The Revenge of Mullaney v. Wilbur: U.S. v. Booker and The Reassertion of Judicial Limits on Legislative Power to Define Crimes

by Ian Weinstein*

The great sentencing reform movement of the last 20 years seemed unstoppable, until a tempest forced it on previously uncharted Constitutional shoals. Blakely v. Washington, 121 S. Ct. 21 (2004), seemed like a bolt from the blue to many. Even among those who noticed the clouds gathering, few foresaw the storm that would break upon the Federal Sentencing Guidelines and scour them until judicial discretion once again held sway. Yet, as is so often the case, retrospect makes plain what was obscure in prospect.

This paper offers a primarily doctrinal account of the line of cases which led to Booker v. United States, 125 S. Ct. 738 (2005), the case in which the United States Supreme Court held that the formerly mandatory United States Sentencing Guidelines could only survive as advisory sentencing provisions. I will trace the development of the Court's procedural sentencing jurisprudence from Williams v. New York, 337 U.S. 241 (1949), to Booker. I suggest that the Court's shifts in this area can best be understood in the context of the larger changes in American criminal law from 1950 to 2005.

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This story begins in 1949, when there was very little procedural regulation of sentencing. Judges possessed broad discretion to impose indeterminate sentences to further rehabilitation in a system in which traditional common law crimes predominated. The story concludes in an era of much greater procedural regulation, perhaps more fitting to a system of legislative dominance through determinate sentencing, established by complex, specific and enforceable statutes which are predominately retributivist in outlook. The cases will take us on a journey away from and back toward judicial sentencing discretion. The return trip, however, ends in a very different legal context in which judicial power may find a stable equilibrium or may once again be constrained.

I. The Historical, Doctrinal and Practice Context of Our Constitutional Sentencing Law

There was much less criminal law in America fifty years ago. There were fewer criminal statutes and they were generally shorter, simpler and less specific than many recent enactments. Statutes generally codified the long standing common law definitions of crimes and within that tradition, states were free to criminalize conduct as each saw fit. Criminal procedure law was not yet constitutionalized and beyond the most basic procedural requirements, states enforced their laws in a variety of ways with little federal oversight.

American criminal law has grown much larger and more complex in the last fifty years. We have seen a great wave of re-codification that has taken many state systems far from the common law tradition, a significant movement toward much more detailed and specific criminal statutes, the constitutionalization of criminal procedure and the tremendous growth of federal law

enforcement and federal adjudication of criminal cases.[1] Along with a new level of complexity, greater consistency existed in our criminal law and practice than in 1955. Yet, great variation in substantive law, procedure and practice remains a signal feature of American criminal law, given the diverse systems in place in the 50 states, the District of Columbia, the federal and the military courts.

Looking across the varied landscape of American criminal justice, one can find current examples of criminal sentencing in America that are characterized by unfettered judicial discretion, complete legislative control through mandatory sentencing, jury sentencing or enforceable guideline sentencing, as well as a range of combinations of each variety of sentencing. Finding guiding historical principles and developing and enforcing useful general rules for this wide variety of dynamic practices is a central problem in American sentencing law.

Although there are wide variations in American sentencing practices and procedures, our modern sentencing law has changed as it has responded to three important and interrelated trends in American criminal justice during the 1980s and 90s: i) the shift in emphasis from rehabilitation to retribution,[2] ii) the related increase in sentence severity[3] and iii) the shift in

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[1]See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (describing a cycle in which politically motivated legislative overcriminalization leads to increased prosecutorial discretion, which in turn facilitates further legislative overcriminalization).

[2] For a trenchant, insightful discussion of the rapid shift from the rehabilitative to the punitive retributivist model in American criminal justice policy, see generally DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (discussing the sudden collapse of the rehabilitative ideal in the late 1970s and early 1980s).

[3] Increasing sentence severity became an explicit goal of the sentencing reform movement, see, Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines,* 28 WAKE FOREST L. REV. 223, 284-87 (1993).

power to control sentence severity from the judiciary to the executive, as the legislature has increased the prosecutor's bargaining power.[4] Although mounting evidence suggests that these trends have peaked, there can be no doubt that they wrought tremendous change on this area in the last twenty years and remain important.

Yet another level of complexity in understanding criminal sentencing in America stems from the doctrinal tendency to view sentencing issues through the Sixth Amendment right to a jury trial, despite the fact that very few cases are resolved by juries. The net effect of this doctrinal focus is that much of the dispute over the proper allocation of sentencing authority among judges, prosecutors and juries ends up as speculation about how differing rules about the need for jurors to decide particular issues will effect the bargaining that constitutes the day to day practice of American criminal law. That bargaining, of course, is not directly regulated by the Sixth Amendment, or any other body of law, but is shaped by the oft discussed shadow of the law. In regulating the allocation of authority between judges and largely hypothetical juries, the Supreme Court is actually, though indirectly, regulating the relative power of each of the three branches to control the criminal justice system.

For example, legislative power to define crimes with greater specificity often extends

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Federal sentences did become harsher as the Guidelines and a range of mandatory minimum sentencing statutes took hold. See, Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentencing Severity: 1980-1998*, 2 FED. SENT. REP. 12 (1999). Many states made similar legal changes and experienced similar sentencing trends during this period.

[4] For a discussion of the shift in sentencing power from judges to prosecutors, see, Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AMERICAN CRIM. L. REV. 87, 101-12 (2003).

executive power by strengthening the prosecutor's position in plea bargaining.[5] But even that relationship depends upon and can be altered by changes in a variety of sentencing procedures. Thus, all things being equal, greater statutory specificity increases prosecutorial bargaining leverage, except where judges retain broad sentencing discretion, where statutory sentencing ranges have significant overlap, where caseload pressure and local culture result in lenient plea offers or where any number of other factors may counterbalance the impact of greater statutory specificity. It is a complex and uncertain business in which all things are rarely equal.

II. The Modern Jurisprudence Begins with Williams v. New York and Broad Judicial Discretion

The modern American constitutional procedural law of sentencing begins with Williams v. New York, 337 U.S. 241 (1949).[6] The defendant in Williams was convicted of murder and the

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[5] *Id.* (Discussing how the growth of substantive law has given prosecutors new charging options that increase the government's bargaining leverage in plea negotiations).

[6] The Supreme Court's sentencing jurisprudence has been largely procedural. Substantive appellate review of federal sentencing did not exist before the Sentencing Reform Act and the Sentencing Guidelines, see, United States v. Tucker, 404 U.S. 443, 447 (1972); Dorszynski v. United States, 418 U.S. 424, 431 (1974). The development of the doctrine of non-reviewability and its weakening through increasing procedural scrutiny of federal sentencing by courts of appeal is discussed in Robert J. Kutak and J. Michael Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review,* 53 NEB. L. REV. 463 (1974) (demonstrating convincingly that courts of appeal occasionally used procedural dress to remand egregious sentences, but arguing for appellate review because the doctrine of non-reviewability prevented the development of sentencing standards). More fundamentally, our very weak doctrine of proportionality review, see Solem v. Helm, 463 U.S. 277 (1983); Ewing v. California, 538 U.S. 11 (2003) (rejecting a challenge to California's three strikes law) is a rejection of the most likely Constitutional basis for broad, substantive regulation of criminal sentencing and undergirds the significant authority Congress and each state legislature maintains over the substantive law of sentencing. In the light of weak proportionality review, the contest naturally turns to the contours of the procedural rules.

jury recommended life in prison. The trial judge sentenced him to death, relying upon facts contained in a pre-sentence report. The defendant argued that he was entitled to confront the witnesses against him at the sentencing hearing, but the Supreme Court upheld the sentence. The Court ruled that the defendant's sentencing was properly governed by much more relaxed rules of procedure than those governing trial. The Court drew a bright line rule between the jury role in adjudicating guilt or innocence and the judicial role in fashioning an individualized sentence in the era of indeterminate, rehabilitative sentencing.

Although Williams is no longer good death penalty law, it marks the beginning of the Supreme Court's modern sentencing jurisprudence. In Williams, the Supreme Court outlined a flexible set of sentencing procedures, which permitted the judge to consider a wide variety of facts and types of evidence, trusting the judge to sort it all out and give the proper, individualized sentence. Although the Court reminded us that sentencing procedures would remain subject to due process scrutiny, citing Townsend v. Burke, 334 U.S. 736 (1948).[7] Williams and its progeny, including Brady v. Maryland, 373 U.S. 83 (1963),[8] and United States v. Grayson, 438 U.S. 41 (1978),[9] established that sentencing was governed by important, but much less demanding procedural requirements than the trial.

Under the flexible procedures approved in Williams, the line between guilt and innocence

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[7] The case granted relief when an un-counseled defendant's sentence was enhanced based on the sentencing court's erroneous belief that the defendant had been convicted of certain offenses.

[8] The prosecutor's "Brady obligation" to disclose exculpatory material to the defense was established in the context of the sentencing phase of a death penalty case.

[9] Affirming a sentence enhanced by a judicial finding that the defendant had lied during his trial testimony.

remained the province of the jury, with all of the strong procedural protections afforded by the Constitution. The key was, and remains, drawing the line at which the Sixth Amendment jury trial right attaches, along with the requirement of proof beyond a reasonable doubt. The contours of the procedural rights due at sentencing have long been anchored at the line between the elements of the offense, which must go to the jury, and other factors relevant to sentence, which need not be adjudicated by the jury and may be determined in a less formal procedure.

III. The Central Question Emerges in Mullaney and Patterson: What is an Element?

In the modern era of criminal jurisprudence, the Supreme Court began to draw the line between the demanding Sixth Amendment jury trial right and the less demanding Due Process right to a fair sentencing procedure in Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977), a very important and hard to reconcile pair of cases. In these cases, the Supreme Court framed the issue as whether and how the Constitution limited legislative discretion to define crimes. If legislative fiat alone can make any given fact an element, bringing it within the ambit of the Sixth Amendment, are there, conversely, enforceable legal limits on consigning the proof of any given fact to the less demanding requirements of the due process clause? The Court's basic answer, after the pair of cases was decided and through the late 1990s, was that legislatures have a great deal of discretion to define crimes and their elements. Much of the subsequent sentencing debate can be understood as an elaboration upon the question of whether and what limits the Constitution imposes on the legislative power to define crimes and set the punishment for those crimes. As we shall see, the cases trace a fairly straight upward trajectory of legislative discretion through the late 1990s and then a somewhat

less direct, but perhaps steeper decline in that discretion, with a corresponding assertion of judicial authority.[10]

The doctrine suggests that the question is whether the legislature has the power to decide what is an element of a crime and what is not, and so to allocate authority between jury and judge. But, in a world of guilty pleas, these cases really define the playing field upon which legislatures and courts jockey for control of sentencing with each other and with prosecutors.

In Mullaney, 421 U.S. 684 (1975), the Court struck down a common law based Maine murder statute presuming malice aforethought[11] from an intentional homicidal act, and placing the burden of proof of lack of malice (reducing the offense to second degree murder) upon the defendant. The Court held that the Maine legislature could not make malice an element of the offense and, at the same time, create a legal presumption of malice because it violated the Sixth Amendment jury trial right. That right requires that the state prove each and every element, beyond a reasonable doubt, to a jury. Although I have noted that the Court favored legislative discretion in this era, Mullaney, the opening salvo in this campaign struck a blow against that discretion.

Like so many important cases, Mullaney has been read and reread for different

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[10]Although it remains to be seen whether the ultimate outcome will be a broad assertion of judicial authority or a narrower assertion of Supreme Court authority to set limits on how legislatures may constrain lower courts.

[11]Malice aforethought is the term of art for the mens rea required for murder under the common law. Generally, malice aforethought included all killings that i) were intentional, ii) resulted from acts done with the intent to inflict grievous bodily injury, iii) resulted from acts done with extremely recklessness disregard for human life, or iv) resulted from the commission of, or from the flight from, a felony. *See generally,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, §32.01.

propositions. It may be most narrowly understood as holding that true presumptions can never operate in favor of the prosecution upon an element of a criminal offense. Although the case certainly stands for that proposition, that understanding of the case sheds no light on how to distinguish elements from other factors. The case may be a bit more broadly understood as holding that common law based crimes have elements so deeply rooted in our law that they cannot be altered by the legislature. As we shall see, that historically based rationale offers a way to cabin Mullaney's reach, but does not provide a broad enough understanding to answer the questions posed by subsequent cases. The case may be most broadly understood as establishing the Supreme Court's authority to review and rule upon the structure and/or substantive adequacy of legislative definitions of criminal offenses. Although this reading of Mullaney is consistent with the current state of the law, there remains great uncertainty about the standards to be applied in such a review. The reach of Mullaney has ebbed and flowed over time. To the degree that United States v. Booker, 125 S. Ct. 738 (2005), relies upon a broader understanding of this important case, it may be viewed as Mullaney's revenge.

The Court returned to the problem of defining elements the following term in Patterson v. New York, 432 U.S. 197 (1977). Perhaps more than most Supreme Court cases involving closely related questions, Mullaney and Patterson can only be understood as a pair, each limiting the other, with the law in this area very much dependent on which case is currently readominant. While Mullaney curtailed legislative discretion, Patterson extended it. In Patterson, the Supreme Court upheld the recently re-codified and heavily Model Penal Code influenced New York homicide statute. 432 U.S. at 201 (ruling on New York Penal Law § 125.25 (2004)). The New York law made all intentional killings the highest grade of non-capital murder and permitted the

defendant to come forward and prove the mitigating defense of extreme emotional disturbance, which reduces the offense to the next lower grade of murder. As many have observed, there is scant difference between the statute disapproved in Mullaney and the statute approved in Patterson. Maine could not shift the burden to the defendant on provocation mitigating murder to manslaughter by requiring malice aforethought as an element, presuming that mental state from intent to murder and permitting the defendant to come forward with evidence of provocation. New York could, however, define the highest grade of murder to include all intentional murders and assign the burden of proof on the affirmative mitigating defense to the defendant. The net effect of the two statutes is the same - intentional murder is the highest grade and the defendant has the burden to prove mitigation to manslaughter. Yet, the Maine statute was held to violate the requirement that the state prove each and every element beyond a reasonable doubt to the jury, while the New York statute was upheld.

The Patterson majority squared its result with Mullaney by limiting the reach of the earlier case. *See* 432 U.S. at 214-16. Justice White read Mullaney for the narrow proposition that once Maine used the language "malice aforethought," it was committed to that traditional element and could not introduce a presumption in favor of the prosecution. *Id.* In this light, the pair of cases sets very broad and historically rooted restrictions upon legislative drafting of criminal statutes. But once Mullaney and Patterson opened the door to Supreme Court review of how legislatures define crimes, they could not be so easily cabined. Although the requirement that an element must be proven beyond a reasonable doubt to the jury seemed to provide a very broad field for legislative action, changing styles of criminal law legislation would make those boundaries much more problematic than they first appeared.

Reconciling Mullaney and Patterson by limiting Mullaney to the particulars of historically rooted, common law statutes may resolve the immediate problem, but it is not an adequate solution. We might say that although the legislature is free to define new crimes, its options are more limited when it uses a well developed, common law scheme. A related political consideration, relevant in 1978, was the Court's reluctance to strike down a strongly Model Penal Code influenced statute during the prime years of MPC influenced re-codification of state codes. While each observation has force, neither brings the law to a stable rule. If Mullaney is really limited to common law statutes that have historical roots limiting the legislature, how are we to understand Patterson's language, consistent with Mullaney, that "there are obviously constitutional limits beyond which the States may not go." 432 U.S. at 210. What are those limits when the legislature drafts outside the common law tradition?

Justice Powell, in his dissent, foreshadows this problem. *Id.* at 216-232. He argued that the Patterson majority vaunted form over substance by giving the legislature the authority to redefine elements as affirmative defenses, eviscerating the central protection of our requirement of proof beyond a reasonable doubt, which had recently been reaffirmed by In re Winship. *Id.* at 229-32. He argues for a Winship/Mullaney rule, which would examine whether the fact at issue makes a significant difference in punishment and whether it is historically rooted. *Id.* at 225-27. Justice Powell seems quite right to search for a rule that would ground this area in more than formal drafting requirement but, while this standard captures the difference between Mullaney and Patterson, it offers little guidance to a criminal law expanding far beyond its historical common law roots. In the cases that follow, Justice Stevens would lead the search for another way to ground the question of what must be proven beyond a reasonable doubt, beyond statutory

drafting rules guided by history.

The jurisprudence of the late 1970 through the late 1980s, the waning of the era of proceduralist adjudication and rehabilitative sentencing, bequeathed us a vague understanding of "element." The law gave state legislatures great discretion in defining crimes and allocating burdens of proof. For example, state legislators could categorize all intentional murders as homicide and give defendants the burden of proof on defenses as traditional and deeply rooted as self defense. Martin v. Ohio, 480 U.S. 228 (1987). This broad legislative power to define crimes was counterbalanced by broad judicial sentencing discretion, and did not, at first, confront the many procedural challenges raised by mandatory sentencing schemes. That would change, but the lack of clarity, and underdevelopment of a body of doctrine defining the notion of an "element" of a criminal statute remained a central ambiguity in American sentencing law. Indeed, many of the sentencing law innovations of the late 1980s and 90s relied upon the Supreme Court's reluctance to elaborate a meaningful definition of "element," and instead to view the area as one of largely unfettered legislative discretion.

Even as the Court reaffirmed its broad approach to the meaning of "elements" in Martin, pressure had already begun to build as legislatures stepped away from indeterminate sentencing and rehabilitation and began their long effort to limit judicial discretion. So long as there was a clear divide between the extensive procedural protection of trial and the discretionary regime of sentencing, the model of Williams was workable, whether or not it was good policy. As legislatures began to enact mandatory sentencing statutes that tied sentencing to fact-finding, strains began to appear.

III. Legislative Discretion Triumphant: McMillan v. Pennsylvania and Sentencing Factors

McMillan v Pennsylvania, 477 U.S. 79 (1986), the fulcrum of this line of cases, involved a challenge to a Pennsylvania statute that imposed a mandatory minimum five year sentence on any person convicted of an enumerated felony who was found, by the judge, at sentencing, to have visibly carried a firearm during the commission of the crime. McMillan revisited the search for a workable understanding of what constitutes an element of an offense.

The Supreme Court upheld the statute in McMillan, ruling that the provision was a sentencing factor, not an element defining a new crime. *Id.* Writing for the Court, then Justice Rehnquist acknowledged that there is no bright line rule and this is a matter "differences of degree." *Id*. at 91. In a crucial passage distinguishing the sentencing factors in the Pennsylvania statute from the burden shifted element in the Maine statute ruled unconstitutional in Mullaney, the Court noted:

> "Section 9712 *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."

Id. at 87-8 (emphasis added). This passage would control our understanding of the distinction between elements and sentencing factors for 18 years, from McMillan through Blakely,[12] although the doctrinal tension became evident earlier. As unfettered judicial sentencing discretion gave way to a variety of legislatively imposed, reviewable sentencing requirements,

[12]Though, a brief period of uncertainty existed between Almendarez-Torres v. United States, 523 U.S. 224 (1998), and Jones v. United States, 526 U.S. 227 (1999).

our understanding of the phrase "a penalty within the range already available to [the court] without the special finding," began to waver and change.

In one light, the essence of the shift that led to Booker was the turn from the McMillan understanding of element and maximum sentence to our current understanding. Under McMillan, the elements of the crime were the particular facts necessary to determine whether the defendant was guilty and so liable for punishment up to the maximum term set by the legislative enactment that defined the crime. It made no difference whether the sentencing court was required to give any particular sentence within any range the legislature might establish - factors that determined where in the range a defendant was actually sentenced were only sentencing factors, not elements, and were only subject to the lesser procedural restrictions of Williams and its progeny. This is the understanding so well argued by Justice O'Connor in her dissent in Apprendi v. New Jersey, 530 U.S. 466 (2000), and long articulated by Justices Breyer and Kennedy.[13] Booker, as we shall see, offers a broader understanding of the maximum sentence concept, extending it all rules that establish the enforceable top of the sentencing range. Of course this shift did not occur all at once, and the particular contours of the shift left McMillan standing, if greatly limited. So how did we get from McMillan to Booker?

One key to the shift is found in Justice Stevens'continued critique of the application of

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[13]A series of cases, including Jones, Apprendi, Blakely, Ring v. Arizona, 536 U.S. 584 (2002), and Booker shifted and broadened the legal understanding of the concept called "statutory maximum" in McMillan and later renamed the concept the "prescribed range of penalties." Justice Scalia, writing for the Court, tells us that "statutory maximum' is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 121 S. Ct. 21 (2004). Rejecting the prior rule, defining the statutory maximum as the maximum term set out in the legislative enactment defining the crime, Blakely broader definition swept enforceable sentencing guidelines into the category of elements for purposes of Winship and Patterson.

Williams style minimalist procedural protections, appropriate to an era of rehabilitation and broad judicial discretion, to the world of enforceable Guidelines and retributivist sentencing.[14] Justice Stevens has trenchantly argued that Mullaney and Patterson, properly read, provide the tools to identify and rein in legislative excesses. In his McMillan dissent, Justice Stevens argued that there is a more fundamental distinction underneath the apparently formalist rule about presumptions in cases involving historically rooted statutes. 477 U.S. at 99-101. He argues that the cases identify a line between aggravating and mitigating factors, capturing an essential legal and political difference between facts that increase punishment and those that mitigate punishment. *Id.* at 100-01. Natural political limits exist on the legislative transformation of elements into mitigating factors, so they need not be constrained in the same way. *Id.* at 100-02. Legislators are unlikely to pass extreme versions of "Patterson statutes" - statutes that broadly criminalize conduct and then burden defendants with mitigating defenses. *Id.* at 101-02. He offers the example of criminalizing everyone who walks into a bank and permitting defendants to prove they are not bank robbers. *Id.* at 100-01. He argues that such a scheme would face intense political opposition. *Id.* at 101. Although his example is suggestive, recent experience shows he may have underestimated the public's willingness to accept broad statutes. On the other hand, recent efforts to address corporate wrongdoing suggest that there is real political sensitivity to extending criminal sanctions to cases in which traditional markers of criminality may be less

[14]Viewed in terms of Court politics, the shift may be seen as Justice Scalia's long term movement toward Justice Steven's position. Of course Justice Scalia developed his position in the context of orginalism and its historical perspective, while Justice Stevens remained ever sensitive to the evolving context of American criminal law and the interplay of shifting substantive law and procedure, but in the end Justice Scalia voted with Justice Stevens.

clear. Whatever the merits of his position on the dangers of overuse of mitigating factors for which the defendant has the burden, his argument on the political dangers of aggravating factors is powerful.

Aggravating factors are quite different, he tells us, because there is much less political backlash to imposing harsher penalties upon those already convicted of some crime. The experience of the last twenty years shows how politically expedient it can be to expose people convicted of any crime to horrendously harsh sentences - opposing those statutes is just being "soft on criminals." That has been our experience with sentencing factors, which have mushroomed since McMillan and unlike mitigating factors, seem to have political limits broader than many anticipated.

The experience of the late 80s and 90s suggests there is a real difference between aggravating and mitigating factors, as Justice Stevens suggested. His dissent in McMillan foreshadows much of the basic structure of the law today. He argued for Court scrutiny of the process of finding facts that establish the enforceable top of the sentencing range, a requirement that characterizes Apprendi and its progeny. *Id.* at 103. His views on mitigating factors, have been somewhat oddly transformed into a distinct set of rules governing facts that establish the bottom of the sentencing range, as in Harris, an opinion from which he dissented. *See* Harris v. United States, 536 U.S. 545 (2002) (holding that a statute increasing the minimum sentence after fact finding by the judge rather than by the jury does not violate a defendant's Fifth or Sixth Amendment rights). But back in 1986, Justice Stevens was still in the minority in the sentencing cases and McMillan was the law.

IV. Legislative Discretion Overreaching: Witte, Almendarez-Torres and the End of Limits

New questions involving procedural protections at sentencing began to come before the Court in the mid 90s, as the federal appellate courts began to sort through and define the issues in the wake of the Court rejection of the separation of powers challenge to the Sentencing Guidelines, Mistretta v. United States, 488 U.S. 361 (1989). The Court's commitment to flexible procedures and legislative discretion, as set out in Williams, Patterson and McMillan reached its high water mark in Witte v. United States, 515 U.S. 389 (1995), and Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Witte, the Court rejected a double jeopardy challenge to a federal prosecution for cocaine distribution based on conduct that had already been used to enhance a sentence, as relevant conduct under the Guidelines, in a prior marijuana prosecution. *Id.*

Justice O'Connor, writing for the Court, relied upon Patterson and McMillan. She argued that the court was not punishing the defendant for distributing cocaine in the first prosecution. *Id.* at 396. Rather, when sentencing for distributing marijuana, the sentencing court properly considered his character as a recidivist, in deciding how to use its traditional sentencing discretion. *Id.* at 406. Only the second prosecution punished him for distributing cocaine, and to the extent that he might be punished twice in a broad sense, if not in the technical sense of punishment which limits the double jeopardy clause, any unfairness is mitigated by the Guidelines treatment of total punishment. *Id.* at 404-06. Justice O'Connor draws on both the Court's double jeopardy jurisprudence for a very narrow understanding of what it means to "punish" for the instant offense and the broad McMillan understanding of what constitutes a

traditional sentencing factor, going to the defendant's character.

Justice Stevens' continued his critique of McMillan and recognized that Williams fit the era of judicial discretion, not enforceable Guidelines. *Id.* at 407-16. Granting that McMillan was the governing law, he argued more particularly in his dissent that the structure of the Guidelines cut against the majority's approach. *Id.* at 409-12. He noted that prior convictions considered in criminal history are clearly relevant to the defendant's character and clearly fall under the line of cases carving out recidivism as a tradition sentencing factor under McMillan. *Id.* at 409-10. But relevant conduct, he noted, is an offense characteristic, not an offender characteristic. *Id.* at 410-11. Thus, relevant conduct is an offense characteristic under the Guidelines and the defendant was being punished for his conduct, not his character, in the first offense, triggering double jeopardy protection. *Id.* at 411. Although Witte is a double jeopardy case and draws on that line of cases, the fundamental question of what constitutes an element, as opposed to a sentencing factor, is crucial to the Fifth Amendment analysis.

The Court returned to this question, in different dress, in Almendarez-Torres v. United States, 523 U.S. 224 (1998), the last case in which a majority of the Court accepted the full force of McMillan. Almendarez-Torres involved a challenge to the illegal reentry statute, which imposed a two year maximum on a person who reentered the country without special permission after deportation, except that any person deported after conviction of an aggravated felony was subject to a 20 year mandatory minimum. *Id.* (reviewing 8 U.S.C. § 1326(b)(2)). The defendant was indicted for illegal reentry, and the indictment did not charge that the defendant had been deported after conviction of an aggravated felony. *Id.* at 226-27. The Pre-sentence Report noted the defendant's eligibility for an enhanced sentence. The defendant objected that the statutory

maximum was limited to two years, given the facts to which he admitted and the omission of his waiver of his right to proof beyond a reasonable doubt on the fact of his previous conviction of an aggravated felony. *Id.* at 227. The judge imposed a sentence of 85 months. *Id.* The defendant appealed and the Court affirmed the sentence. *Id.* at 248.

Justice Breyer, writing for the Court, rejected the defendant's argument, finding that the aggravated felony requirement was a sentencing factor, not an element. *Id.* at 226-27. The Court began its analysis by trying to determine Congress' intent, staying true to McMillan's central teaching that the legislature is free to define crimes as it chooses within very broad constitutional limits. *Id.* at 228-35. After close analysis of the statutory language, the Court concluded that Congress intended the section to operate as a sentencing factor, not an element. *Id.* at 235. After finding that the legislature intended to create a sentencing enhancement and not an element, the Court went on to consider whether there was a constitutional infirmity in that choice.

The Court first considers whether Mullaney and Patterson limit legislative power in this case and the opinion emphasizes how little of an affect the limiting principle of Mullaney had at this time with the observation that:

> At most, petitioner might read all these cases, taken together, for the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element. But we do not see how they can help petitioner more than that.

523 U.S. at 242.

The Court then considers McMillan, the case "upon which petitioner must rely." *Id.* Applying the five factor test of McMillan, and emphasizing that recidivism is the classic

sentencing factor, the Court notes that this statute is just like the statute in McMillan in four of the five dimensions discussed in the earlier case. *Id.* at 242-46. As in McMillan, i) there was no express violation of the limits set out in Patterson, as the government did not enjoy a presumption on a long established and central element of a common law crime, ii) the defendant did not face a differential in sentencing ranging from a fine to life in prison, as was the case with the Maine statute rejected in Mullaney, iii) the statute did not create a separate offense and, iv) the statute "gave no impression" that it was intended to make the enhancement the tail that wagged the dog, but only gave precision to a traditional sentencing factor. *Id.* at 243-46.

The core of the case comes down to the fifth factor, the relationship between the sentence imposed and the statutory maximum. The Court concluded that although the statute in this case did raise the maximum sentence specified by the legislative enactment defining the crime, they have not and would not adopt a bright line rule "that any significant increase in a statutory maximum sentence would trigger a Constitutional "elements" requirement."[15] *Id.* at 247. The majority's treatment of the statutory maximum in Almendarez-Torres marks the apogee of Patterson's legislative discretion model. The analysis revolves around discerning legislative intent. The Court discusses the idea of constitutional limitations on legislative power late, little and lightly.

Justice Scalia's dissent in Almendarez-Torres first argues that McMillan should be read to set a real and substantial limit on legislative discretion, requiring that facts resulting in a

[15]The opinion goes on to note that it would be anomalous to establish a bright line rule about the statutory maximum in light of the fact that a judge could constitutionally make factual findings rendering a defendant eligible for a death sentence. *Id.* at 247. Of course that rule would not survive the great shift that was about to occur, as Apprendi was followed by Ring.

sentence above the statutory maximum be treated as elements.[16] The dissent then goes on to critique the notion that recidivism is different from other sentencing factors and only then addresses the question of statutory interpretation. It would not be too long before a majority of the Court would be willing to impose real limitations upon legislative discretion to define crimes, reasserting the role of the jury that undergirds a broader reading of Mullaney and also reopening space for judicial discretion in the era of detailed legislative criminal statutes.

V. Mullaney's Revenge: Jones, Apprendi and the Reassertion of Limitations on the Legislature

The significance of the next case in this line, Jones v. United States, 526 U.S. 227 (1999), is obvious in hindsight, but at the time it seemed just a small step back on the long march to legislative discretion to define crimes and set punishments with ever increasing specificity. Jones involved a challenge to the federal carjacking statute, 18 U.S.C. § 2119, which carried a maximum sentence of 15 years and permitted enhancement of a sentence up to 25 years if there was a finding of serious bodily injury. Jones was tried on an indictment that did not plead serious bodily injury, convicted by a jury and then sentenced to 25 years after the trial judge found the requisite enhancing fact of injury, by a preponderance of the evidence. *Id.* at 230-31.

Justice Souter, now in the majority with Justices Scalia, Ginsburg and Stevens, with the other dissenters in Almendarez-Torres, joined here by Justice Thomas, turns first to the question of legislative intent, but finds that avenue of analysis inconclusive. *Id.* at 233. Although the majority expresses an inclination toward the view that Congress intended to define a separate

[16]Importantly, Justice Scalia carefully distinguishes mandatory minimums from maximums. 523 U.S. at 253.

crime and so made serious bodily injury an element, rather than a sentencing factor, the Court recognizes "the possibility of the other view," and in the face of that uncertainty, reads the statute to avoid declaring it unconstitutional. *Id.* at 239. But this apparent deference to the legislature only sets up the larger constitutional question as the majority goes on to breathe new life into the limits set by Mullaney. Although the Court might have stopped there and treated Almendarez-Torres and Jones as only a pair of constitutional doubt cases, presenting a less ambiguous statute in Almendarez-Torres and a more ambiguous statute in Jones, it does not. *See id.* at 248-49.

The Jones opinion goes on to discuss the fundamental division of authority between judge and jury under the Sixth amendment, revives the McMillan formulation of the statutory maximum as the limit above which a mere sentencing factor may not further enhance a sentence and clearly limits Almendarez-Torres to cases in which recidivism is the enhancing factor. *See id.* at 251-52. The holding that the car jacking statute created two separate crimes and that serious bodily injury must be pled and proven to the jury proved the turning point in the Supreme Court's contemporary sentencing cases. *See id.*

As is so often the case as the Court takes incremental steps, the complicated relationships among the boundaries of legislative power, judicial power, prosecutorial power and the role of the jury are only partially explored in Jones. The analysis of the jury's historical role and the explicit focus on balance between judge and jury marks an important shift in analysis, away from statutory construction and discussions of legislative intent and toward the constitutional limits on legislative discretion. That shift in analysis would become more pronounced in Apprendi and Blakely. *See* 530 U.S. 466 (2000); 121 S. Ct. 21 (2004). What remains unstated in Jones, but surfaces quite clearly in Blakely, is discussion of the 20 year shift from indeterminate sentencing

to detailed sentencing statutes and Guidelines. In a system dominated by guilty pleas, the apparent doctrinal shift of authority from judge to jury (expanding the range of elements and so apparently diminishing the judicial role), is really a shift in power back to judges and away from a 20 year rise in legislative and prosecutorial power to set punishment.

Justice Kennedy's dissent in Jones gestures in the direction of the systemic impact and potential disruption to which the underlying reasoning of Jones could, and eventually did, lead. *Id.* at 254. First analyzing the statutory language for evidence of Congressional intent, the dissent argues that the statute creates only a sentencing factor. *Id.* at 256. The dissent then goes on to argue that Almendarez-Torres should have been understood as reaching more broadly and cementing the broad view of legislative discretion to define crimes. *See id.* at 266-71. Raising the flag of formalism first flown in this debate by Justice Powell in his dissent in Patterson, Justice Kennedy notes that the majority would have Congress simply raise the statutory maximum to life, changing a few words to get the same result. *Id.* at 267.

In many respects, Jones left us back in the world of Mullaney and Patterson. After Patterson, it seemed there were some limits to legislative authority to define crimes. It appeared that those powers were broad, but the contours of the discretion were uncertain. McMillan gave us broad discretion, seemingly limited by the statutory maximum in the legislative enactment defining the crime. Then Almendarez-Torres suggested that even the statutory maximum was not a clear limit. These were the doctrinal underpinnings of detailed statutory sentencing provisions and enforceable Guidelines.

Jones signaled a change in direction, but left open the real possibility that the Court would continue to set very broad limits and might leave much of contemporary sentencing

undisturbed. The Court was willing to impose some limits on legislative discretion to define crimes and sentences, although like Mullaney, the first case to set limits, its reach was unclear. It seemed possible that Jones would have its Patterson, a follow up case that would limit Jones to its very particular setting and reaffirm the late 20th Century sentencing world of Williams style minimalist procedural requirements in the era of enforceable Guidelines. Instead, we got Apprendi.

Justice Stevens, writing for the majority, positions Apprendi as flowing from and foreshadowed by Jones. 530 U.S. at 476. Apprendi involved the NJ assault statute, which carried a ten year statutory maximum, but permitted a sentence of up to 20 years if the assault was racially motivated. *Id.* at 468-69 (referring to N.J. Stat Ann. § 2C:4-3(e) (West 2000)). The judge sentenced the defendant to 12 years, although the finding of racial bias was made by the judge, under a preponderance of the evidence standard. *Id.* at 471. The Court offers an extended, historically based discussion of the Sixth Amendment right to a jury trial and emphasizes the special role statutory maxima play in our system. *Id.* at 476-83. The opinion then sets out a rule that does not use the language "statutory maximum," but the broader phrase "prescribed range of penalties." The Court tells us:

> . . . [with the prior offense exception] we endorse the statement of the rule set forth in the concurring opinion[s] [of] . . . [Jones]. "It 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. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 490. The battle lines have now shifted. The question is no longer whether statutory maxima offer a bright line rule, but whether other kinds of limits, most notably Guidelines, will

fall within the ambit of "the prescribed range of penalties."

Justice O'Connor's dissent takes on the historical analysis of the majority and argues that the rule announced in Apprendi effectively overrules McMillan, without admitting that it does so or justifying the departure from stare decisis. *Id.* at 476-85. Although one may quibble with the characterization that McMillan was overruled, there can be no doubt that Apprendi was profoundly unsympathetic to the McMillan approach, which eschewed bright line rules in this area and supported broad legislative discretion to define crimes and punishment. Justice Breyer makes the point more plainly in his dissent, arguing that Apprendi upset the settled understanding on the division of sentencing authority and cast grave doubt on modern sentencing. *Id.* at 564-66. His dissent also asks whether juries can engage in the detailed fact-finding required by enforceable Guidelines, raising questions about two parts of the triangular relationship among juries, judges and legislatures (and those legislative surrogates in this context, the prosecutors). *Id.* at 557.

VI. One Step Back and the Final Leap Forward: Harris, Blakely and Booker

Although Apprendi was clearly a very significant case, it was followed by an opinion that could have limited it, as Patterson limited Mullaney . Harris v. United States, 536 U.S. 545 (2002), posed a challenge to the mandatory sentencing provision of 18 U.S.C. §924(c), which imposes a minimum seven year term upon anyone convicted of a crime of violence or a narcotics trafficking offense who brandishes a weapon during the commission of that offense. The defendant argued that the statute created a separate crime which was not submitted to the jury for proof beyond a reasonable doubt and thus violated Jones. *Id.* at 551. The defendant also argued

that the statute increased the prescribed range of penalties and violated Apprendi. *Id.*

The majority, made up of the Jones dissenters and Justice Scalia, breathed new life into McMillan, which also involved a mandatory minimum sentence for use of a gun in the commission of another crime. In a decision that may be read as carefully distinguishing the precedents and applying stare decisis, or as using a bit of formalism to revive the letter if not the spirit of a discredited case, the Court ruled that 924(c) was a sentencing factor under McMillan, not an element under Apprendi. *Id.* at 556-57. The key to Harris is that juries must find facts that set the maximum penalty, but judges may find facts that establish the bottom of a sentencing range.

Justice Thomas, in dissent and joined by the remaining three of the Jones majority, Justices Stevens, Souter and Ginsburg, argues that the logic and language of Apprendi cannot and should not be squared with McMillan. *Id.* at 572. He relies, with some justification, on the argument that the language "facts that increase the prescribed range of penalties," embraces mandatory minimums, as well as the maximum. *Id.* at 578. Justice Thomas notes that "before today, no one seriously believed that the Court's earlier decision in McMillan could coexist with the logical implications of the Court's later decisions in Apprendi and Jones." *Id.* at 582. But Harris revived the possibility that legislative discretion to define crimes and to allocate and limit judicial sentencing authority, sufficient to sustain most enforceable guidelines systems, could survive. After Harris, it seemed possible that the Court would walk the line, requiring that statutory maximum altering facts go to juries and all, or some subset of other enhancing facts could remain with the judge. But Blakely erased many of those questions.

As this audience well knows, Blakely brought the top of the range in enforceable

sentencing guidelines systems within the ambit of Jones and Apprendi. Once the door closed on the meaning and scope of the phrase "facts that increase the prescribed range of penalties," the major hope to save the Federal Guidelines was the argument that they were not statutes, but some other form of law that did not fall within the rule first promulgated by Mullaney. But that argument did not garner five votes on the Supreme Court. Booker followed directly from Blakely and by that point the interesting and hard questions were remedial, not doctrinal.

The road from Mullaney to Booker took us far into the land of unlimited legislative discretion and back. It started in an era characterized by fewer, less specific criminal statutes which relied upon judicial discretion and indeterminate sentencing to apply those broader rules to the vast array of cases that came before the courts. Procedural protections mattered less in that system because sentences turned on individual judgements, not the application of rules. The system had little need to examine the limits of legislative power, as the legislature was not inclined to approach, let alone push upon, the limits it had long observed.

By the late 1980s, the whole interdependent system began to shift dramatically. As legislators began to define crimes and set punishment with ever greater specificity, sentencing procedures began to matter a great deal and the bounds of legislative and judicial power became contested. Although the doctrinal questions played out in the right to a jury trial, our reliance upon guilty pleas has turned jury power into judicial power, at least for now. The politicization of criminal justice in the 1980s and the strong assertion of legislative dominance in criminal justice that developed in response to that politicization were the underlying forces that pushed these issues forward. In what may be a healthy exercise in correcting power imbalances among the branches of our government, the Court circled back around to renewed concern with the

limits of legislative power as the issues took on a very different cast in the world of mandatory minimums and enforceable Guidelines.

At each extreme statement of the limits of legislative discretion, Patterson and Jones, the dissent argues that either the majority's failure to limit legislative authority or the majority's excessive limitation upon legislative authority is a retreat into mere formalism - the legislature can always find a way to write the statute to achieve its desired result, within the bounds of the Court's requirement. This captures the current reality. Whether we think about "topless guidelines" or a system of very lengthy and detailed statutes setting out a wide array of mandatory sentences for very specific offenses, drafting alternatives exist to return us to much of pre-Booker sentencing in the post-Booker worlds.

Predictions about the future of criminal sentencing in America have lately been frequent and frequently wrong. As a theoretical matter, there is great appeal in the call for the Supreme Court to engage in more regulation of the substantive criminal law. As Bill Stuntz has argued, the Court could construct a system of procedural limits with real bite on substantive criminal statutes, creating an updated version of common-law court lawmaking and couple it with revived judicial sentencing authority.[17] This would insulate our criminal law from the danger of politicization of criminal justice, which I have argued is at the root of the stresses and excesses of the last 15 years.

Short of that major change, perhaps we must recognize that there is very likely to be a

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[17]See generally Stuntz, *supra* note 1 (Suggesting Constitutional regulation of the substantive criminal law as one way to escape the problems of overcriminalization and excessive prosecutorial power brought on by the politicization of American criminal justice policy).

degree of formalism in any solution the Court offers to these problems. In our system of coordinate branches of government, it may well be impossible to find a substantive solution that will provide stable lines defining the reach of each branch, if each branch continues to push on the line. Perhaps Justice Stevens was right to look to self limiting principles in the long term politics of criminal law. In his analysis of the difference between aggravating and mitigating factors, he noted the natural limits on turning elements into mitigating factors - at some point too much innocent conduct is swept in and people are unwilling to have many defendants forced to prove their innocence.

But aggravators are different, as their harm is limited to an already despised class, convicted criminals. While Justice Stevens is right and the Court must step in to protect the rights of defendants, it may also be true that even aggravating factors have an upper political limit. At some point, the creation of too many aggravating factors creates clear enough substantive injustice to merit public attention. The continued development of enhanced and mandatory penalties has become a clear cause of injustice in America as the public learns of more and more sentences that simply do not fit the crime. The history of this period is still to be lived and written. But if it turns out that the tide of sentence severity and politicization of criminal justice has turned, then we will have reached the political limits of enhancing sentences through legislative domination of our criminal law. That would offer the best hope of a more workable and stable long term solution. If each branch and player in our system would stop trying to expand his or her power by pressing aggressively on the edges of the law, the fundamental limits of the doctrines would not matter so much. We would stop running up

against the limits of the law - after all the law itself cannot make us good, it can only help us to be good if we are so inclined.