ADVANCE SHEET – November 12, 2021

President's Letter

In this issue, we present two famous law review articles and a landmark case relating to the principles underlying our criminal law.

The first article was written not by a lawyer but by the British philosopher and Christian apologist C.S. Lewis, perhaps best known as the author of the delightful Screwtape Letters, at a time when confidence in the rehabilitative functions of the criminal law and in the role of the psychiatric profession were at their height. The article was published in Australia because Lewis could not get an English law review to publish it. Maryland's since drastically amended Defective Delinquent law may have been the legislative high water mark of enthusiasm for the indeterminate sentencing that Lewis decried.

The second article, a moderate rejoinder to Lewis, has as its principal author the Australian criminologist Norval Morris, later a professor at the University of Chicago Law School, best known for his successful advocacy of systems of partial week-end and night-time confinement. Morris' article was followed by similar moderate criticism by Francis Allen, Morris' colleague at Chicago, and more emphatic advocacy of fixed, determinate sentencing and minimum sentencing guidelines for purposes of incapacitation by the influential American academic James Q. Wilson, crystallized in the Federal Sentencing Guidelines. Contrary to the hopes of Lewis and Allen, the repudiation of indeterminate sentencing was accompanied by a Thermidor, revising average sentences sharply upward, particularly in cases arising out of the so-called drug war.

This tendency was brought to a halt by the opinion of Justice Scalia, for a Supreme Court majority, in *Blakely v. Washington* , 542 U.S. 296 (2004) requiring that facts aggravating sentences be found by a jury. The subsequent case of *United States v. Booker*, 543 U.S.220 (2005) in which Justice Ginsburg cast the determinative vote, allowed guidelines to survive but denied them mandatory effect, producing much confusion.

In our last letter, we listed books available as Christmas presents from our bookstore. A few words about some of them may tempt you further:

Reason and Imagination: The Correspondence of Learned Hand ($35). Several hundred pages of Hand's reactions to political events, including his unflattering characterizations of Mc Kinley ("sanctimonious jellyfish"), Woodrow Wilson, and Warren Harding.

Prohibition in Maryland ($15). Memorable writings by Mencken and Governor Ritchie, and some hilarious accounts by Congressman Hill of "The Battle of Franklin Farms" and by Senator William Cabell Bruce on the proliferation of stills in Maryland.

The Days Trilogy ($30). The definitive Library of America edition of Mencken's autobiography.

Louis Brandeis: American Prophet($20). Jeffrey Rosen's short but illuminating biography.

Brady v. Maryland ($20). The Bar Library's own collection of writings on a vital case.

Ex Parte Merryman ($15). Two sets of tributes,50 years apart, to the much-maligned Chief Justice Taney's habeas corpus opinion.

Baltimore and the 19th of April ($15). A memoir by the Bar Library's founder, George William Brown, about the Civil War and much else.

Failure to Flourish ($30). Professor Clare Huntington's trenchant critique of contemporary family law.

Call Joe Bennett at 410-727-0280 to make delivery and payment arrangements.

George W. Liebmann

THANK YOU FOR YOUR SERVICE

Yesterday was Veterans' Day, a day set aside to honor America's veterans and their service to our country. It is held on November 11 in recognition of the World War I armistice which was signed on the 11th hour of the 11th day of the 11th month. World War I was, as we all recall, the war to end all wars.

Whenever I say thank you for your service to someone I see in uniform I sort of feel like Lincoln at Gettysburg when he said "But, in a larger sense, we cannot dedicate -- we cannot consecrate -- we cannot hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract." How small are my words compared to the largeness of their actions? Still, whenever I am with my daughter and someone finds out she is serving in the military and utters those words to her, I know how much she appreciates it, and I certainly know how proud I feel.

So I encourage everyone to let our men and women serving in the military know how you do in fact appreciate their service, in your words or perhaps even a donation to the U.S.O. or some other organization dedicated to veterans and active military personnel.

There is a quote "All gave some, some gave all," to describe military service, in particular, those that gave their lives. I can remember my daughter Mary's graduation from basic training at Fort Sill which is in Lawton, Oklahoma. She would be heading to Texas for her specialty training, but for

two days we were able to spend time with her. When the time for these new soldiers to go to their next stations arrived, all gathered on the base to say goodbye. There were very few dry eyes. The tears, rather than blur the vision, brought into sharp focus a large measure of just what our military give up, a large measure of who they and all of us are.

In essence, there truly are two days for thanksgiving in November, one on the fourth Thursday and one on November 11. To any and all veterans who might be reading this thank you for your service.

Joe Bennett

THE HUMANITARIAN THEORY OF PUNISHMENT

By C. S. LEWIS

Fellow of Magdalen College

IN ENGLAND we have lately had a controversy about Capital Punishment. I do not know whether a murderer is more likely to repent and make a good end on the gallows a few weeks after his trial or in the prison infirmary thirty years later. I do not know whether the fear of death is an indispensable' deterrent; I need not, for the purpose of this article, decide whether it is a morally permissible deterrent. Those are questions which I propose to leave untouched. My subject is not Capital Punishment in particular, but that theory of punishment in general which the controversy showed to be almost universal among my fellow-countrymen. It may be called the Humanitarian theory. Those who hold it think that it is mild and merciful. In this I believe that they are seriously mistaken. I believe that the "Humanity" which it claims is a dangerous illusion and disguises the possibility of cruelty and injustice without end. I urge a return to the traditional or Retributive theory not solely, not even primarily, in the interests of society, but in the interests of the criminal.

According to the Humanitarian theory, to punish a man because he deserves it, and as much as he deserves, is mere revenge, and, therefore, barbarous and immoral. It is maintained that the only legitimate motives for punishing are the desire to deter others by example or to mend the criminal. When this theory is combined, as frequently happens, with the belief that all crime is more or less pathological, the idea of mending tails off into that of healing or curing and punishment becomes therapeutic. Thus it appears at first sight that we have passed from the harsh and self-righteous notion of giving the wicked their deserts to the charitable and enlightened one of tending the psychologically sick. What could be more amiable? One little point which is taken for granted in this theory needs, however, to be made explicit. The things done to the criminal, even if they are called cures, will be just as compulsory as they were in the old days when we called them punishments. If a tendency to steal, can be cured by psychotherapy, the thief will no doubt be forced to undergo the treatment. Otherwise, society cannot continue.

My contention is that this doctrine, merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being.

The reason is this. The Humanitarian theory removes from Punishment the concept of Desert. But the concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question "Is it deserved?" is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a "just deterrent" or a "just cure". We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a "case".

The distinction will become clearer if we ask who will be qualified to determine sentences when sentences are no longer held to derive their propriety from the criminal's deserts. On the old view the problem of fixing the right sentence was a moral problem. Accordingly, the judge who did it was a person trained in jurisprudence; trained, that is, in a science which deals with rights and duties, and which, in origin at least, was consciously accepting guidance from the Law of Nature, and from Scripture. We must admit that in the actual penal code of most countries at most times these high originals were so much modified by local custom, class interests, and utilitarian concessions, as to be very imperfectly recognizable. But the code was never in principle, and not always in fact, beyond the control of the conscience of the society. And when (say, in eighteenth-century England) actual punishments conflicted too violently with the moral sense of the community, juries refused to convict and reform was finally brought about. This was possible because, so long as we are thinking in terms of Desert, the propriety of the penal code, being a moral question, is a question on which every man has the right to an opinion, not because he follows this or that profession, but because he is simply a man, a rational animal enjoying the Natural Light. But all this is changed when we drop the concept of Desert. The only two questions we may now ask about a punishment are whether it deters and whether it cures. But these are not questions on which anyone is entitled to have an opinion simply because he is a man.

He is not entitled to an opinion even if, in addition to being a man, he should happen

also to be a: jurist, a Christian, and a moral theologian. For they are not questions about principle but about matter of fact; and for such cuiquam in sua arte credendum. Only the expert "penologist" (let barbarous things have barbarous names), in the light of previous experiment, can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. It will be in vain for the rest of us, speaking simply as men, to say, "but this punishment is hideously unjust, hideously disproportionate to the criminal's deserts". The experts with perfect logic will reply, "but nobody was ~g about deserts. No one was talking about punishment in your archaic vindictive sense of the word. Here are the statistics proving that this treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?" The Humanitarian theory, then, removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose special sciences do not even employ such categories as rights or justice. It might be argued that since this transference results from an abandonment of the old idea of punishment, and, therefore, of all vindictive motives, it will be safe to leave our criminals in such hands. I will not pause to comment on the simple-minded view of fallen human nature which such a belief implies. Let us rather remember that the "cure" of criminals is to be compulsory; and let us then watch how the theory actually works in the mind of the Humanitarian. The immediate starting point of this article was a letter in one of our Leftist weeklies. The author was pleading that a certain sin, now treated by our laws as a crime, should henceforward, be treated as a disease. And he complained that under the present system the offender, after a term in gaol, was simply let out to return to his original environment where he would probably relapse. What he complained of was not the shutting up but the letting out. On his remedial view of punishment the offender should, of course, be detained until he was cured. And of course the official straighteners are the only people who can say when that is. The first result of the Humanitarian theory is, therefore, to substitute for a definite 'sentence (reflecting to some extent the community's moral judgment on the degree of ill-desert involved) an indefinite sentence terminable only by the word of those experts-and they are not experts in moral theology nor even in the Law of Nature-who inflict it. Which of us, if he stood in the dock, would not prefer to be tried by the old system?

It may be said that by the continued, use of the word punishment and· the use of the verb "inflict" I am misrepresenting Humanitarians. They are not punishing, not inflicting, only healing. But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success-who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared -shame, exile, bondage, and years eaten by the locust- is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard. If we turn from the curative to the deterrent justification of punishment we shall find the new theory even more alarming. When you punish a man in terrorem, make of him an "example" to others, you are admittedly using him as a means to an end; someone else's end. This, in itself, would be a very wicked thing to do. On the classical theory of Punishment it was of course justified on the ground that the man deserved it. That was assumed to be established before any question of "making him an example" arose. You then; as the saying is, killed two birds with one stone; in the process of giving him what he deserved you set an example to others. But take away desert and the whole morality of the punishment disappears. Why, in Heaven's name, am I to be sacrificed to the good of society in this way? - unless, of course, I deserve it.

But that is not the worst. If the justification of exemplary punishment is not to be based on desert but solely on its efficacy as a deterrent, it is not absolutely necessary that the man we punish should even have committed the crime. The deterrent effect demands that the public should draw the moral, "If we do such an act we shall suffer like that man." The punishment of a man actually guilty whom the public think innocent will not have the desired effect; the punishment of a man actually innocent will, provided the public think him guilty. But every modern State has powers which make it easy to fake a trial. When a victim is urgently needed for exemplary purposes and a guilty victim cannot be found, all the purposes of deterrence will be equally served by the punishment (call it "cure" if you prefer) of an innocent victim, provided that the public can be heated into thinking him guilty. It is no use to ask me why I assume that our rulers will be so wicked. The punishment of an innocent, that is, an undeserving, man is wicked only if we grant the traditional view that righteous punishment means deserved punishment. Once we have abandoned that criterion, all punishments have to be justified, if at all, on other grounds that have nothing to do with desert. Where the punishment of the innocent can be justified on those grounds (and it could in some cases be justified as a deterrent) it will be no less moral than any other punishment. Any distaste for it on the part of a Humanitarian will be merely a hang-over from the Retributive theory. It is, indeed, important to notice that my argument so far supposes no evil intentions on the part of the Humanitarian and considers only what is involved in the logic of his position. My contention is that good men (not bad men) consistently acting upon that position would act as cruelly and unjustly as the greatest tyrants.

They might in some respects act even worse. Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better", is to be treated as a human person made in God's image.

In reality, however, we must face the possibility of bad rulers armed with a Humanitarian theory of punishment. A great many popular blue prints for a Christian society are merely what the Elizabethans called "eggs in moonshine" because they assume that the whole society is Christian or that the Christians are in control. This is not so in most contemporary States. Even if it were, our rulers would still be fallen men, and, therefore, neither very wise nor very good. As it is, they will usually be unbelievers. And since wisdom and virtue are not the only or the commonest qualifications for a place in the government, they will not often be even the best unbelievers. The practical problem of Christian politics is not that of drawing up schemes for a Christian society, but that of living as innocently as we can with unbelieving fellow-subjects under unbelieving rulers who will never be perfectly wise and good and who will sometimes be very wicked and very foolish. And when they are wicked the Humanitarian theory of punishment will Put in their hands a finer instrument of tyranny than wickedness ever had before. For if crime and disease are to be regarded as the same thing, it follows that any state of mind which our masters choose to call "disease" can be treated as crime; and compulsorily cured. It will be vain

to plead that states of mind which displease government need not always involve moral turpitude and do not therefore always deserve forfeiture of liberty. For our masters will not be using the concepts of Desert and Punishment but those of disease and cure. We know that one school of psychology already regards religion as a neurosis. When this particular neurosis becomes inconvenient to government, what is to hinder government from proceeding to "cure" it? Such "cure" will, of course, be compulsory; but under the Humanitarian theory it will not be called by the shocking name of Persecution. No one will blame us for being Christian, no one will hate us, no one will revile us.

The new Nero will approach us with the silky manners of a doctor, and though all will be in fact as compulsory as the tunica molesta or Smithfield or Tyburn, all will go on within the unemotional therapeutic sphere where words like "right" and "wrong" or "freedom" and "slavery" are never heard. And thus when the command is given, every prominent Christian in the land may vanish overnight into Institutions for the Treatment of the Ideologically Unsound, and it will rest with the expert gaolers to say when (if ever) they are to re-emerge. But it will not be persecution. Even if the treatment is painful, even if it is life-long, even if it is fatal, that will be only a regrettable accident; the intention was purely therapeutic. Even in ordinary medicine there were painful operations and fatal operations; so in this. But because they are "treatment", not punishment, they can be criticized only by fellow experts and on technical grounds, never by men as men and on grounds of justice. This is why I think it essential to oppose the Humanitarian theory of punishment, root and branch, wherever we encounter it. It carries on its front a semblance of mercy which is wholly false. That is how it can deceive men of good will. The error began, perhaps, with Shelley's statement that the distinction between mercy and justice was invented in the courts of tyrants. It sounds noble, and was indeed the error of a noble mind. But the distinction is essential. The older view was that mercy "tempered" justice, or (on the highest level of all) that mercy and justice had met and kissed. The essential act of mercy was to pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient.

If crime is only a disease which needs cure, not sin which deserves punishment, it cannot be pardoned. How can you pardon a man for having a gumboil or a club foot? But the Humanitarian theory wants simply to abolish Justice and substitute Mercy for it. This means that you start being "kind" to people before you have considered their rights, and then force upon them supposed kindnesses which they in fact had a right to refuse, and finally kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties. You have overshot the mark. Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice: transplanted to the marshlands of mere Humanitarianism it becomes a man-eating weed, all the more dangerous because it is still called by the same name as the mountain variety. But we ought long ago to have learned our lesson. We should be too old now to be deceived by those humane pretensions which have served to usher in every cruelty of the revolutionary period in which we live. These are the "precious balms" which will "break our heads".

There is a fine sentence in Bunyan:

"It came burning hot into my mind, whatever he said, and however he flattered, when he got me home to his house, he would sell me for a slave."

There is a fine couplet, too, in John Ball:

“Be ware ere ye be woe
Know your friend from your foe.”

One last word. You may ask why I send this to an Australian periodical. The reason is simple and perhaps worth recording: I can get no hearing for it in England.

THE HUMANITARIAN THEORY OF PUNISHMENT

A REPLY TO C. S. LEWIS

By NORVAL MORRIS and DONALD BUCKLE

THE University of Melbourne has recently established a Department of Criminology. Our Chairman is a Judge of the Supreme Court, and our Board includes specialists in Medicine, Psychology, Sociology, Psychiatry, and Criminology. Already it is clear that we all adhere, to a greater or less degree, to what C. S. Lewis in his entirely delightful article called a "Humanitarian Theory of Punishment". His thesis is so profoundly opposed to our work as participants in this new Department that it is incumbent upon us to state our position; though we face this task with trepidation, seeing ourselves as Davids with literary slings incapable of delivering a series of blows as incisive as even one phrase from the armoury of Goliath Lewis.

Lewis' vital contention is that the Humanitarian Theory gives to the supposed expert an unwarranted and unjustified power over other men's lives. It is, of course, undeniable that to put a man in a white coat, or to give him a degree in psychology or sociology, does not diminish his sadistic potentialities or the disrupting effects of power on him. Such specialists must be regarded with that healthy scepticism of which Lewis is a fine champion; but scepticism should not lead us to deny their usefulness entirely, and insist-as does Lewis-on purely condign punishment, linked, as he phrases it, to the criminal's "desert". As we shall show, the use of the expert does not involve any abandonment of control over him. He can be kept on tap and yet not on top.

Let us attempt a reply to Lewis' article by advancing two propositions contrary t6 his thesis. First, the possibility of linking with the Humanitarian Theory of Punishment a just consideration of the interest of society and of the criminal. Secondly, the impossibility of his suggested return to the Retributive Theory of Punishment. If these propositions be demonstrated, there is little left of Lewis' argument; though its great worth as a warning against the uncontrolled allocation of powers remains. Lewis rests his case on a suggested dichotomy in which a contrast is drawn between the "deserved" or "just" punishment on the one hand. and therapy or treatment on the other-the latter being the significant purpose of those upholding the Humanitarian Theory of Punishment. To us, this seems an unreal distinction. Whatever the punishment inflicted as a "just" punishment, whatever theory of punishment one may espouse, it cannot be denied that reformation procured in association with it is a desirable thing. To an extent, therefore, some concept of therapy is involved in every desirable theory of punishment. What Lewis opposes is that therapy should be procured through punishment (not in association with it but by means of it), arguing that if treatment be elevated to a purpose as distinct from a mere subsidiary part of a punishment we shall have been delivered over to omnipotent moral busybodies who will work cruelty

without end.

Herein then lies the kernel of the discussion - Lewis regards reformation and deterrence as subsidiary and never as a justification of punishment and suggests that the Humanitarian Theory of Punishment has erected them into its vital aims. This, we believe, is a perversion of the Humanitarian theory. To us, the vital purpose of the criminal law is the protection of the community, always limiting and conditioning its punishments in the light of two other factors, namely, a determination by its actions never to deny the fundamental humanity of even the most depraved criminal, and secondly, a critical appraisal of the limits of our understanding of the springs of human conduct and our ability to predict its course. There is a third limitation imposed by the community's expectations of penal sanctions which we shall later consider. Lewis' article omits any reference to the protection of the community as a valid aim of penal sanctions. He stresses the human personality of each individual criminal, and with this we agree. One human personality he overlooks, however, is the individual humanity of the potential victim of the criminal. It is this humanity we defend; the humanity of those whose only likely connection with the criminal law is the law's failure to protect them from clearly dangerous people.

There is, surely, a parallel in the medical sphere. None of us shrinks from imposing considerable limitations on the freedom of action of those suffering from an infectious disease, and it is perfectly clear that over a wide area we have a Humanitarian Theory of Social Medicine. By suggesting this, we do not mean to take up the completely determinist position, and do not argue that criminal actions are as inaccessible to the actor's control as are the germs that may infect him. Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that society. And it is a virus from which society must seek protection. Thus, Lewis' suggestion that the humanitarians think "all crime is more or less pathological" is untrue if he means by it that crime is regarded as individually pathological. No responsible authority would accept that crime is an individually pathological phenomenon; but it is quite clearly a socially pathological phenomenon.

From the point of view of a society, therefore, the prime function of punishment must clearly be the protection of that society. The complete absence of any regard for the potential victim of the criminal which runs through Lewis' article is to us somewhat shocking. His insistence on the individual personality of the criminal to the extent that the punishment must in some way be regarded by the community as deserved, as capable of being measured by an efficient punishment system, carries with it a total disregard for the essential personality of the potential victims of the criminal. Per contra, it seems to us that an argument for this aim of the criminal law-the protection of the community-is conclusive provided it does not carry with it any serious disadvantages. And the disadvantage Lewis sees, and which is undoubtedly a threat, is the possibility of the abuse of power necessarily given to those aiming to fulfill this purpose. Can the expert be kept on tap and not on top? This risk of administrative abuse of power runs throughout the whole social pattern as we increasingly come to rely on the expert in economics, in town planning, in many aspects of social organization, indeed in every sphere of our corporate life, including that of the detection and punishment of crime. One of the basic problems of our age is to erect effective controls by which we can make use of the services of experts and yet guard ourselves from their potential authoritarian danger. In the field of penal sanctions, because of our traditional awareness of this danger, this protection can fairly easily be guaranteed.

The Criminal Courts have traditionally represented the common man and the common man's view of morality. The Judges have earned the confidence of the people as unbiased and incorruptible men. The Courts have to hand excellent techniques for controlling the exuberance of the expert in criminology or penology. Let the ultimate control always reside in the Courts, let the expert always be accountable to them, let the criminal always have access to the Court, let the controls of natural justice which the law has built up be applicable, and, it is suggested, the tyranny which Lewis foreshadows will not eventuate. This type of protection of the individual citizen is surely not beyond the wit of a Nation that has built up the concept of a Parliament and the idea of a Jury.

A test case is given by one of the- basic demands of those adhering to the Humanitarian theory: or certain types of criminals the Humanitarians wish to substitute for definite sentences some degree of indeterminacy as to the period those criminals will spend in prison. As Lewis points out. herein lies a real risk of tyranny. The answer is again to be found in the existing courts. These should require the expert to give evidence publicly and. subject to cross-examination. to substantiate the reasons for his decision concerning the release of the criminal. The prisoner should have the power to initiate this type of enquiry at regular intervals and the onus of proof should never shift from the expert.

An example of wise techniques of judicial control of the indeterminate sentence is to be found in the recent Tasmanian Sexual Offences Act 1951which allows the courts to impose several forms of indeterminate sentence accompanied by re-educative measures on certain sexual offenders. One of these sentences is called a Treatment Order and section 13 (2) of the Act protects the convicted criminal against the tyranny of the expert by providing that:

"A person against whom a treatment order has been made may petition the court to discharge the order upon the ground-
(a) that the treatment is unreasonable;
(b) that the treatment is ineffective:
(c) that the treatment is not being given or is unduly protracted;
or
(d) that the ... petitioner is cured of the indisposition which the order was made to cure."

The use of "indisposition" is infelicitous and there 'may well be other grounds on which the criminal should be allowed to petition the court; but the need to avoid the abuse of power and the establishment of means of achieving this is clearly recognized in this Act as it is throughout Anglo-American jurisprudence. This recognition constitutes a complete rebuttal of Lewis' worst fears.

We therefore submit that we have demonstrated the practical possibility of a Humanitarian theory carrying with it a due regard for the interests both of society and of the individual criminal. Now let us suggest the impossibility of a return, as Lewis recommends to the Retributive Theory of Punishment.

For certain types of criminals given, our present moral conscience a return to a pure Retributive Theory is unthinkable. At both ends of the scale of punishment practically every civilized society has abandoned the Retributive Theory. With child criminals we have abandoned it quite explicitly, holding that the welfare of the child must frequently be regarded as a major consideration motivating courts charged with sentencing juvenile delinquents. The cost to the community of rewarding the larceny of a few sweets by a child with a punishment exactly equated to that social harm, has proved too

expensive to be tolerated. It has been calculated that an incurable schizophrenic costs the community some £20,000 throughout his life, and it is clear that the adult criminal costs the community a great deal more. Therefore, both for the child's sake and for the community's, it is frequently necessary to reward the delinquent child with a punishment not "justly related", in the sense in which Lewis uses the phrase, to the offence he has committed. The emphasis must be on therapy. We suggest that there would be no responsible opinion reversing this development. And at the other end of the scale of punishment the community has likewise abandoned any hint of a Retributive Theory. With habitual criminals every civilized society has abandoned any attempt to equate the punishment to the latest crime that that criminal committed. There are various techniques adopted all over the world. By some the habitual criminal is first punished for the crime he has committed and then held in prison for a protracted period on account of his being an habitual criminal. Others add together the man's dangerousness to the community and his latest offence, and impose a sentence on him as an habitual criminal which is clearly unrelated to that offence only. Here again nobody could tolerate the thought of abandoning this Humanitarian approach to punishment and reverting to a purely Retributive one.

It is, we agree, possible to gather some support for a return to the Retributive Theory of Punishment for the graver and more professional type of criminal who has not yet developed into the habitual criminal. It is possible to do this simply because we do not know very much about the causes of crime. It is not possible, however, to find support for such a retrograde step in regard to those people who are at present put on probation. These are asked to atone for their crimes by being good citizens. And the Courts, advised by those who have studied problems of punishment and by those probation officers who are working in society, have decided that the people they put on probation are good risks, that is to say, they are not likely to offend again. A Retributive Theory could not tolerate such an approach to the punishment of these more minor offenders. Agreed, there is room for mercy in a Retributive Theory, but it could not be a universally applied mercy for certain types of crimes or criminals-if so, it would no longer be Retributive. Thus for child delinquents, for habitual criminals, and for those on probation-to take only a few-the punishments accepted by all civilized societies as suitable are not "deserved" punishments in any expiatory talionic sense. This concept of "desert" is really the lynchpin of Lewis' article. As he sees it, the idea of the "deserved" or "just" punishment is an acceptance that for each offence, calculated in the light both of the crime committed and the history of crimes perpetuated by that individual, there is a price of punishment known fairly widely throughout the community-that there is, in other words, a price-list of deserved punishments. This may well be a true picture of what is in many men's minds; but it is only true for those people who consider a static situation in crime, who consider only two parties to any crime-the criminal and his victim. Now the contrast with this is the Humanitarian Theory which sees crime as a dynamic situation, not involving two parties, but involving many parties: not only a criminal and his victim, but a whole list of future potential victims who, unless they are protected with the best means at our disposal, are likely to suffer hardship. In arranging this protection, however, the Humanitarian must always remember that it should be related to the extent of current knowledge, and to the fact that the community must be expected to bear some risk for its dangerous and pathological elements.

We do not go to the extreme of denying importance to the community's conception of a "deserved" punishment. The punishments imposed on criminals serve purposes other than those we have canvassed-they constitute society's official pronouncement of the gravity with which any criminal action is viewed, and therefore assist in reinforcing that community's sense of right. This sense of right, this group super-ego, must never

be exacerbated either by the too great leniency or the extreme severity of any punishment imposed. In other words, the community's sense of a just punishment will create the polarities of leniency and severity between which the criminal law may work out its other purposes. Where we do deny the validity of this concept of the just or deserved punishment is where it is advanced as a basic philosophic justification of punishment, and not merely as a limiting factor. Kant and Hegel built theories of punishment round this concept which had no more connection with the day-to-day realities of our criminal law than with the pieces on the chess board. It is a similar erection of an emotional sense of right, not applied to the factual exigencies of the task faced by those imposing penal sanctions, that leads to such impossibilities as Lewis' suggested return to the Retributive Theory of Punishment. By constantly making the experts justify to judges and to juries their actions in relation to criminals, punishment may be kept linked to the social conscience of the community. This, we submit, is a more truly comprehended "just" or "deserved" punishment than is the entirely emotional, atavistic approach which Lewis advocates. It must not be assumed that Lewis' version of the Retributive Theory is itself completely satisfactory. Indeed, arguing from no less an authority than St. Thomas Aquinas, we may describe "retribution" as a deprivation or imitation of the individual's powers to continue to exercise his choice between good and evil acts in the area where his delinquency has occurred. (See Dr. Hawkins' article "Punishment and Moral Responsibility" at page 92 of The King's Good Servant-Papers read to the Thomas More Society of London, 1948.) In most cases, therefore, the punishment which will take the form of removal from society is itself the retribution, and should logically continue until the prisoner reaches a sufficient state of grace that he no longer intends to transgress. To us, there is no lack of conformity between theories derived from the Scholastic and Humanitarian philosophies.

Lewis may have been led to his conclusion by what appears to us an over-simplified view of the aetiology of crime. He appears to regard any crime solely as the result of a wrong choice between doing good or doing ill. We do not propose to wander into the morass of the free will-determinism argument, for we agree with Lewis that this is a cause of crime. We do not, however, regard it as the only cause of crime which is to us an extremely complicated moral, physical, psychological, and sociological phenomenon in which the totality of the criminal's inheritance and environment, together with his area of free will, will have causal connection with the crime he commits. To relate punishment to but one aetiological factor is to minimize the difficulty of fixing a rational sentence. Our argument thus leads to a rejection of the Retributive Theory, not only on philosophical but also on purely practical political grounds, and to an acceptance of a morally just Humanitarian approach to punishment. It may be that a vital cause of our different view of punishment from that accepted by Lewis lies in our lower estimation of the efficacy of law as a means of social control. Law stands below Custom and well below Religion as a means of guiding men to the Good Life. It is a relatively blunt instrument of moral control, and should not be thought of as a means of achieving expiation of sin or completely just retribution for evil-doing.

Ralph Howard BLAKELY, Jr., Petitioner,
v.
WASHINGTON.

No. 02–1632.
Argued March 23, 2004.Decided June 24, 2004.Rehearing Denied Aug. 23, 2004.See 542 U.S. 961, 125 S.Ct. 21.

Opinion
Justice SCALIA delivered the opinion of the Court.

Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's Sixth Amendment right to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. In the process, he implored her to dismiss the divorce suit and related trust proceedings.
When the couple's 13–year–old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.
The State charged petitioner with first-degree kidnaping, Wash. Rev.Code Ann. § 9A.40.020(1) (2000).[1] Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use of a firearm, see §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125.[2] Petitioner entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.
The case then proceeded to sentencing. In Washington, second-degree kidnaping is a class B felony. § 9A.40.030(3). State law provides that "[n]o person convicted of a [class B] felony shall be punished by confinement ... exceeding ... a term of ten years." § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310(1), box 2–V (standard range of 13–17 months); § 9.94A.310(3)(b) (36–month firearm enhancement).[3] A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State v. Gore,* 143 Wash.2d 288, 315–316, 21 P.3d 262, 277 (2001) . When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3). A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Id.,* at 315, 21 P.3d, at 277

(citing § 9.94A.210(4)).
Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. § 9.94A.390(2)(h)(iii).[4]
Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3–day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:
"The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.
"The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48–49.
The judge adhered to his initial determination of deliberate cruelty.
Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, 111 Wash.App. 851, 870–871, 47 P.3d 149, 159 (2002), relying on the Washington Supreme Court's rejection of a similar challenge in *Gore, supra,* at 311–315, 21 P.3d, at 275–277 . The Washington Supreme Court denied discretionary review. 148 Wash.2d 1010, 62 P.3d 889 (2003). We granted certiorari. 540 U.S. 965, 124 S.Ct. 429, 157 L.Ed.2d 309 (2003).

II

This case requires us to apply the rule we expressed in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "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." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).[5]
These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi,* see 530 U.S., at 476–483, 489–490, n. 15; *id.,* at 501–518, 120 S.Ct. 2348 (THOMAS, J., concurring), and need not repeat them here.[6]
Apprendi involved a New Jersey hate-crime statute that authorized a 20–year sentence, despite the usual 10–year maximum, if the judge found the crime to have been committed " 'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id.,* at 468–469, 120 S.Ct. 2348 (quoting

N.J. Stat. Ann. § 2C:44–3(e) (West Supp.1999–2000)). In *Ring v. Arizona,* 536 U.S. 584, 592–593, and n. 1, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found 1 of 10 aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra,* at 491–497, 120 S.Ct. 2348; *Ring, supra,* at 603–609, 122 S.Ct. 2428.

In this case, petitioner was sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10–year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, 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.* See *Ring, supra,* at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts 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," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90–month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," *Gore,* 143 Wash.2d, at 315–316, 21 P.3d, at 277 , which in this case included the elements of second-degree kidnaping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b).[7] Had the judge imposed the 90–month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death i n *Ring* (because that is what the judge could have imposed upon finding an aggravator).

The State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. 477 U.S., at 81, 106 S.Ct. 2411. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.,* at 82, 106 S.Ct. 2411; cf. *Harris, supra,* at 567, 122 S.Ct. 2406. *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. 337 U.S., at 242–243, and n. 2, 69 S.Ct. 1079. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.,* at 252, 69 S.Ct. 1079. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the

enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.[8]

Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.[9]

III

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti–Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control ... in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States,* 526 U.S. 227, 244–248, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi's* critics would advocate this absurd result. Cf. 530 U.S., at 552–553, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.[10]

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan,* 477 U.S., at 88, 106 S.Ct. 2411. What this means in operation is that the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See 111 Wash.App., at 869, 47 P.3d, at 158.[11] Petitioner's 90–month sentence exceeded the 53–month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State v. Oxborrow,* 106 Wash.2d 525,

528, 533, 723 P.2d 1123, 1125, 1128 (1986) (en banc) (15–year exceptional sentence; 1–year standard maximum sentence); *State v. Branch,* 129 Wash.2d 635, 650, 919 P.2d 1228, 1235 (1996) (en banc) (4–year exceptional sentence; 3–month standard maximum sentence). Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far.* We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

By reversing the judgment below, we are not, as the State would have it, "find [ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See Wash. Rev.Code Ann. § 9.94A.010 (2000). Nothing we have said impugns those salutary objectives.

Justice O'CONNOR argues that, because determinate-sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post,* at 2543–2548. This argument is flawed on a number of levels. First, the 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 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 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. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* disserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. Justice O'CONNOR simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State v. Gould,* 271 Kan. 394, 404–414, 23 P.3d 801, 809–814 (2001), the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi's* requirements to its current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp. 1018–1023 (codified at

Kan. Stat. Ann. § 21–4718 (2003 Cum.Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3–7. The result was less, not more, judicial power.

Justice BREYER argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post,* at 2553. But nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi,* 530 U.S., at 488, 120 S.Ct. 2348; *Duncan v. Louisiana,* 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.[12]

Nor do we see any merit to Justice BREYER's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17–element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post,* at 2553, 2555–2556 (citing Bibas, Judicial Fact–Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L.J. 1097 (2001)). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, 54 Stan. L.Rev. 295, 296 (2001) ("Every prosecutorial bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi* ").

Any evaluation of *Apprendi's* "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A), (D),[13] based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice BREYER identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

The implausibility of Justice BREYER's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. Justice BREYER's only authority asking that defendants be protected from *Apprendi* is an article written not by a criminal defense lawyer but by a law professor and former prosecutor. See *post,* at 2553 (citing Bibas, *supra*); Association of American Law Schools Directory of Law Teachers 2003–2004, p. 319.

Justice BREYER also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. *Post,* at 2555, 2557. The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining, but see *supra,* at 2541, and n. 12) is that the Sixth Amendment was not written for the benefit of those who choose to forgo its protection.

It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

Justice BREYER's more general argument—that *Apprendi* undermines alternatives to adversarial factfinding— is not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "nonadversarial" truth-seeking processes, *post,* at 2557, supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. See 3 Blackstone, Commentaries, at 373–374, 379–381. Justice BREYER may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.

* * *

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," Blackstone, *supra,* at 343, rather than a lone employee of the State.

The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Footnotes

*

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1

Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

2

Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, Wash. Rev.Code Ann. §§ 9A.36.021(1)(c) , 10.99.020(3)(b) (2000). The 14–month sentence on that count ran concurrently and is not relevant here.

3

The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see § 10.99.040, but did not increase the standard range of his sentence.

4

The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the

departure. See 111 Wash.App. 851, 868–870, and n. 3, 47 P.3d 149, 158–159, and n. 3 (2002). It affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

5

Justice BREYER cites Justice O'CONNOR's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post,* at 2558–2559 (dissenting opinion). Of course, as he notes, Justice O'CONNOR was referring to an entirely different quotation, from *Archbold*'s treatise. See 530 U.S., at 526, 120 S.Ct. 2348 (citing J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). Justice BREYER claims the two are "similar," *post,* at 2558, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment," 1 Criminal Procedure § 81, at 51, must be charged in the indictment and proved to a jury, *id.,*, ch. 6, at 50–56. As one "example" of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.,* § 82, at 51–52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even Justice BREYER's academic supporters do not make *that* claim. See Bibas, Judicial Fact–Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L.J. 1097, 1131–1132 (2001) (conceding that Bishop's treatise supports *Apprendi,* while criticizing its "natural-law theorizing").

6

As to Justice O'CONNOR's criticism of the quantity of historical support for the *Apprendi* rule, *post,* at 2548 (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. Justice O'CONNOR does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra,* at 2538–2540.

7

The State does not contend that the domestic-violence stipulation alone supports the departure. That the statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See §§ 9.94A.390(2)(h)(i)-(iii).

8

Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

9

The United States, as *amicus curiae,* urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25–30. The Federal Guidelines are not before us, and we express no opinion on them.

10

Justice O'CONNOR believes that a "built-in political check" will prevent lawmakers from manipulating offense elements in this fashion. *Post,* at 2548. But the many immediate practical advantages of judicial factfinding, see *post,* at 2545–2547, suggest that political forces would, if anything, pull in the opposite direction. In any case, the

Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area.

11

Another example of conversion from separate crime to sentence enhancement that Justice O'CONNOR evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post,* at 2546. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136–138 (1769)), is unclear.

12

Justice BREYER responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post,* at 2555–2556. True enough. But why would the States that he asserts we are coercing into hard-heartedness—that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them—want to prevent a defendant from *choosing* that regime? Justice BREYER claims this alternative may prove "too expensive and unwieldy for States to provide," *post,* at 2556, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17–element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial factfinding. Justice BREYER's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

13

To be sure, Justice BREYER and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.