole board is most competent and it would fail to advance *Apprendi*'s core interests.

Id. at 16. In other words, Ball contends that *Apprendi*'s rule is expansive enough to govern parole board fact-finding, yet narrow enough that it reaches only "[f]acts which bear primarily on an offender's threat to society and need for incapacitation or rehabilitation . . . ." *Id.* at 6.

The problem seems to be that the Michigan Supreme Court (and to a lesser extent the Pennsylvania Superior Court) has confused the "guideline range"—the range within which the sentencing judge enjoys discretion—with the "sentence range" in an indeterminate scheme—the range within which the parole board enjoys discretion. It has read *McMillan* and *Harris* as allowing any increase in the bottom end of a "sentence range," though the cases addressed an increase in the low-end of a judge's authority.[221] Accordingly, it has distinguished *Blakely* on the ground that a Michigan sentence will always fall within the "sentence range" approved by the jury

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While appreciating Ball's argument, this Article requires no such reconceptualization of the *Apprendi* right and its implication on indeterminate sentencing. Rather, this Article merely seeks to point out that even under the prevailing "view that *Apprendi* is a mechanical rule applying only during the judicial pronouncement of the sentence . . . ," ISS schemes raise serious constitutional concerns even at the moment the judge imposes a sentence. *Id*. at 6. The reason is uncomplicated: when a sentencing judge imposes a sentence of "fifteen-years-to-life," he or she is "imposing" a "sentence" of "fifteen-years-to-life."

221. Justice Kennedy's plurality opinion in *Harris* explains that when a judge-found fact leads to an "increas[e] [in] the mandatory minimum (but [does] not extend[] the sentence beyond the statutory maximum) . . . *the jury's verdict has authorized the judge to impose the minimum with or without the finding*." Harris v. United States, 536 U.S. 545, 557 (2002) (emphasis added). Thus, *McMillan* and *Harris* merely stand for the proposition that even after *Apprendi*, a mandatory minimum sentence may be based on disputed facts not proven to a jury beyond a reasonable doubt, so long as the judge could have imposed the same sentence without the challenged factual findings.

While beyond the scope of (and unnecessary to) this Article, the staying power of the *McMillan*/*Harris* exception to *Blakely*, upon which the Michigan courts purport to rely, is debatable. In *Harris*, four Justices voted to overrule *McMillan* and apply *Apprendi* to a mandatory minimum sentence. *Id.* at 572–83 (Thomas, J., dissenting). Although Justice Breyer believed that *Apprendi* had been wrongly decided, he agreed that as a matter of constitutional law, *McMillan* cannot be reconciled with *Apprendi*. *Id.* at 569 (Breyer, J., concurring). "A common reading of Breyer's opinion is that, at the time, he was waging a defensive battle to shield the federal sentencing guidelines from successful attack under *Apprendi*," and in light of the Court's later cases, he has recognized "that he has lost the battle . . . and must adjust his future votes to best serve the new post-*Blakely* realities." Reitz, *supra* note 61, at 1097 n.54 (citation omitted). *See also* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1193 n.14 (2005) (explainingthat the Michigan Supreme Court decision equating "'guidelines' minimum terms to the mandatory minimum sentence laws upheld in *Harris* . . . assumes that the . . . case will not be overruled. This assumption may be incorrect."); Wool, *supra* note 28, at 144 n.36 (noting that because five Supreme Court Justices "see no distinction for Sixth Amendment purposes between enhancements of minimum sentences and maximum sentences. . . . [T]he additional weight of the *Blakely* decision [may] be sufficient to foster a majority to overrule *Harris* . . . .").

verdict—a correct observation that misses the point entirely.

The Michigan Supreme Court's reliance on *Harris* is misplaced because the federal system at issue in that case bears no resemblance to Michigan's sentencing scheme. The mandatory minimum in *Harris* represented not only the least amount of time that the defendant might spend in prison, but also the floor of the sentencing judge's discretion. The fact that only the latter of these matters for *Apprendi* purposes[222] was not obvious or even important in *Harris*, or, for that matter, in almost any other context, because when a defendant gets a fixed sentence, the time he actually serves will always equal the sentence imposed by the judge.

Under an ISS scheme, however, the sentencing judge must impose a two-dimensional range, so the floor of the judge's discretion will never equal the time actually spent in prison. As applied to ISS, *Harris* merely stands for the proposition that an increase in the floor of a sentencing judge's discretion based on judge-found facts poses no *Apprendi* problem. As *McMillan* and *Blakely* make clear, the same is not true of the ceiling.

The entire *Blakely* line of cases establishes the principle that the ceiling in a sentencing judge's discretion may not be raised based on facts not admitted by the defendant or proven to the jury beyond a reasonable doubt; that "ceiling" is the "statutory maximum" for *Blakely* purposes. Though none of these cases dealt directly with ISS schemes, their logic is easily applied.[223]

222. "Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, *and of the judicial power to impose it*, are the elements of the crime for the purposes of the constitutional analysis." *Harris*, 536 U.S. at 567 (emphasis added).

223. Admittedly, Justice Scalia's concurring opinion in *Apprendi* suggested that parole release would result in a defendant getting "less than" the sentence authorized by the jury verdict—and, consequently, assumes that the mandatory-release date might constitute the statutory maximum in an indeterminate scheme. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). As W. David Ball points out, however, Justice Scalia does not appear to have fully appreciated that this sentiment doesn't fit the facts of even *Apprendi* or (later) *Blakely* themselves:

> In addition to making assumptions about the way a state's parole system operates, Justice Scalia's argument rests on an assumption that the key interest *Apprendi* vindicates is notice. . . . But [in] *Blakely* [the defendant] had constructive knowledge that he could do 120 months—the taxonomic maximum—for kidnapping, and his ninety month sentence was vacated. The judge could have sentenced Charles Apprendi to consecutive sentences and put him in prison for a total of twenty years, but instead found facts in aggravation himself in sentencing him to twelve.

3. *Mandatory Versus Advisory Guidelines in an ISS Scheme*

In its first major post-*Blakely* decision, the Pennsylvania Superior Court in *Smith* upheld Pennsylvania's ISS scheme based on the incorrect assumption that *Blakely* had specifically approved of indeterminate (parolable) sentencing.[224] Two years later, however, following the remedial opinion in *Booker*—which fully endorsed the constitutional validity of advisory sentencing guideline schemes—the same court largely righted itself.

In *Kleinicke*, the court explained that Pennsylvania sentencing courts may impose any sentence within the statutory range notwithstanding the advisory guidelines; the courts do not rely on judge-found facts for their authority.[225] The court correctly observed that "the *Booker* Court ruled that the federal guidelines could operate constitutionally as long as they, like Pennsylvania's guidelines, were voluntary in nature."[226] The idea is simple: because sentencing judges are free to reject the guidelines and impose the harshest sentence under the statute, the "ceiling" of their discretion is not coextensive with the top of the guidelines.

The Michigan courts can find no such refuge under *Booker*, however. In Michigan's mandatory ISS scheme, sentencing judges have no discretion to impose an above-guideline sentence unless and until they make additional factual findings that increase the guidelines and support the harsher sentence.[227]

The introductory hypothetical may provide the clearest illustration of why Michigan's sentencing scheme violates *Blakely*.[228] If a jury verdict (or

Ball, *supra* note 71 (manuscript at 94). Simply put, Justice Scalia was not fully considering the particular concerns of indeterminate sentencing in general or ISS in particular.

224. Commonwealth v. Smith, 863 A.2d at 1172, 1179 (Pa. Super. Ct. 2000).

225. Commonwealth v. Kleinicke, 895 A.2d 562, 573 (Pa. Super. Ct. 2006).

226. *Id.*

227. MICH. COMP. LAWS ANN. § 769.34(3) (West 2006).

228. At least two additional Michigan sentencing scenarios—exceptions to the general scheme discussed above—involve obvious *Blakely* violations beyond the scope of this Article. The first arises under MICH. COMP. LAWS § 769.34(4)(a), which provides as follows:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the

guilty plea) exposes a defendant to a statutory mandatory-release date of ten years, and a mandatory guideline range of two to four years, the judge may impose a sentence between two to ten years and four to ten years, with four to ten years being "the maximum sentence a judge may impose."[229] The ceiling of the judge's discretion is not ten years, but rather four to ten years. This is the "statutory maximum" for *Blakely* purposes.

It should be obvious that if the judge in this hypothetical relies on new, disputed facts at sentencing to apply an increased guideline range of five to seven years, and imposes even the low end sentence of five to ten

> jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Id. Thus, where the high end of the guidelines range is less than eighteen months, the default under Michigan law is an "intermediate sanction" (fixed sentence) of no more than twelve months in jail, but if, and only if, the sentencing judge finds "substantial and compelling reasons," he or she may impose a much lengthier parolable prison sentence. *Id.* Notwithstanding the United States Supreme Court's rejection of a materially indistinguishable statute in *Cunningham v. California*, 549 U.S. 270, 288–89 (2007), the Michigan Supreme Court upheld the above statute in *People v. Harper*, 739 N.W.2d 523 (Mich. 2007), explaining that "the superficial similarity of the statutory language in California's determinate scheme does not transform Michigan's intermediate sanction cells into the relevant statutory maximums for *Blakely* purposes. Rather, the similar language . . . yields a different result *when read in the context of Michigan's indeterminate scheme*." *Harper*, 729 N.W.2d at 536 (emphasis added). In this scenario, it is not the scoring of the guidelines, but rather the sentencing court's further judicial fact-finding, that violates the defendant's Sixth Amendment rights. *See id.* at 545.

The second exception arises under MICH. COMP. LAWS § 769.34(4)(c), which concerns "straddle cells." "A defendant falls within a straddle cell when, after the sentencing variables have been scored, the upper limit of the recommended minimum sentence exceeds 18 months, but the lower limit of the recommended minimum sentence is 12 months or less." People v. McCuller, 739 N.W.2d 563, 567 n.5 (Mich. 2007) (citing MICH. COMP. LAWS ANN. § 769.34(4)(c)). Where the guidelines straddle the eighteen month threshold, the sentencing court may either sentence the defendant to an intermediate sanction (a fixed jail sentence of less than twelve months) or a lengthier parolable prison term. *See* MICH. COMP. LAWS ANN. § 769.34(4)(c). Here, the scoring of the guidelines—again based on facts not admitted or proven to the jury—is what places the defendant in jeopardy of a parolable prison sentence rather than a fixed jail sentence, which, as discussed above, would be the default pursuant to MICH. COMP. LAWS § 769.34(4)(a). Yet the Michigan Supreme Court has also upheld this statute, even after a post-*Cunningham* remand from the United States Supreme Court. *See McCuller*, 739 N.W.2d at 566 (citing McCuller v. Michigan, 549 U.S. 1197 (2007)). Perhaps not surprisingly, the court reasoned simply that "Michigan, unlike California, has a true indeterminate sentencing scheme." *Id.* at 566.

229. Blakely v. Washington, 542 U.S. 296, 303 (2004).

years, the judge has imposed a harsher sentence than the relevant "maximum." The judge has, in other words, "inflict[ed] punishment that the jury's verdict alone does not allow . . . and . . . exceed[ed] his proper authority."[230] And he has unquestionably failed the simplest test offered by the Supreme Court in *Blakely*: "Had the judge imposed the [five to ten year] sentence solely on the basis of the plea, he would have been reversed."[231]

V. CONCLUSION

In both the academic scholarship and the case law, prior analysis of indeterminate structured sentencing has been encumbered by a complete misunderstanding of some of the Supreme Court's most important language—"statutory maximum" and "indeterminate sentencing." That the causes of this misunderstanding can be easily identified is no excuse for the utter failure to dig below the surface to determine exactly what the Court meant when it used these terms.

It should be abundantly clear that when the Supreme Court recognized an exception to *Blakely* for "indeterminate" sentencing schemes, it was not referring to schemes utilizing parole, but rather was focused on the absence of sentencing guidelines or similar structures that constrain sentencing judges' discretion. Because ISS schemes rely on guidelines, they are not exempt from *Blakely* review.

It should be equally clear that a statutory maximum for *Blakely* purposes is the top of a sentencing judge's discretion. Because a judge in an ISS scheme must "impose" a sentence consisting of both a parole-eligibility date and a mandatory-release date, the statutory maximum sentence is the harshest sentence containing both of these numbers based on the facts reflected in the jury verdict or guilty plea.[232]

Finally, it may well be that ISS is "the best bet" among *Blakely*-compliant sentencing schemes, particularly in a jurisdiction seeking to direct sentencing judges' discretion and employ a parole board.[233] But because ISS is subject to the same *Blakely* analysis as any other guided or structured sentencing scheme, its legality depends entirely on whether its guidelines are mandatory or advisory. An ISS scheme with advisory

230. *Id.* at 304 (citation omitted).
231. *Id.*
232. Chanenson, *supra* note 8, at 432.
233. *Id.* at 433–34.

sentencing guidelines, such as Pennsylvania's, appears to pose no constitutional problem, while a scheme employing mandatory sentencing guidelines, such as Michigan's, is fundamentally inconsistent with the Sixth Amendment right recognized in *Blakely*.