A Question for Another Day: The Constitutionality of the U.S. Sentencing Guidelines under Apprendi v. New Jersey

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INTRODUCTION

In 1984 Congress established the U.S. Sentencing Commission in response to concern over the disparity in criminal sentencing among federal judges and Parole Commission sentencing reductions.² Congress charged the Commission with the creation of statutory guidelines for the range of sentences available to federal district courts in their sentencing procedures³ and charged federal judges to adhere to the guidelines when sentencing convicted federal prisoners.⁴ Pursuant to its charge, the Commission promulgated the U.S. Sentencing Guidelines,⁵ and the initial guidelines took effect on November 1, 1984.

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¹ Apprendi v. New Jersey, 530 U.S. 466, 523 (2000) (Thomas, J., concurring); see also id. at 487 n.13.
Eleven years later, the United States Supreme Court hand
down Apprendi v. New Jersey, which reversed a state court’s sentencing under New Jersey’s hate crimes sentencing enhancer on grounds of unconstitutionality. A broad reading of the Apprendi rationale prompts question as to the constitutionality of sentencing under the U.S. Sentencing Guidelines.

Apprendi declared unconstitutional a defendant’s sentence because the determination of a key fact at sentencing led to a sentence above the statutory range for the offense of conviction. In a five-four opinion written by Justice Stevens, the Court held that any fact, other than prior conviction, that increases punishment beyond the prescribed statutory maximum must be proven to a jury beyond reasonable doubt—a standard that establishes both the factfinder’s identity and the prosecution’s burden of proof. Apprendi and its various concurring and dissenting opinions carried additional baggage, however. Controversy arose as to whether Apprendi’s rationale had a much broader sweep—affecting not only the use of factors to extend sentences beyond the statutory maximum, but also the use of factors to extend sentences beyond the statutory minimums. Such a rationale could render unconstitutional sentencing under determinate schemes such as the U.S. Sentencing Guidelines. Under the Sentencing Guidelines, federal judges find, at the sentencing stage and by a preponderance of evidence, the factors relevant to punishment greater than that of the statutory minimums for conviction of federal crimes.

The Apprendi opinions themselves noted the potential effect of such a rationale on the Guidelines. While the Court has not specifically addressed the Guidelines in the wake of Apprendi, two years after Apprendi, in Harris v. United States, the Court affirmed the use of legislative sentencing factors. While Harris affirmed a statutorily provided sentencing structure, the Court’s decision implies the constitutionality of sentencing under the Guidelines. The Harris

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7 530 U.S. 466 (2000).
8 See infra note 147 and accompanying text.
9 Apprendi, 530 U.S. at 474.
10 Id. at 490.
11 See, e.g., id. at 543-44 (O’Connor, J., dissenting).
12 See id. at 497 n.21; id. at 523 n.11 (Thomas, J., concurring); id. at 544 (O’Connor, J., dissenting); id. at 561 (Breyer, J., dissenting).
14 Id. at 568.
opinion was quite fractured, however, and several of the writing Justices deemed Harris inconsistent with Apprendi. Thus, the potential conflict between the Sentencing Guidelines and the Apprendi decision continues to warrant consideration.

This Note examines the constitutionality of the U.S. Sentencing Guidelines under the Court's Apprendi decision. Part I details the history, purposes, and effects of the Sentencing Guidelines. Part II examines the Supreme Court precedent leading up to Apprendi and analyzes the separate Apprendi opinions. Part III considers the aftermath of Apprendi in the federal circuits, particularly, the effect of Apprendi on review of sentences delivered under the Sentencing Guidelines. Part IV argues the constitutionality of sentencing under the Guidelines notwithstanding the Apprendi decision. The Note concludes with a policy-based reinforcement of the Sentencing Guidelines' constitutionality.

I. THE ORIGINATION OF THE U.S. SENTENCING GUIDELINES

No two crimes—or criminals—are alike. But should two substantially similar people who commit substantially similar crimes receive substantially similar sentences? And if those sentences involve prison confinement, should the convicted prisoners actually serve similar amounts of time? Logic and a sense of fundamental fairness dictate an affirmative response to both of these questions.

A. HISTORY OF THE U.S. SENTENCING GUIDELINES

Before the Sentencing Guidelines took effect, judges reasonably and routinely differed as to the appropriate amount of punishment warranted by an individual's commission of a crime. In 1949, the Supreme Court instructed judges to consider "the fullest information

15 See infra notes 318-38.

possible concerning the defendant’s life and characteristics.”17 As a result, federal judges had a great deal of discretion in declaring the sentence for any individual criminal: “in the pre-Guidelines era, outside of statutory maximums and constitutional limits; judges were guided only by their own notions of justice in imposing sentences.”18

This discretion “led to demonstrably disparate results.”19

Evidence as early as 1933 suggested “striking differences and wide disparity in sentence type and length.”20 Judicial decisions were found to be influenced by “the offender’s race, sex, religion, income, education, occupation and other status characteristics.”21 Indeed, researchers argued that “disparities often reflected discriminatory attitudes” and that “[r]acial discrimination would manifest itself in the form of more severe sentences for minority defendants than for equally situated white offenders.”22 On the other hand, some evidence suggested that other judges would “impose excessively lenient sentences on minority defendants in an effort to remedy past societal injustices.”23 Regardless of motivations, the evidence suggested that gross disparity existed at the sentencing stage among federal judges.24

Other circumstances augmented the exercise of judicial discretion. The statutory maximums were relatively broad.25 Judges were not required to announce reasons for their sentencing decisions.26

18 Hutchison et al., supra note 6, § 10.1, at 1685; see also id. at 1687 n.6 (quoting S. Rep. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182 (“[E]ach judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”)).
19 Id. at 1685.
21 Id. at 895.
22 Hutchison et al., supra note 6, § 10.1, at 1685.
23 Id.
24 Id. (quoting Judge Marvin Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 54 (1973) (“The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes.”)).
25 Id. Hutchison and his co-authors illustrate, “For example, judges could sentence a defendant convicted of bank robbery anywhere from straight probation to twenty years in prison.” Id. at 1687 n.2.
Nor were sentences generally subject to appeal. This factors combined to enhance and protect judicial sentencing discretion and to insulate the disparities present in federal sentencing.

Not only did nominal sentences vary, but decisions of the Parole Commission also affected the length of time served. During the time of the Parole Commission, the criminal justice system emphasized rehabilitation of prisoners. Given this goal, the Parole Commission had authority to release rehabilitated prisoners: "indeterminate sentencing was founded upon the theory of rehabilitation, and it could only be applied with the liberal use of discretion." Thus, "the Parole Commission was vested with the authority to determine the defendant's actual release date, a decision that could reduce a defendant's sentence to one-third or less of its nominal term." The indeterminacy of these reductions potentially "duped" victims and their families because convicted criminals' prison time could be substantially shorter than their nominal sentences.

During the 1960s and 1970s, dissatisfaction with judicial discretion in sentencing and Parole Commission discretion in prison time reductions gave rise to calls for sentencing reform. Many commentators suggested the abolition of the Parole Board. In response to these proponents of reform, Congress heard evidence in 1983 on the disparity in federal criminal sentences.

B. Purposes of the U.S. Sentencing Guidelines

The Comprehensive Crime Control Act of 1984 emerged from the 1983 congressional hearings. The Sentencing Reform Act ap-

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27 Id. (citing United States v. Tucker, 404 U.S. 443, 447 (1972)).
28 Nagel, supra note 20, at 894.
30 Id. at 1686 (quoting Panel Discussion, Equity Versus Discretion in Sentencing, 26 Am. Crim. L. Rev. 1813, 1816 (1989) (statement by Commissioner Ilene H. Nagel)).
33 See id.
peared as title II of the Crime Control Act. In several significant ways, the Sentencing Reform Act changed the prior sentencing system and its characteristic discretion. Primarily, the Act established the U.S. Sentencing Commission, a body instructed to devise and promulgate uniform sentencing guidelines. The Crime Control Act explicitly set forth the purposes of the Sentencing Commission:

The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The primary responsibilities of the Sentencing Commission were thus to establish uniform sentencing guidelines and to measure the effectiveness of those sentences in the criminal justice system. Both in devising sentences and measuring their effectiveness, Congress directed the Commission to adhere to the purposes of 18 U.S.C § 3553(a)(2).

Paragraph 3553(a)(2) of title 18 sets forth the goals of federal criminal punishment. Both the Sentencing Commission when promulgating guidelines and a court when sentencing under the guidelines must consider

The need for the sentence imposed—

37 Nagel referred to § 3553(a)(2) as “the long awaited statement of the goals of sentencing in the federal system.” Nagel, supra note 20, at 901.
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with the needed education or vocational training, medical care, or other correctional treatment in the most effective manner. 38

The Code essentially sets forth the traditional goals of a criminal justice system—retribution, deterrence, incapacitation, and rehabilitation. 39 Senate Report 98-225 clarifies that all factors are appropriate considerations for sentencing: "the Committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case." 40 The Report further states, however, that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has. For example, the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment. 41

In a footnote, the Report brings more clarity to the significance of the rehabilitation factor in prison time sentencing:

Section 3582(a) provides, however, in light of current knowledge that in determining whether to impose a sentence of imprisonment and in determining the length of a term of imprisonment, the sen-

39 Nagel further explained,

The statement of specific goals was meant to provide a comprehensive statement of the federal law of sentencing. The goals of adequately reflecting the seriousness of the offense, promoting respect for law, deterrence, and incapacitation can be assumed to have been prompted by a desire for sentencing to be responsive to society's right to protection from criminal predation. The goals of just punishment, and the provision of education, training, and treatment can be assumed to have been prompted by a desire for fairness and justice for the offender. The publication of and adherence to such clear goals provided the hope for increased certainty. Finally, the range of options would be provided through certain, mandated sentencing guidelines tied to the offense and the criminal history of the offender.

Nagel, supra note 20, at 902.
41 Id.
tencing judge should recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Proposed section 994(k) of title 28, as enacted by section 207(a) of this bill, provides that the sentencing guidelines should reflect the “inappropriateness” of using rehabilitation or availability of corrections programs as the basis for imposing a term of imprisonment.42

Thus, Congress directed the Sentencing Commission to adhere to traditional theories of criminal punishment but, in reaction to the perceived failures of indeterminate sentencing, limited the consideration the Commission could give to rehabilitation when determining the length of prison sentences.

The codification of the purposes of federal sentencing was not insignificant. Indeed, the previous lack of such a statement may have fostered the wide disparity in sentencing: “[b]ecause no single purpose of punishment has reigned supreme, judges historically have been accorded extremely broad discretion to select among the purposes of punishment while fashioning an appropriate sentence.”43

The codification of a theory of federal criminal punishment limited that discretion in some sense by requiring a court to take into account all theories of punishment in devising an appropriate sentence.

Yet, even in codifying the purposes of federal sentencing, Congress did not dictate one purpose or even one primary purpose of criminal punishment. Perhaps this is so because Congress intended an element of discretion to remain at the sentencing stage. In Senate Report 98-225, the Committee on the Judiciary also spoke to the purpose of the Sentencing Guidelines:

The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.44

The legislative history suggests that Congress sought not to eliminate judicial discretion at sentencing but to limit that discretion in a meaningful and appropriate way while maintaining an individualized criminal justice system.

Beyond the statement of federal criminal punishment theory provided in 28 U.S.C. § 3553(a)(2), Congress also set several boundaries

42 Id. at 67 n.140; see also 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).
for the Commission's development of guidelines in 18 U.S.C. § 994.45 Several of these mandates bear on the potential Apprendi challenge. The Commission was to establish whether a fine, probation, or imprisonment was appropriate for a conviction and was to establish the amount of a fine and term of probation or imprisonment (including whether that term of imprisonment should run consecutively or concurrently).46 Maximum terms of imprisonment were not to exceed the minimum term by more than six months or twenty-five percent of the minimum term, whichever was greater.47 In determining the offense level, the Commission was to take into account the grade of the offense, surrounding circumstances, the nature and degree of harm, the community view of the gravity, public concern generated, the deterrent effect of a sentence, and the current incident level of the offense.48 Offender categories were to include, to the extent relevant, age, education, vocational skills, mental or emotional states, physical conditions (including drug addiction), employment history, family ties and responsibilities, community ties, role in the offense, criminal history and the extent to which criminal activity reflected that individual's livelihood.49 The guidelines were to provide "certainty and fairness in sentencing" and were to reduce "unwarranted sentence disparities."50 The guidelines were to "reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."51 The other provisions of § 994 pertain to additional factors for the Commission to consider in promulgating its guidelines.52

Thus, with the passage of the Sentencing Reform Act of 1984, Congress expressed an intent to combat "the tripartite problems of disparity, dishonesty, and . . . excessive leniency"53 and to establish a uniform system of criminal punishment based on traditional goals of retribution, incapacitation, deterrence, and rehabilitation. Despite the goal of uniformity, Congress also expressed a desire that the sentencing of any federal convict remain an individualized decision with an appropriate level of judicial discretion. To this end, Congress cre-

45 See also Nagel, supra note 20, at 903–05.
47 Id. § 994(b)(2) (excepting that "if the minimum term of the range is 30 years or more, the maximum may be life imprisonment").
48 Id. § 994(c)(1)–(7).
49 Id. § 994(d)(1)–(11).
50 Id. § 994(f).
51 Id. § 994(m).
52 See id. § 994.
53 Nagel, supra note 20, at 883.
ated the U.S. Sentencing Commission and directed it to provide courts guidelines with relatively narrow ranges to guide the exercise of sentencing discretion.

C. Effect of the Sentencing Guidelines

On April 13, 1987, the U.S. Sentencing Commission presented Congress with its proposed sentencing guidelines.\(^{54}\) Congress had six months to propose changes in the sentencing guidelines but made no such proposals, and so the Guidelines took effect on November 1, 1987.\(^{55}\) In defining the Commission’s statutory mission, the *U.S. Sentencing Guidelines Manual* relates that the Act provides instruction to the Commission in developing a rational federal sentencing process, “the most important of which directs the Commission to create categories of offense behavior and offender characteristics.”\(^{56}\) The primary purpose of the *Manual*, then, is to set forth the appropriate categories of offenses and offenders for a sentencing judge to consider. Categorization of the offender and the offense yields a guideline range of prescribed penalty.\(^{57}\)

Section 3553(b) of title 18 requires the court to sentence an offender within the prescribed range unless “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”\(^{58}\) The *Sentencing Manual* notes the appellate consequences for such a departure:

If . . . a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742.\(^{59}\)

This structure provides some incentive to remain within the statutory range prescribed by the guidelines. Presumably a court accepts the burden of justification and increased appellate review only upon truly


\(^{55}\) Id. For a critical analysis of the efficacy of the Sentencing Guidelines in following Congress’s statutory guidance, see Ogletree, *supra* note 43.

\(^{56}\) *U.S. Sentencing Guidelines Manual* § 1A.2.

\(^{57}\) Id.


atypical circumstances. The burden of justification and the divergent standards of review enhance the limits on judicial discretion in implementing the guidelines.

The Manual recognizes, to an extent, the element of artificiality in characterizing offenses and offenders: "There is a tension . . . between the mandate of uniformity and the mandate of proportionality. Simple uniformity—sentencing every offender to five years—destroys proportionality." At the same time, attempting to design a "sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect." The Manual notes that "revert to the simple, broad category approach" would have eliminated the difficulty of determining which factors should be relevant to an offense and offender's categorization, but would have violated the very purposes of the Sentencing Reform Act. The Commission chose instead to "balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the dis-

60 For a discussion of the early willingness of judges to depart from the guidelines, see Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines, 76 Notre Dame L. Rev. 21 (2000). Professor Berman noted that,

early decisions which countenanced the exercise of departure authority were in a decided minority. Most district courts reasoned that "valid departures are likely to be few in number," since the Sentencing Commission "already considered all but the most esoteric factors." Reflecting the views of many colleagues, one sentencing judge concluded that "[i]t is clear . . . that the Sentencing Commission intended to leave the departure window open only a crack." The courts of appeals often validated this perspective through rulings that suggested that the Commission's "heartlands" were large and left little room for departures. In particular, many circuits strictly construed the Guidelines' instructions that most offender characteristics are "not ordinarily relevant" and disallowed departure on these grounds in all but the most exceptional circumstances.

Id. at 54-55 (footnotes omitted) (collecting cases to support these conclusions); see also infra note 132.


62 Id. The Manual further relates, "The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless." Id. The Manual also suggests that "the greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." Id.
cretionary powers of the sentencing court. The Commission therefore recognizes that it forecloses some of the contextual proportionality factors that might have influenced a sentencing court pre-guidelines but forecloses that deliberation purposefully in light of the countervailing considerations of uniformity.

1. An Explanation

Certainly an exhaustive review of the Sentencing Guidelines is beyond the scope of this Note, but an explanation of the basic structure is necessary for an analysis of its constitutionality under Apprendi. As discussed above, the Guidelines provide for a range of penalties appropriate to an individual offender's conviction. Section 1B1.1 provides the general instructions for application of the Guidelines.

Upon conviction for or a guilty plea to a single offense, the sentencing court must first determine the appropriate offense guideline section in Chapter 2. The appropriate offense guideline section (determined from the statutory index) yields a base offense level and describes specific offense characteristics that might increase or decrease the level. Specific offense characteristics include criminal results, degree of bodily injury, and extent of financial injury, to name only a few. The offense guideline section also provides cross-references and special instructions. The sentencing court must adjust the base level for circumstances related to the victim, the role of the offender in the commission of the crime, and obstruction of justice. If the defendant has clearly accepted responsibility for the offense, the level is decreased. After following subsections 1B1.1(a) through (e), the sentencing court has established the level of the offense.

The sentencing court must next categorize the offender. First, the court must establish the defendant's criminal history category in

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64 Id.
65 See supra notes 46–64 and accompanying text.
67 Sentencing on multiple counts of conviction is determined in a similar matter—the level for each offense is determined by applying subsections 1B1.1(a) through (c) for each count and then the counts are grouped with appropriate adjustments under section 3D. See id. § 1B1.1(d); see also id. § 3D.
68 See id. § 1B1.1(a); see also id. § 1B1.2; id. § 2; id. app. A.
69 See id. § 2.
70 See id. § 1B1.1(b); see also, e.g., id. § 2A4.1.
71 See id. § 1B1.1(c); see also id. §§ 3A–C.
72 See id. § 1B1.1(e); see also id. § 3E. Further adjustment may be made for cooperation in the government investigation or prosecution. See id.
section 4A. The court must next adjust that category for any applicable reasons set forth in section 4B, which refers to career offenders and criminal livelihood. The total determined points equals the criminal history category of the offender.

The sentencing court then applies the criminal history category and the offense level to the sentencing table contained in section 5A to determine the applicable probation and imprisonment guideline range. The court has discretion to sentence within the range provided. Further sentencing requirements and options for probation, imprisonment, supervision, fines, and restitution are provided in sections 5B through G. Finally, the court is directed to refer to sections 5H and K for policy statements regarding specific offender characteristics and departures that warrant consideration in sentencing.

2. An Application

The effect of the Sentencing Guidelines may best be seen through an example. Posit John Doe, an ex-con, who abducts a member of Congress for publicity and ransoms the Congressman for one million dollars, releasing him eight days after the abduction. Doe used no dangerous weapons in the abduction, and the Congressman was not injured. Doe pled guilty to violating 18 U.S.C. § 351(b) three days before trial and truthfully admitted the commission of the offense. Twenty years ago, Doe was convicted of armed robbery and served four years.
Doe must be sentenced for a violation of § 351(b). The statute provides for imprisonment for any term of years or for life when the victim of the abduction does not die—a rather broad statutory maximum. The Sentencing Guidelines restrict judicial discretion within this statutory maximum.

In sentencing Doe under the Guidelines, the court must first determine the applicable offense guideline. In the Statutory Index (Appendix A), 18 U.S.C. § 351(b) references two applicable offense guidelines: section 2A1.1 and section 2A4.1. Commentary to section 1B1.2 provides that when the Statutory Index provides more than one offense guideline, "the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted." Here, the offense conduct was kidnapping. Section 2A1.1 of the Guidelines pertains to homicide; section 2A4.1 of the Guidelines pertains to kidnapping. The court must select section 2A4.1 as the applicable offense guideline section.

Having selected the applicable offense guideline, the court must next determine the level of the offense. Section 2A4.1 establishes the base offense level as 24. Section 2A4.1 provides several specific offense characteristic factors as well. If a ransom demand is made, the level increases by 6. Here, Doe demanded one million dollars and therefore the offense level increases to 30. Also, if the victim is not released within seven days, the level increases by 1. Because Doe did not release the Congressman until eight days passed, the level of the offense increases to 31. The cross reference pertains to killing of the victim and does not apply. Thus, section 2A4.1 establishes an offense level of 31 prior to adjustment.

Next the sentencing court must make appropriate adjustments based on victim characteristics, role of the offender in the crime, and obstruction of justice. Section 3A1.2 provides for an increase by 3

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82 Id. § 351(b).
83 See U.S. Sentencing Guidelines Manual § 1B1.1(a). For simplicity of reference, this section will refer to the court as responsible for the determination of the Guidelines' application. In practice, the probation and defense attorneys may negotiate the computation with the court ultimately ratifying it.
84 Id. app. A.
85 Id. § 1B1.2 cmt. n.1.
86 See id. § 1B1.1(b)–(e).
87 Id. § 2A4.1(a).
88 Id. § 2A4.1(b)(1).
89 Id. § 2A4.1(b)(4)(B).
90 See id. § 2A4.1(c).
91 See id. § 1B1.1(c); see also §§ 3A–C.
levels if the victim was a government officer. Here, the Congress-
man is clearly a government officer, and Doe's offense level increases
to 34. Although section 3A1.3 provides for an adjustment increase
when the victim was physically restrained, the Commentary to that sec-
tion specifically provides that the adjustment does not apply to of-
fenses covered by section 2A4.1, the offense category applicable to
Doe. The remaining victim-related adjustments—hate crime motiva-
tion or vulnerable victim—do not apply to Doe's offense. Nor do
any of the role adjustments apply. Furthermore, Doe did not inter-
fere with the investigation or prosecution of the crime or risk human
life in fleeing law enforcement, and therefore no adjustments are ap-
propriate under section 3C1. After section 1B1.1(c) adjustments,
the offense level stands at 34.

The court must next make any adjustments required by the of-
fender's acceptance of responsibility. Doe pled guilty to a violation
of 18 U.S.C. § 351(b) three days before trial and truthfully admitted
the conduct of the offense. Under section 3E1.1(a), Doe is entitled to
a two-level decrease because he has demonstrated "acceptance of re-
sponsibility for his offense." While Doe may contend that he is enti-
tled to an additional one-level decrease under section 3E1.1(b)(2), his
acceptance of the plea bargain three days before the trial likely has
not saved the government time and expense in preparing for trial,
and consequently he is likely not entitled to the additional one-level
decrease. Doe's offense level after all adjustments thus stands at 32.

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92 Id. § 3A1.2(a).
93 Id. § 3A1.3, cmt. 2.
94 See id. § 3A1.1.
95 See id. § 3B1.1–4. Doe was the sole criminal actor in no position of trust, and
he possessed no special skills. The adjustments for an aggravating role require addi-
tional participants in the criminal activity, abuse of a trust position, or use of a special
skill. See id. § 3B1.1.
96 See id. § 3C1.
97 See id. § 1B1.1(e).
98 Id. § 3E1.1(a); see also id. § 3E1.1, cmt. n.3.
99 See id. § 3E1.1(b)(2). The Commentary states,
In general, the conduct qualifying for a decrease in offense level under sub-
section (b)(1) or (2) will occur particularly early in the case. For example,
to qualify under subsection (b)(2), the defendant must have notified authori-
ties of his intention to enter a plea of guilty at a sufficiently early point in
the process so that the government may avoid preparing for trial and the
court may schedule its calendar effectively.

Id., cmt. n.6. Three days is likely not sufficient time for the government to avoid
preparing for trial or for the court to effectively schedule its calendar. See, e.g.,
United States v. Smith, 245 F.3d 538, 547 (6th Cir. 2001) (entering guilty plea five
days before trial was not timely for purposes of section 3E1.1(b) adjustment).
Having determined the offense level, the sentencing court next must determine the criminal history category factor. Doe has a criminal record and served four years on a conviction twenty years ago. Section 4A1.1 directs the sentencing court to “[a]dd 3 points for each prior sentence of imprisonment exceeding one year and one month.” The Sentencing Guidelines further define prior convictions as “any sentence previously imposed.” Prior sentences of imprisonment are counted if they were imposed within fifteen years of the commencement of the offense at hand or if the offender was incarcerated during any portion of the previous fifteen years. Sentences outside that timeframe are not counted. Here, Doe committed the crime twenty years after being sentenced to prison for armed robbery and sixteen years after his release. Thus, his prior conviction will not be counted for the purposes of section 4A1.1. The career offender and criminal livelihood provisions of section 4B1 similarly do not apply, and so Doe will have zero criminal history points.

Section 1B1.1(g) requires the sentencing court to determine the appropriate guideline range according to the sentencing table provided in section 5A, based on the previously determined offense level and criminal history category. Applying an offense level of 32 and a criminal history category of I (based on zero criminal history points) yields a Zone D statutory range of 121 to 151 months of imprisonment (or ten years, one month to twelve years, seven months of imprisonment). This range clearly restricts the judicial discretion provided for in 18 U.S.C § 351(b).

Should the sentencing court have concerns that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described,” the court may undertake an upward or downward departure from the guidelines. Here, Doe abducted a federal elected official. Possibly the disruption of the federal government and

100 See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(f).
101 Id. § 4A1.1(a).
102 Id. § 4A1.2(a)(1).
103 Id. § 4A1.2(e)(1).
104 Id. § 4A1.2(e)(3).
105 See id.; see also id. § 4A1.1, cmt. n.1.
106 See id. § 4B1.
107 See id. § 1B1.1(g).
108 See id. § 5A.
110 Id. § 3553(b).
the public's deprivation of one of its elected representatives warrants an upward departure. Then again, the Commentary to section 3A1.2 regarding official victims discusses the appropriateness of an upward departure for victimization of a "high-level official, e.g., the President and Vice President"; perhaps victimization of a single Congresswoman does not rise to the level of severity required for an upward departure. Should the court choose to impose an upward departure, it must articulate its reasons for so doing, and its departure is subject to appellate review on grounds of reasonableness. If the court declines to depart from the statutory range and sentences the defendant to, say, eleven years, the court is effectively subject only to appellate review on the correctness of its application of the Sentencing Guidelines.

D. Notable Features of the Sentencing Guidelines

Having explained and applied a sentencing determination under the Guidelines, it is appropriate to discuss in greater detail several of the features of the Guidelines that may bear upon the constitutionality of sentencing under them. Several of these features are set forth in the Manual's "Introduction" to the Sentencing Guidelines.

1. The Virtues of a Charge Offense System

The Sentencing Commission reports that, in devising the guidelines, it deliberated on the comparative virtues of a charge offense system and a real offense system. A charge offense system emphasizes the conduct that constitutes the elements of the offense while a real offense system emphasizes the conduct in which the defendant engaged. The example the Guidelines Manual provides is informative:

111 See U.S. SENTENCING GUIDELINES MANUAL § 3A1.2, cmt. n.2 ("Certain high-level officials, e.g., the President and Vice President, although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted.").

112 Id. (emphasis added). This recommendation represents a guided departure. See id. § 1A4(b) (discussing guided and unguided departures).

113 See 18 U.S.C. § 3553(c)(2).

114 See id. § 3742(c)(3).

115 See id. § 3742(a)(2). An appellate court may also review whether the sentence "was imposed in violation of the law." Id. § 3742(a)(1).

116 U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A.

117 Id. § 1A4(a).

118 Id.
A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.\textsuperscript{119}

Presumably sentencing under a real offense system might warrant additional punishment because the additional harms are considered in sentencing. The \textit{Guidelines Manual} describes the pre-guidelines sentencing system as a real offense system: "[t]he sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer."\textsuperscript{120} The Commission initially attempted to develop a real offense system, but ultimately abandoned those efforts after it "found no practical way to combine and account for the large number of diverse harms arising in different circumstances" and no "practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases."\textsuperscript{121}

The Commission instead "moved closer to a charge offense system."\textsuperscript{122} The system devised by the Commission incorporates real offense elements, however. First, the applicable offense categories are generic and reflective of actual conduct, rather than described in purely statutory language, given the "overlapping and duplicative" provisions of federal criminal law.\textsuperscript{123} Second, the usage of alternative base offense levels, specific offense characteristics, cross references, and adjustments "take[s] account of a number of important, commonly occurring real offense elements."\textsuperscript{124} Thus, the Commission based the Guidelines on a charge offense system for reasons of practicality and simplicity, but refined the Guidelines by implementing elements of a real offense system.

\begin{itemize}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.; see also Ogletree, supra note 43, at 1949 (noting that the proposed guidelines based on a real offense system were "widely criticized on the grounds that they were inflexible, probably unconstitutional, difficult to administer, and overly harsh compared to existing sentencing practices").}
\item \textsuperscript{122} U.S. \textit{SENTENCING GUIDELINES MANUAL} § 1A4(a).
\item \textsuperscript{123} \textit{Id.; see also id. ch. 2, introductory cmt.}
\item \textsuperscript{124} \textit{Id.} § 1A4(a) (noting real offense characteristics such as "role in the offense, the presence of a gun, or the amount of money actually taken").
\end{itemize}
2. Adjustments and Departures

In sentencing defendants, courts must make appropriate adjustments under the Guidelines on the basis of offense characteristics and may depart from the guideline ranges if the court determines that the Commission did not adequately consider an aggravating or mitigating circumstance in formulating the Guidelines. The adjustments and the departures require the sentencing court to consider real offense elements of the conviction.

When conduct relevant to adjustments under the guidelines is in dispute, the court must give the parties an opportunity to present information regarding that conduct and must resolve the dispute at the sentencing hearing. The Commentary to section 6A1.3 relates that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." Disputed relevant offense characteristics that form the basis for required sentencing adjustments are thus to be proven to the judge under the preponderance standard.

Departures, on the other hand, may be warranted when the court finds atypical aggravating or mitigating circumstances not adequately considered by the guidelines. The Commission developed the guidelines with a generic offense in mind and expected courts to depart from the guidelines when the specific offense was not appropriately described:

[t]he Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

125 See id. § 1B1.1(b)-(e).
127 For example, in the hypothetical sentencing in Part I.C.2, did the defendant demand a ransom?
128 U.S. SENTENCING GUIDELINES MANUAL § 6A1.3.
129 Id., cmt. But see Hutchison et al., supra note 6, § 6A1.3 cmt. f(6), at 1528-33 (discussing the continued validity of this statement after Apprendi v. New Jersey, 530 U.S. 466 (2000)).
130 18 U.S.C. § 3553(b); see also U.S. SENTENCING GUIDELINES MANUAL §§ 1A4(b), 1B1.1(i).
131 U.S. SENTENCING GUIDELINES MANUAL § 1A4(b).
Offenses outside the heartland of the applicable guideline offenses may thus warrant departure from the guideline ranges because the crime is not adequately described by the Guidelines.  

The Commission envisions two types of departures: guided and unguided. Guided departures result from "instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions." Section 4A1.3 provides for departures based on criminal history not accurately reflected in criminal history points. Other miscellaneous departure suggestions are located within the offense guidelines. On the other hand, an unguided departure has not been specifically considered by the Commission: "[i]t may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines." Chapter Five, Part K provides policy statements discussing the appropriateness of departures based on factors ranging from substantial assistance to authorities to dismissed and uncharged conduct. Similar to adjustments, the Commission has stated that it believes the judge under a preponderance standard may resolve disputes regarding the grounds justifying a departure. In sum, the adjustments and departures require judicial factfinding after conviction.

132 A plentiful amount of judicial and scholarly debate surrounds departure jurisprudence and is beyond the scope of this Note. See, e.g., Koon v. United States, 518 U.S. 81 (1996); Berman, supra note 60; Frank O. Bowman, III, Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline, 29 STETSON L. REV. 7 (1999); Michael Goldsmith & Marcus Porter, Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures, 69 GEO. WASH. L. REV. 57 (2000).

133 U.S. SENTENCING GUIDELINES MANUAL § 1A4(b).

134 Id. An example of a guided departure was previously provided in Part I.C.2. See supra notes 110–14 and accompanying text.

135 U.S. SENTENCING GUIDELINES MANUAL § 4A1.3. Hutchison and his co-authors point out that a guided section 4A1.3 departure warrants an increase on the horizontal axis of the sentencing table while unguided departures under section 5K2.0 are "not tied to specified increases or decreases to other levels in the sentencing grid. Rather, such departures are limited only by any maximums or minimums imposed by the statutes of conviction and by the appellate review standard of reasonableness." Hutchison ET AL., supra note 6, § 10.4, at 1701.

136 See Hutchison ET AL., supra note 6, § 10.4(a), at 1700–01.

137 U.S. SENTENCING GUIDELINES MANUAL § 1A4(b).

138 See id. §§ 5K1.1–5K2.21.

E. The Apprendi Challenge

As discussed, the adjustments and departures modify the charge offense structure of the Guidelines based on real offense factors. The judge typically finds these factors at sentencing on a preponderance standard, and these factors can increase the level of punishment for the conviction. In the wake of *Apprendi v. New Jersey*,140 this aspect of the Guidelines has come under some constitutional challenge. In *Apprendi*, the Court held that only a jury could find under a reasonable doubt standard a factor that increased the offender's punishment beyond the statutory maximum.141 Commentators have characterized the rationale of *Apprendi*, however, as standing for the broader proposition that "it is wrong to convict a person of one crime and impose punishment for another."142 This broader proposition might require any factor that increased the offender's punishment to be charged against the defendant and decided by a jury under a reasonable doubt standard. Such a broad reading of the *Apprendi* rationale implicates the constitutionality of the relevant characteristics, adjustment, and departure provisions of the Sentencing Guidelines. Under the Guidelines, a judge determines the relevant factors under a preponderance of the evidence standard at sentencing, and those determinations could lead to an increased sentence (above the statutory minimum). While two of the Court's recent decisions, *Ring v. Arizona*143 and *Harris v. United States*,144 help illuminate the extent of the *Apprendi* holding, they do not conclusively resolve the potential conflict of *Apprendi* and sentencing under the Guidelines.145 The *Apprendi* decision must therefore be examined in detail.

II. How Broad Is the Holding of *Apprendi v. New Jersey*?

The Supreme Court decided *Apprendi v. New Jersey* on June 26, 2000.146 Since that decision, the question of the import of *Apprendi* on the constitutionality of the U.S. Sentencing Guidelines has arisen.147 The question is prompted by a perceived disjunction be-

140 530 U.S. 466 (2000).
141 Id. at 490.
143 536 U.S. 584 (2002).
144 536 U.S. 545 (2002).
145 See infra Part III.A.
146 *Apprendi*, 530 U.S. at 466.
tween the stated holding of *Apprendi* and its central rationale.\textsuperscript{148} Indeed, the various concurring and dissenting opinions of *Apprendi* prompt the question.\textsuperscript{149} The *Apprendi* opinions are best understood in light of the decision's relevant precedent.

**A. The Relevant Precedent of Apprendi**

1. *In re Winship* and the Due Process Constitutional Standard

In 1970, the Supreme Court held that every element of a crime must be proven to a jury beyond reasonable doubt.\textsuperscript{150} More specifically, the Court stated that "every fact necessary to constitute the crime" must be proved under the reasonable doubt standard.\textsuperscript{151} The court reasoned that such a requirement played a "vital role" in the criminal justice system: "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."\textsuperscript{152} The Court went to some length to ensure the interpretation of its decision:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.\textsuperscript{153}

Thus, the Court stated for the first time that the Constitution required the reasonable doubt standard of proof.

Only Justice Black dissented as to the necessity of proof beyond a reasonable doubt.\textsuperscript{154} Relying on his interpretation of total—and literal—incorporation, Justice Black rejected the majority's constitutional assertion of the reasonable doubt standard:

> The Bill of Rights, which in my view is made fully applicable to the States by the Fourteenth Amendment . . . does by express language provide for, among other things, a right to counsel in criminal tri-

\textsuperscript{148} See Chemerinsky, *supra* note 142, at 104.

\textsuperscript{149} *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring); *id.* at 523 & n.11 (Thomas, J., concurring); *id.* at 523–54 (O'Connor, J., dissenting); *id.* at 555 (Breyer, J., dissenting).


\textsuperscript{151} *Id.*

\textsuperscript{152} *Id.* at 363–64.

\textsuperscript{153} *Id.* at 364.

\textsuperscript{154} *Id.* at 377 (Black, J., dissenting).
A QUESTION FOR ANOTHER DAY

A QUESTION FOR ANOTHER DAY

als, a right to indictment, and the right of a defendant to be informed of the nature of the charges against him. And in two places the Constitution provides for trial by jury, but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt.155

Although Chief Justice Burger and Justice Stewart also dissented, their concerns pertained to the narrower holding in Winship—that the constitutional standard applied to juvenile proceedings.156 Thus, despite its dissents, Winship stands for the principle that the Constitution requires proof beyond a reasonable doubt of every fact constituting an element of an offense. Given such a standard, the subsequent Supreme Court cases wrestle with who carries what burdens of proof and what constitutes an element of an offense.157

2. Mullaney v. Wilbur and the Prosecution’s Burden

In Mullaney v. Wilbur,158 a statutory scheme effectively required a defendant to prove by a preponderance of evidence provocation upon heat of passion in order to reduce a felonious murder conviction to manslaughter.159 The Court held that the prosecution was required to carry the burden of proof as to the absence of heat of passion.160 Acknowledging that proving a negative might be difficult for the prosecution, the Court stated that, “to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.”161 Mullaney stands for the proposition that the prosecution must carry the burden of proof beyond a reasonable doubt as to every factual element of the offense. A fortiori, a statutory scheme cannot shift the burden of proof as to an element of the offense.

155 Id. (Black, J., dissenting). Justice Black further noted, “As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.” Id. at 378 (Black, J., dissenting). While proof beyond a reasonable doubt has become firmly entrenched in modern constitutional criminal traditions, it is interesting to reflect upon this historic voice of dissent. If Justice Black had the better argument in Winship, the constitutionality of adjustments and departures under the Sentencing Guidelines becomes less significant.
156 See id. at 375–76 (Burger, C.J., dissenting).
157 Hailed as “one of the most important U.S. Supreme Court decisions in years,” Chemerinsky, supra note 142, at 102, Apprendi, at its most basic level, is merely one of a line of decisions defining what constitutes an element of an offense.
159 Id. at 684–85.
160 Id. at 704.
161 Id. at 703–04.

Although *Mullaney* establishes that the prosecution must carry the burden of proof as to every element of the offense,162 *Patterson v. New York*163 clarifies that defendants carry the burden of proof as to affirmative defenses.164 New York required a defendant charged with murder to prove by a preponderance of evidence that he acted under extreme emotional disturbance and was instead guilty of manslaughter. The Court explained that due process did not require the prosecution to disprove the existence of that factor:

Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.165

Thus, *Mullaney* did not require the prosecution to carry a reasonable doubt standard as to all relevant facts—only those constituting an element of the offense. Absence of an affirmative defense was not an element of the offense and the state was not required to describe it as such.166

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162 *See supra* Part II.A.2.
164 *Id.* at 210.
165 *Id.* The Court also made the following comment in a footnote which bears some relevance to the extent of the *Apprendi* decision:

There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting “the degree of criminal culpability.” . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system. . . .

The Court did not intend *Mullaney* to have such far-reaching effect.

*Id.* at 214 n.15 (citations omitted). The Court was not referring to sentencing reform—it specifically mentioned changes to the burdens of proof on the felony-murder rule and sentencing reform that occurred post-*Patterson*—but the limits of *Mullaney* are clearly referenced in this footnote.

166 In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court suggested that “*Patterson* teaches that we should hesitate to conclude that due process bars the State from

In *McMillan v. Pennsylvania*, the Court upheld the use of "sentence factors," proved by a preponderance of evidence to the court at sentencing, to create mandatory minimum sentences. Defendants brought a due process challenge to the Pennsylvania Mandatory Minimum Act and its imposition of a mandatory sentence if a person "visibly possessed a firearm" during the offense of conviction because the Act effectively increased their sentences (within the statutory range for their convictions) based on a fact not proven to the jury beyond a reasonable doubt.

Noting that the state could have made, but chose not to make, visible possession of a firearm an element of the offense, the Court proceeded under *Patterson*. In reaffirming the power of the state to define its criminal offenses, the Court recognized the existence of constitutional limits, but stated,

> While we have never attempted to define precisely the constitutional limits noted in *Patterson*, i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today, we are persuaded by several factors that Pennsylvania’s Mandatory Minimum Sentencing Act does not exceed those limits.

The Court upheld the sentencing factor system because the Mandatory Minimum Act created no presumptions nor relieved the prosecution of its burden of proving guilt. The Court concluded its *Mullaney* and *Patterson* discussion by stating,

> The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm. Pennsylvania’s decision to do so has not transformed against its will a sentencing factor into an “element” of some hypothetical “offense.”

pursuing its chosen course in the area of defining crimes and prescribing penalties.”

*Id.* at 86.

167 *Id.* at 79.

168 *Id.* at 91–92.

169 *Id.* at 84.

170 *Id.* at 85–86.

171 *Id.* at 86.

172 *Id.* at 87.

173 *Id.* at 89–90.
Additional considerations of the Court bear some repetition. In response to the defendants’ subsidiary challenge that due process required proof beyond the preponderance standard, the Court stated, “Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania’s scheme that would warrant constitutionalizing burdens of proof at sentencing.” In response to the defendants’ claim that they were effectively denied a jury trial the Court quickly determined, “Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” These comments indicate that a sentencing court may find facts relevant only to sentencing based on a preponderance standard and will not violate due process or the right to a jury trial by so doing.

Because Justice Stevens authored the majority opinion in Apprendi, his dissent in McMillan warrants some consideration. Justice Stevens rejected the majority’s conclusion that the visible possession of the firearm was not an element of the offense:

Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, I believe that the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.

Justice Stevens reasoned that if a factor “shall give rise both to a special stigma and to a special punishment, that component must be treated as a ‘fact necessary to constitute the crime’” governed by the proof beyond a reasonable doubt standard of In re Winship.

Under Justice Stevens’s reasoning, sentencing factors that create a special stigma and lead to special punishment constitute elements of the offense.
5. *Jones v. United States* and Increasing the Statutory Maximum

One year prior to *Apprendi*, the Court suggested in *Jones v. United States* that any factor beyond recidivism that increases the statutory maximum penalty for a crime must be proved beyond a reasonable doubt to a jury. Justice Kennedy dissented, joined by the Chief Justice, and Justices O'Connor and Breyer. The Court began its discussion with statutory analysis that characterized the offense statute as actually providing three separate offenses with individual elements rather than one substantive offense with statutory maximums based on sentencing factors. Because the majority construed the statute as effectively providing three separate offenses with distinct elements, the elements specific to each offense had to be charged in an indictment, proven beyond reasonable doubt, and submitted to a jury. Before reaching this conclusion, the majority emphasized the role of juries. Nonetheless, the majority concluded with this statement:

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."

180 Id. at 227 (5-4 decision).

181 The Court had previously affirmed the constitutionality of sentencing increases based on prior criminal convictions not charged in the indictment of the present offense. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (5-4 decision). In *Almendarez-Torres*, the Court reasoned that recidivism was a traditional basis for increasing punishment, that Congress had the authority to authorize a longer sentence for recidivism, and that such a statutory scheme did not create significantly great unfairness. *Id.* at 243-46.

182 *Jones*, 526 U.S. at 243 n.6 (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).


185 *Jones*, 526 U.S. at 251-52.

186 Id. at 242-48. The Court concluded, “[D]iminishment of the jury’s significance by removing control over facts determining a statutory sentencing range would
It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.\textsuperscript{187}

The Court thus foreshadowed the \textit{Apprendi} controversy.

\textbf{B. The \textit{Apprendi} Opinions}

The Court decided \textit{Apprendi} five to four.\textsuperscript{188} It fractured along what might be considered non-ideological lines: Justice Stevens wrote the majority opinion, and Justices Scalia, Souter, Thomas, and Ginsburg joined in that opinion; Justice Scalia wrote a separate concurring opinion; Justice Thomas also wrote a concurring opinion, in which Justice Scalia joined as to Parts I and II; Justice O'Connor filed a dissent; Chief Justice Rehnquist, and Justices Kennedy and Breyer joined her dissent, and Justice Breyer also filed a separate dissenting opinion, in which Chief Justice Rehnquist joined.\textsuperscript{189} The factual and procedural background of \textit{Apprendi} and the five opinions are examined separately below.

1. The Facts and Procedural History of \textit{Apprendi}

In 1994, an African-American family moved into a previously all-white neighborhood in Vineland, New Jersey.\textsuperscript{190} On December 22, 1994, at 2:04 A.M., several .22 caliber shots were fired into the family's home.\textsuperscript{191} Police arrested Charles C. Apprendi, Jr., almost immediately, and at 3:05 A.M., Apprendi admitted that he had fired the shots.\textsuperscript{192} Three hours later, at 6:04 A.M., Apprendi admitted to an interrogating officer that "because they are black in color he does not want them in the neighborhood."\textsuperscript{193}

A grand jury charged Apprendi with twenty-three offenses of differing degrees.\textsuperscript{194} The charges alleged shootings on four different

\textsuperscript{187} Id.
\textsuperscript{188} \textit{Apprendi} v. New Jersey, 530 U.S. 466, 468 (2000).
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 469.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
dates and the unlawful possession of various weapons.\textsuperscript{195} No charges alleged that Apprendi acted with a racially biased purpose, and no charges referred to New Jersey's hate crimes statute.\textsuperscript{196}

Apprendi pled guilty to two counts of second-degree unlawful firearm possession and one count of third-degree unlawful antipersonnel bomb possession.\textsuperscript{197} The prosecutor dismissed the grand jury's twenty other counts.\textsuperscript{198} In addition, the prosecutor reserved the right to request the sentencing court to impose an "enhanced" sentence under New Jersey's hate crimes statute\textsuperscript{199} for the charge stemming from the December 22 shooting, on the ground that the shooting was racially biased.\textsuperscript{200} The defense reserved the right to contest such an enhancement as unconstitutional.\textsuperscript{201}

At a plea hearing, the trial court explained the maximum sentences and accepted the three guilty pleas.\textsuperscript{202} The prosecution then moved for sentence enhancement under the hate crimes statute for the charge relating to the December 22 shooting.\textsuperscript{203} Without enhancement, Apprendi was subject to a ten-year maximum sentence on the shooting count; with enhancement, Apprendi was subject to a ten-year minimum and twenty-year maximum sentence on that count.\textsuperscript{204}

At an evidentiary hearing on Apprendi's "purpose" for committing the December 22 shooting, the prosecution presented police officer testimony of Apprendi's interrogation, in which he confessed to have acted "because they are black in color."\textsuperscript{205} The defense presented psychological and character evidence that Apprendi did not have a reputation for racial bias.\textsuperscript{206} Apprendi himself testified and explained that the shooting was alcohol-induced and that the police officer's testimony did not accurately describe his statement.\textsuperscript{207} The trial court found the prosecution's evidence more credible and found "that the crime was motivated by a racial bias."\textsuperscript{208} The court
then sentenced Apprendi to twelve years on the shooting charge and to shorter concurrent sentences on the remaining two charges.209

Apprendi challenged his sentence on grounds of unconstitutionality. Relying upon In re Winship, he argued that the Due Process Clause required a jury to find beyond reasonable doubt the bias that supported his sentence enhancement.210 A divided New Jersey Appellate Court upheld the constitutionality of the enhancement, terming it a "sentencing factor" and finding it within the boundaries of McMillan v. Pennsylvania.211

The New Jersey Supreme Court affirmed.212 The New Jersey Supreme Court noted that placement of a criminal component within sentencing provisions did not necessarily mean that the component was not an element of the offense.213 The state supreme court nonetheless decided that the hate crimes enhancer was valid under McMillan and Almendarez-Torres v. United States,214 because the enhancer did not impermissibly shift burdens and did not "‘create a separate offense calling for a separate penalty.’"215 The dissent found the enhancer unconstitutional because the purpose behind the defendant's action related to a mental state and "‘must be characterized as an element’" of the crime.216 The dissent also noted that because the finding of the racially biased purpose significantly increased the penalty range, it should have been treated as an element of the offense.217 The dissent concluded that "‘there can be little doubt that the sentencing factor applied to this defendant—the purpose to intimidate a victim because of race—must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt.’"218 The Supreme Court granted certiorari219 and reversed.220

209 Id.
210 Id.
213 Apprendi, 530 U.S. at 472; see Apprendi, 731 A.2d at 492.
215 Apprendi, 530 U.S. at 473 (quoting Apprendi, 731 A.2d at 494).
216 Id. (quoting Apprendi, 731 A.2d at 498).
217 Id. (quoting Apprendi, 731 A.2d at 498).
218 Id. at 474 (quoting Apprendi, 731 A.2d at 512).
220 Apprendi, 530 U.S. at 474.
2. The Majority Opinion

The majority held New Jersey's hate crimes sentencing enhancer unconstitutional. The Court began its analysis by asking whether Apprendi had a constitutional right to have a jury find racial bias under the proof beyond a reasonable doubt standard, and suggested that the answer was foreshadowed in Jones v. United States: "under the Due Process Clause . . . any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The majority thus framed the issue as a challenge to the criminal defendant's well-established rights to jury trial and proof beyond a reasonable doubt.

The Court examined the "novelty" of the New Jersey hate crimes enhancement scheme under historical verdict and sentencing procedures. Because application of the enhancer exposed the defendant to a greater penalty—an additional ten years—than the penalty prescribed for the crime of conviction—a maximum of ten years—the enhancement in effect became an element of the offense and required proof beyond a reasonable doubt to a jury. The Court held, "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."

In reaching this conclusion, the majority made several other comments relevant to the constitutionality of the Sentencing Guidelines. First, the Court generally affirmed judicial discretion in sentencing within statutory ranges:

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discre-

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221 Id. at 497.
222 Id. at 475–76.
223 Id. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).
224 Id. at 477–78.
225 Id. at 482–83. The Court noted that the McMillan "sentencing factors" decision did not protect the New Jersey statutory scheme because the Court in McMillan had noted constitutional limits to the state's authority to define away elements of the crime. Id. at 486. Particularly, the Court noted that facts kept from the jury that expose the defendant to greater punishment could raise constitutional problems. Id.
226 Id. at 490.
227 Id.
tion of this nature in imposing sentence within statutory limits in the individual case.\textsuperscript{228}

The Court thus indicated \textit{Apprendi}'s formal limit: sentences within the statutory range specified by the offense of conviction fall within the sentencing court's discretion. Second, in a footnote, the Court denied that it overruled \textit{McMillan v. Pennsylvania}, the case that allowed the court to decide "sentencing factors" under a preponderance standard:

The principal dissent accuses us of today "overruling \textit{McMillan}."] We do not overrule \textit{McMillan}. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the \textit{McMillan} opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on \textit{McMillan}, we reserve for another day the question whether stare decisis considerations preclude reconsideration of its narrower holding.\textsuperscript{229}

Thus, while the majority called into question the use of sentencing factors found by a judge upon a preponderance of evidence standard to increase a sentence within the statutory range, the Court had an opportunity to overrule \textit{McMillan} and did not do so.\textsuperscript{230}

Finally, the Court specifically rejected Justice O'Connor's suggestion in dissent that the Court's reasoning determined the unconstitutionality of the Sentencing Guidelines:

The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.\textsuperscript{231}

The majority thus declined to extend its reasoning to the Guidelines.

\textsuperscript{228} \textit{Id.} at 481 (citing \textit{Williams v. New York}, 337 U.S. 241, 246 (1949) (noting the trial court's historically wide discretion to sentence within the limits of the law)).

\textsuperscript{229} \textit{Id.} at 487 n.13 (internal citations omitted) (discussing \textit{McMillan v. Pennsylvania}, 477 U.S. 79 (1986)).

\textsuperscript{230} In \textit{Harris v. United States}, 536 U.S. 545 (2002), the Court explicitly declined to overrule \textit{McMillan}. See infra notes 317-33 and accompanying text.

\textsuperscript{231} \textit{Apprendi}, 530 U.S. at 497 n.21 (citing \textit{Edwards v. United States}, 523 U.S. 511, 515 (1998) (suggesting that the defendant might have statutory and constitutional claims if a sentence imposed under the Guidelines exceeds the statutory maximum because "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").
In sum, the Court held that New Jersey must have charged and proven racial bias to a jury beyond reasonable doubt in order to enhance Apprendi's sentence beyond the statutory maximum. In reaching this conclusion, the majority claimed that it did not overrule McMillan and that it had not decided the constitutionality of the Sentencing Guidelines.

3. Justice Scalia's Concurrence

Justice Scalia joined the majority opinion and also issued a separate concurrence "in response to Justice Breyer's dissent." Justice Scalia characterized Justice Breyer's dissent as one "prepared to leave criminal justice to the State." In response, Justice Scalia emphasized the fundamentality of the right to a jury trial:

the criminal will never get more punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens. In describing this process, Justice Scalia twice referred to the fact-finding function of the jury. First, he described the historic guarantee of jury-trial fact-finding as "the right to have a jury determine those facts that determine the maximum sentence the law allows." Three sentences later, Justice Scalia concluded that the constitutional guarantee "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Only Justice Scalia's second description questions the constitutionality of the Sentencing Guidelines. Justice Scalia suggested that "all the facts" that "subject the defendant to a legally prescribed punishment must be found by the jury." This category could include facts that determine adjustments and departures under the Sentencing Guidelines. Facts relevant to adjustments and departures do subject a defendant to prescribed punishment ranges under the Guidelines. Without a finding of such facts, the prescribed sentencing range (under the Guidelines) might be lower. Determination of facts relevant to adjustments and departures does not, however, subject the

232 Id. at 498 (Scalia, J., concurring).
233 Id. (Scalia, J., concurring).
234 Id. (Scalia, J., concurring).
235 Id. at 499 (Scalia, J., concurring).
236 Id. (Scalia, J., concurring).
237 Id. (Scalia, J., concurring).
defendant to increased punishment outside the statutory range for the offense of conviction. Justice Scalia’s concern for “facts” that “subject the defendant to a legally prescribed punishment” should therefore be read narrowly and in light of his first description of the factfinding function: the jury finds “those facts that determine the maximum sentence the law allows.”238 Although judicial fact finding under the Guidelines may subject the defendant to higher ranges under the Guidelines, the judge is not finding facts that subject the defendant to a higher statutory maximum. The jury has already found the facts that determine the statutory maximum; the judge finds facts that determine sentencing within that statutory range.

4. Justice Thomas’s Concurrence

Justice Thomas also wrote a separate concurrence, parts of which Justice Scalia joined. Justice Thomas urged the Court to adopt “a broader rule.”239 Noting that the definition of the elements of a crime determined the scope of the jury’s domain,240 Justice Thomas asserted that all facts determining punishment severity constituted elements of a crime: “[o]ne need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.”241 Justice Thomas justified this position on legal history. He concluded a seventeen-page historical survey by stating, “I simply note that this traditional understanding—that a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment—continued well into the 20th-century, at least until the middle of the century.”242 Justice Thomas then asserted that McMillan—in upholding sentencing factors—had broken with the past:

It is fair to say that McMillan began a revolution in the law regarding the definition of a “crime.” Today’s decision, far from being a sharp break with the past, marks nothing more than a return to the status

238 Id.
239 Id. (Thomas, J., concurring).
240 Id. at 499–500 (Thomas, J., concurring) (citing, inter alia, In re Winship, 397 U.S. 358, 364 (1970)).
241 Id. at 501 (Thomas, J., concurring). Justice Thomas also noted that “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment.” Id. (Thomas, J., concurring).
242 Id. at 518 (Thomas, J., concurring) (citing Knoll & Singer, supra note 183, at 1069–81).
Justice Thomas’s comments illustrate the disjunction between the *Ap
prendi* and *McMillan* decisions.

Indeed, in the next part of the concurrence, in which Justice Scalia did not join, Justice Thomas highlighted the consequences of his concurrence. Justice Thomas began the discussion by distin-
guishing, first, “what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punish-
ishment of the accused” from, second, “what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature’s ability to set broad ranges of punish-
ment.” Justice Thomas then expressly refused to consider the second category. The constitutionality of sentencing under the Guidelines falls most directly under this second category to the extent that adjustments and departures raise concerns about the imposition of punishment within the limits of entitlement. Although Justice Thomas expressly declined to address these constitutional constraints, aspects of his analysis of the first question—prosecutorial entitlement requirements—may, in fact, affect the Sentencing Guidelines.

Justice Thomas noted several consequences that emerged from his “common-law rule.” First, *Almendarez-Torres* was wrongly de-
cided. Because the defendant’s prior convictions were used as a basis to increase his sentence, those prior convictions should have been proven to the jury: “the fact of a prior conviction is an element in a recidivism statute.” Second, *McMillan* was wrongly decided: a state’s mandatory minimum entitled the government “to more than it would otherwise have been entitled.” By virtue of this entitlement,

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243 *Id.* (Thomas, J., concurring) *But see id.* at 527–28 (O’Connor, J., dissenting) (criticizing Justice Thomas’s historical justification for failure to cite cases prior to the Bill of Rights and noting that “there is a crucial disconnect between the historical evidence Justice Thomas cites and the proposition he seeks to establish with that evidence”).

244 *Id.* at 518 (Thomas, J., concurring).

245 *Id.* at 520 (Thomas, J., concurring).

246 *Id.* (Thomas, J., concurring).

247 *Id.* at 520–21 (Thomas, J., concurring) (noting the “error to which [he] succumbed” in joining Chief Justice Rehnquist, and Justices O’Connor, Kennedy, and Breyer to form a majority in *Almendarez-Torres*).

248 *Id.* at 521 (Thomas, J., concurring). Justice Thomas noted the special concern of jury prejudice that led to treating recidivism differently but noted that “this concern . . . does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction.” *Id.* (Thomas, J., concurring).

249 *Id.* at 522 (Thomas, J., concurring).
the fact underlying the mandatory minimum constituted an element of the crime.\textsuperscript{250} Third, Justice Thomas noted \textit{Apprendi}'s possible consequences for \textit{Walton v. Arizona}.\textsuperscript{251} In \textit{Walton}, the court upheld Arizona's capital punishment scheme in which aggravated facts found by a judge determined eligibility for the death penalty.\textsuperscript{252} Given that the death penalty is a form of "greater punishment," Justice Thomas indicated the potential impact of \textit{Apprendi} on the continued viability of \textit{Walton}.\textsuperscript{253} Noting, however, the unique context of capital punishment, Justice Thomas described the potential conflict as "a question for another day."\textsuperscript{254} In a footnote to this statement, Justice Thomas also noted the potential consequences of the \textit{Apprendi} rule upon the Sentencing Guidelines:

It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under \textit{Mistretta v. United States}, 488 U.S. 361, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989). But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." \textit{Id}. at 413, 109 S. Ct. 647 (Scalia, J., dissenting).\textsuperscript{255}

Although Justice Thomas expressly refused to consider the effects of his "common-law rule" on the Guidelines, his second comment indicated that the Guidelines should not be treated differently than other state and federal laws. Of the majority and concurring opinions, then, Justice Thomas's opinion comes closest to an attack on the Guidelines, and his attack is indirect, at most.\textsuperscript{256}

\textsuperscript{250} \textit{Id}. (Thomas, J., concurring) ("Thus, the fact triggering the mandatory minimum is part of 'the punishment sought to be inflicted'... it undoubtedly 'enters into the punishment' so as to aggravate it... and is an 'ac[t] to which the law affixes... punishment.'" (citations omitted) (quoting 1 J. Bishop, \textit{Law of Criminal Procedure} 50, 330, 51 (2d ed. 1872))).
\textsuperscript{251} 497 U.S. 639 (1990).
\textsuperscript{252} \textit{Id}. at 655–56.
\textsuperscript{253} \textit{Apprendi}, 530 U.S. at 522–23 (Thomas, J., concurring).
\textsuperscript{254} \textit{Id}. at 523 (Thomas, J., concurring). Indeed, the Supreme Court partially overruled \textit{Walton} under \textit{Apprendi} reasoning. \textit{See Ring v. Arizona}, 536 U.S. 584 (2002) (holding that the Arizona statute that required the judge to determine the presence of aggravating factors upon a first degree murder conviction for the imposition of the death penalty violated the Sixth Amendment right to a jury trial); \textit{see also infra Part III.A.}
\textsuperscript{255} \textit{Apprendi}, 530 U.S. at 523 n.11 (Thomas, J., concurring).
\textsuperscript{256} While the recent overruling of \textit{Walton} does not bode well for the Sentencing Guidelines "question for another day," the Court's recent decision in \textit{Harris v. United States}, 536 U.S. 545 (2002), suggests that \textit{Apprendi} has formal limits. Thus, Justice Thomas's previous comments that the constitutionality of judicial and legislative sentencing range discretion is "quite another" issue than prosecutorial entitlements to
5. Justice O'Connor's Dissent

Justice O'Connor wrote a dissenting opinion, in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined. Justice O'Connor began by suggesting that the Apprendi decision represented a "watershed change in constitutional law." Rejecting the majority's "bright-line rule," Justice O'Connor noted that "the Court cannot identify a single instance, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied as a constitutional requirement, the rule it announces today." Justice O'Connor then reviewed and re-characterized the historical evidence cited by the majority and the concurring opinions and concluded,

In sum, the Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on irrelevant historical evidence, to ignore our controlling precedent (e.g., Patterson), and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context (e.g., Walton).

The court has failed to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

Justice O'Connor thus dismissed the underlying foundation of both the majority and concurring opinions.

At least one of Justice O'Connor's characterizations of the majority and concurring opinions deserves specific mention. In examining the majority's precedent, Justice O'Connor criticized the Court's distinction of McMillan v. Pennsylvania. Because the Court in McMillan upheld the use of a sentencing factor—a factor not proven to the jury beyond a reasonable doubt—to impose a minimum penalty, Justice O'Connor argued that it "point[ed] to the rejection of the Court's [Apprendi] rule." She further argued that "at least two" of the Court's Apprendi formulations conflicted with McMillan: first, the principle that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penal-

higher punishment kinds, degrees, or ranges should be taken at face value. Apprendi, 530 U.S. at 520 (Thomas, J., concurring).
257 Apprendi, 530 U.S. at 523 (O'Connor, J., dissenting).
258 Id. at 524 (O'Connor, J., dissenting).
259 Id. at 525 (O'Connor, J., dissenting).
260 Id. at 539 (O'Connor, J., dissenting).
262 Apprendi, 530 U.S. at 532 (O'Connor, J., dissenting).
ties to which a criminal defendant is exposed"; and, second, the Court's endorsement of Justice Scalia's concurring opinion in *Jones v. United States* in which he wrote that "it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." Justice O'Connor reasoned that the Court's holding as to increases or alterations to the range of penalties "by definition, must include increases or alterations to either the minimum or maximum penalties." If accurate, her characterization of the majority's holding threatens the Guidelines because of the constructive minimums created by them. Following this characterization, Justice O'Connor alleged that the Court did not narrow *McMillan* as Justice Stevens had suggested, but was, in fact, "overruling *McMillan*" without "explain[ing] why such a course of action is appropriate under normal principles of stare decisis."

Justice O'Connor's dissent reveals the consequences of carrying the rationale of the *Apprendi* holding beyond its conclusion. Surely she is correct in that some constitutional concerns surround sentence minimums as well as maximums. Nonetheless, the language of the majority opinion did not compel the result Justice O'Connor described. While the majority may have laid the groundwork for overturning *McMillan*, with the exception of Justice Thomas in his concurrence, the majority Justices explicitly stated that they were not so doing. *McMillan*'s application, "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," therefore stood under *Apprendi*. Despite Justice O'Connor's characterization to the contrary, *Apprendi* did not make unconstitutional the use of sentencing factors to impose a minimum punishment within the applicable statutory range.

Justice O'Connor noted further concerns with the reasoning of the majority and concurrence. First, she noted the disjunction be-

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263 Id. at 533 (O'Connor, J., dissenting) (quoting id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252–53 (1998)) (emphasis added)).
264 Id. (O'Connor, J., dissenting) (quoting Jones, 526 U.S. at 253 (Scalia, J., concurring) (emphasis added)).
265 Id. (O'Connor, J., dissenting).
266 Id. (O'Connor, J., dissenting).
267 Id. at 487 n.13 (O'Connor, J., dissenting) (leaving open the possibility of overturning the narrower holding of *McMillan* but reserving that question "for another day" given the probability of legislative reliance).
268 Id. (O'Connor, J., dissenting).
269 This interpretation was clarified, in a manner of speaking, in *Harris v. United States*, 536 U.S. 545 (2002). See infra Part III.A.
between *Apprendi* and *Walton v. Arizona*. While *Walton* upheld an Arizona statute requiring the judge to determine aggravating factors that supported an increase in punishment (to death), *Apprendi* declared sentencing under a similar scheme (outside the capital punishment context) unconstitutional. Second, Justice O’Connor proposed that a state could avoid the *Apprendi* problem by altering its statutory scheme. Theoretically a state could impose higher maximums at the outset but allow judges to find the non-existence of certain factors under the preponderance standard. A judge finding the absence of these factors could impose a lower statutory range. Based upon her formalistic reroute of the *Apprendi* problem, Justice O’Connor suggested that the actual holding of *Apprendi* must be broader than the majority admitted:

Given the pure formalism of the above readings of the court’s opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court’s decision *may be* that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt.

Justice O’Connor relied upon this interpretation to raise concern about the effect of *Apprendi* on determinate sentencing schemes—such as the federal scheme under the Sentencing Guidelines.

Before reviewing Justice O’Connor’s discussion of the potential consequences of *Apprendi* on the Sentencing Guidelines, a critique of her underlying reasoning is warranted. As discussed previously, Jus-

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271 *Walton*, 497 U.S. at 642–44.

272 See supra Part II.B.

273 *Apprendi*, 530 U.S. at 542 (O’Connor, J., dissenting).

274 *Id.* (O’Connor, J., dissenting) Justice O’Connor suggested, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years’ imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, *not* to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years’ imprisonment. *Id.* (O’Connor, J., dissenting). Justice O’Connor suggested a relatively complex sentencing system. While the system might meet the formalistic requirements of *Apprendi*, the majority opinion noted that her proposal might still suffer from constitutional defects. *Id.* at 490 n.16 (O’Connor, J., dissenting).

275 *Id.* at 544 (O’Connor, J., dissenting) (emphasis added).
Justice O'Connor may have been entirely correct to suggest that the majority's reasoning threatened determinate sentencing schemes. But despite the theoretical threat, the sky had not yet fallen. First, the majority expressly disclaimed that its opinion determined the constitutionality of the Sentencing Guidelines. Second, when the Court stated its rule in its own terms, it took care to state that any factor that increased a sentence "beyond the prescribed statutory maximum" was required to be proved to the jury beyond reasonable doubt. Third, the majority affirmed the exercise of judicial discretion in sentencing "within statutory limits." Finally, Justice O'Connor based her fears on a suspicion that the majority's holding "may be" that facts (other than prior convictions) that increase maximum punishments "beyond an otherwise applicable range" fall under the Apprendi rule. Justice O'Connor's entire premise sounds in speculation, therefore, and the majority's explicit comments to the contrary require a contrary conclusion, namely, that Apprendi did not render sentencing under the Guidelines unconstitutional.

Justice O'Connor registered grave concerns that Apprendi invalidated decades of sentencing reform and would throw the federal criminal system into disarray. Characterizing the constitutional holding of the majority as entitling a defendant "to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme," Justice O'Connor stated that Apprendi "will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades." Justice O'Connor then discussed the justifications behind determinate sentencing procedures—

276 Id. at 497 n.21; see also text accompanying note 231.
277 Apprendi, 530 U.S. at 490 (emphasis added).
278 Id. at 481 (emphasis omitted).
279 Id. at 543–44 (O'Connor, J., dissenting) (emphasis added). Justice O'Connor later stated that

[j]nder the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt.

Id. at 546 (O'Connor, J., dissenting). Justice O'Connor's position merits strong consideration. Indeed, the Court could easily extend its decision in the way Justice O'Connor describes. One must note, however, that the Court did not go so far, at least not in Apprendi. Whether one can justify or explain Apprendi's limitations and distinctions on principle presents an entirely different question.
280 Id. at 549 (O'Connor, J., dissenting).
primarily the disparities in sentencing of similarly situated defendants. She also predicted a multitude of sentencing challenges by prisoners in the federal system and confusion in future sentencing procedures about the validity of sentencing under the Guidelines. Justice O'Connor concluded her dissent by evaluating the New Jersey statute and finding it constitutional under the Court's precedent, particularly *McMillan*.

6. Justice Breyer's Dissent

Justice Breyer also wrote a separate dissent, to which Chief Justice Rehnquist joined. Justice Breyer embarked on a justification of judicial fact-finding and determinate sentencing. Calling the majority's rule "a procedural ideal," Justice Breyer suggested that the determination of sentencing factors by the judge reflected a "practical" reason—an "administrative need for procedural compromise" in the criminal justice system.

Justice Breyer maintained that the system required administrative compromise because of the multiplicity of facts involved in a criminal sentencing and the potential for unfairness to the defendant. Justice Breyer proceeded to consider two legislative solutions to sentencing problems—first, commissions to establish uniform guidelines, i.e., the U.S. Sentencing Commission, and second, statutory specifications regarding the use of certain sentencing factors. Justice Breyer noted that legislatures developed these solutions to combat disparity in sentencing problems.

After he dismissed as irrelevant the majority's limit of its rule to statutory maximums, Justice Breyer concluded,

[T]he rationale that underlies the Court's rule suggests a principle—jury determination of all sentencing-related facts—that, unless restricted, threatens the workability of every criminal justice system.

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281 *Id.* at 549–50 (O'Connor, J., dissenting); *see also supra* Part I.A–B.
283 *Id.* at 552–54 (O'Connor, J., dissenting).
284 *Id.* at 555 (Breyer, J., dissenting).
285 *Id.* (Breyer, J., dissenting).
286 *Id.* at 556–57 (Breyer, J., dissenting) (emphasis added).
287 *Id.* at 557 (Breyer, J., dissenting). Here Justice Breyer raised the quintessential problem—must the defendant contend, "I did not sell drugs, but I sold no more than 500 grams"? *Id.* (Breyer, J., dissenting).
288 *Id.* at 560 (Breyer, J., dissenting).
289 *Id.* at 559–60 (Breyer, J., dissenting).
290 *Id.* at 563 (Breyer, J., dissenting).
(if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions). 291

Justice Breyer rejected this rationale and found New Jersey's sentencing statute valid under traditional sentencing practices. 292

7. Opinion Summary

Before turning to the effects of Apprendi, the foregoing discussion warrants a summary to review the Justice's positions on the constitutionality of the Sentencing Guidelines under the Apprendi rule. The majority opinion did not reverse the holding of McMillan; it did limit McMillan's holding to the extent the holding was not already so limited. The majority asserted that the Guidelines were not before it and refused to consider the constitutionality of the Guidelines. In his concurrence, Justice Scalia raised doubts as to the constitutionality of the Guidelines only in his concluding sentence, which asserted that the jury should find all facts that prescribe punishment. This conclusion should be read in light of Justice Scalia's earlier description of the jury's fact-finding function as that of finding facts relevant to the statutory maximum. Justice Thomas in concurrence reserved the question of the constitutionality of the Guidelines but suggested that the Guidelines were entitled to no special treatment. Justice O'Connor in dissent warned that the majority and concurrence reasoning would have grave effects on the Sentencing Guidelines. Justice Breyer maintained the constitutionality of the Guidelines for practical reasons. Thus, only the opinion of Justice Thomas explicitly advocated a position that might render the Guidelines unconstitutional.

III. The Aftermath of Apprendi in the Federal Courts

Indeed, the federal courts have construed Apprendi relatively narrowly. The Supreme Court has answered in part two of the questions it left unanswered in Apprendi, but it has not addressed specifically the constitutionality of sentencing under the Guidelines in light of the rationale expounded in Apprendi. While several Courts of Appeals have reversed drug sentences based on Apprendi, no circuit has held that Apprendi invalidated the federal sentencing guidelines procedure as a whole. Not every post-Apprendi decision can be examined—as of

291 Id. at 565 (Breyer, J., dissenting).
292 Id. at 565–66 (Breyer, J., dissenting).
the time of writing, 4761 reported cases cited *Apprendi*—but several deserve mention.

**A. The Supreme Court’s Post-Apprendi Decisions**

In a pair of cases handed down on June 24, 2002, the Supreme Court addressed the substantive reach of *Apprendi*. In *Ring v. Arizona*, the Court used *Apprendi* reasoning to invalidate the Arizona capital punishment scheme previously upheld in *Walton v. Arizona*. In *Harris v. United States*, the Court declined to hold that *Apprendi* overruled *McMillan v. Pennsylvania*. While the congruity among *Apprendi* and these cases may lie in the eyes of the beholder, the post-*Apprendi* decisions, especially *Harris*, suggest that sentencing under the Guidelines will not be found unconstitutional. Rather, *Apprendi* must stand for its narrow holding—facts increasing punishment beyond the statutory maximum for the crime of conviction must be proved to a jury beyond reasonable doubt—as opposed to a broader rationale—all facts increasing punishment must be proved to a jury beyond reasonable doubt. *Apprendi* must have formal limits, and statutory sentencing schemes should be parsed for their formal adherence to the narrow rule.

In *Ring v. Arizona*, the Court found unconstitutional Arizona’s death penalty conviction process. Under Arizona’s capital prosecution scheme, a jury first determined a defendant’s guilt for first-degree murder. Upon conviction, the judge, using a preponderance standard, determined the existence or non-existence of certain aggravating factors. If at least one aggravating factor existed, and no sufficiently substantial mitigating factors called for leniency, the judge

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293 A search of Westlaw citing references, limited to reported cases, yielded this number. KeyCite of *Apprendi*, 530 U.S. at 466 (performed Apr. 3, 2003).

294 See *Ring v. Arizona*, 536 U.S. 584 (2002); *Harris v. United States*, 536 U.S. 545 (2002). The Supreme Court has also considered the procedural aspects of *Apprendi*. See *Cotton v. United States*, 535 U.S. 625 (2002). In *Cotton*, the Supreme Court held that *Apprendi* errors were subject to plain error review, thereby limiting pre-*Apprendi* conviction relief. *Id.* at 631.

295 536 U.S. 584.

296 497 U.S. 639 (1990); see also *supra* notes 270–72 and accompanying text.

297 536 U.S. 545.

298 Admittedly, this characterization directly conflicts with the Court’s own characterization. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (“[T]he relevant inquiry is not one of form, but of effect.”); see also *Ring*, 536 U.S. at 609 (characterizing aggravating factors as the “functional equivalent of an element of a greater offense”) (quoting *Apprendi*, 530 U.S. at 494 n.19).

299 *Ring*, 536 U.S. at 588.

300 *Id.*
was authorized to impose the death sentence. The Court upheld this scheme in 1990 in Walton v. Arizona. Twelve years later, Justice Ginsburg, writing for the Court in Ring, explained that “Apprendi’s reasoning is irreconcilable with Walton’s holding in this regard,” and the Court held that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”

Justice Ginsburg noted that the Apprendi majority had distinguished Walton. The majority in Apprendi had reconciled Walton by determining that the statutory maximum provided under the Arizona scheme was death, and that “it may be left to the judge to decide whether that . . . ought to be imposed.” Relying in part on Justice O’Connor’s dissent in Apprendi and the Arizona Supreme Court’s determination that Justice O’Connor had the better argument, Justice Ginsburg concluded the majority opinion by asserting, “Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury.” In the capital punishment context, the Court appeared to give Apprendi a broad and functional, as opposed to a narrow and formal, construction.

The Court’s opinion was not unanimous. Justice Scalia, joined by Justice Thomas, concurred, citing the “accelerating propensity” of state and federal legislatures to adopt “sentencing factors.” Justice Scalia then asserted that those factors “must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.” Justice Kennedy also concurred, affirming his view that Apprendi was wrongly decided but acquiescing in

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301 Id. at 592–93.
302 497 U.S. 639 (1990); see also id. at 648 (noting and rejecting defendant’s characterization of the factors as “elements of the offense” rather than “sentencing considerations”).
303 Ring, 536 U.S. at 589.
304 Id. at 602.
305 Id. (quoting Apprendi v. New Jersey, 530 U.S. 466, 497 (2000)).
306 Id. at 609 (citation omitted) (quoting Apprendi, 530 U.S. at 494 n.19).
307 Id. at 587.
308 Id. at 611–12 (Scalia, J., concurring).
309 Id. at 612 (Scalia, J., concurring). Justice Scalia also criticized Justice Breyer’s decision to concur. Because Justice Breyer refused to acquiesce in the Apprendi holding, Justice Scalia suggested, “There is really no way in which Justice Breyer can travel with the happy band that reaches today’s result unless he says yes to Apprendi. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to Apprendi-land.” Id. at 613 (Scalia, J., concurring).
its holding. Justice Breyer concurred in the judgment, citing his belief that "jury sentencing in capital cases is mandated by the Eighth Amendment." Justice O'Connor, joined by Chief Justice Rehnquist, dissented. Justice O'Connor, restating her conviction that *Apprendi* "was a serious mistake," described the majority's overturning of *Walton* as an expansion of *Apprendi* that "exacerbates the harm done in that case." The judgment was thus seven to two, with six Justices joining the majority opinion, and five Justices supporting the *Apprendi* decision.

Read separately, *Ring* might suggest a substantial expansion of *Apprendi* beyond its formal holding. In *Apprendi*, the Court held that facts that increase punishment beyond the statutory maximum must be proven to the jury beyond a reasonable doubt. In *Ring*, the Court invalidated the Arizona statute because the aggravating factors were not proven to a jury beyond a reasonable doubt, even though the statute under which the defendant was sentenced to death did provide for a capital conviction (upon the later finding of aggravating factors). Seemingly, the defendant was not punished beyond the statutory maximum, and yet *Apprendi* controlled, rendering the sentence constitutionally invalid. Despite this apparent rejection of the narrow *Apprendi* holding—note Justice Ginsburg's comments as to functional equivalence—the facts authorizing the defendant's capital sentence were found by the sentencing judge alone under the sentencing scheme. The jury verdict alone did not authorize a capital conviction. In this sense, the judge did sentence beyond the maximum penalty authorized by the jury conviction, violating the formal *Apprendi* rule. The Court's application of *Apprendi* in *Harris v. United States*, the second case delivered on June 24, 2002, reinforces this interpretation.

In *Harris*, the Court upheld a defendant's mandatory minimum conviction and refused to overturn *McMillan v. Pennsylvania*. In *Harris*, the defendant was convicted of a violation of 18 U.S.C. § 924(c)(1)(A) for carrying a firearm during and in relation to a drug...
trafficking offense. Under § 924(c)(1)(A), a defendant faces mandatory minimums depending upon whether the firearm was simply carried, or whether it was brandished or discharged. Writing for five members of the Court, Justice Kennedy performed a statutory analysis of § 924(c)(1)(A), and determined that the brandishing and discharge factors were sentencing factors and not elements of the crime. Then Justice Kennedy, writing for a plurality of the Court, proceeded to distinguish McMillan from Apprendi. Justice Kennedy asserted that McMillan did not undermine McMillan because Apprendi was based on the historical practice of submitting facts authorizing maximum punishment to the jury, and there was "no comparable historical practice" of submitting facts determinative of mandatory minimums to the jury. Justice Kennedy reconciled McMillan and Apprendi with this statement:

Read together, McMillan and Apprendi mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date.

Thus, Justice Kennedy's plurality opinion emphasizes the limitation of the rule of Apprendi to statutory maximums—its formal limit.

As in Ring, the Court's opinion was fractured. Justice O'Connor concurred and reaffirmed her belief that Apprendi was wrongly decided. Justice Breyer concurred in the judgment and concurred in part in the opinion but did not concur in Justice Kennedy's reconciliation of McMillan and Apprendi: "I cannot easily distinguish Apprendi v. New Jersey, from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction." Justice Breyer then proceeded to express disapproval at the

319 Harris, 536 U.S. at 550.
320 18 U.S.C. § 924(c)(1)(A) (2000); see also Harris, 536 U.S. at 550–51.
321 Chief Justice Rehnquist and Justices O'Connor, Scalia, and Breyer joined this part of the opinion. Harris, 536 U.S. at 549.
322 Id. at 550–56.
323 The Chief Justice and Justices O'Connor and Scalia, but not Justice Breyer, joined this portion of the opinion. Id. at 549.
324 Id. at 563 (suggesting that the "Apprendi rule did not extend to those facts").
325 Id. at 567.
326 Id. at 569 (O'Connor, J., concurring).
327 Id. (Breyer, J., concurring) (citation omitted).
use of mandatory minimums. Justice Thomas wrote a dissenting opinion, which Justices Stevens, Souter, and Ginsburg joined. Justice Thomas asserted, "The Court’s holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated Apprendi just two years ago." Justice Thomas then proceeded to explain that the rule of Apprendi dictated that the facts underlying the defendant’s mandatory minimum sentence be proven to the jury beyond reasonable doubt and that considerations of stare decisis did not justify upholding McMillan. Justice Thomas concluded by noting that only a minority of the Court supported the distinction between Apprendi and McMillan and that one of the Justices (Justice O’Connor) in support of the distinction did not support the Apprendi case itself. As Justice Thomas pointed out, the Harris Court only weakly upheld the McMillan precedent in its justification of the use of sentencing factors to impose mandatory minimums.

Although Harris addressed judicial fact-finding for the imposition of mandatory minimums dictated by the legislature, the holding—while weakly supported—bodes well for the Sentencing Guidelines. The Sentencing Guidelines effectively create mandatory minimums (and maximums) within the statutory maximum ranges. If legislative mandatory minimums are permissible, then the Sentencing Commission’s effective mandatory minimums should be equally constitutionally permissible.

This conclusion depends, in part, upon the strength of the Harris precedent. Justice Thomas suggested that Harris conflicts with Apprendi.

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328 Id. at 570 (Breyer, J., concurring) ("Mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.").
329 Id. at 572 (Thomas, J., dissenting).
330 Id. (Thomas, J., dissenting). Justice Thomas also justified his dissent in this way: "[g]iven that considerations of stare decisis are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants, I would reaffirm Apprendi, overrule McMillan, and reverse the Court of Appeals." Id. at 572–73 (Thomas, J., dissenting). Justice Thomas’s justification is not apropos, however, if McMillan can be logically reconciled with Apprendi, and it seems that the understanding of Apprendi upon which Justice Thomas most relies is that of his concurrence.
331 Id. at 573–83 (Thomas, J., dissenting).
332 Only Chief Justice Rehnquist and Justices O’Connor and Scalia joined the portion of Justice Kennedy’s opinion distinguishing McMillan and Apprendi. See id. at 549; see also id. at 557 ("McMillan and Apprendi are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases.").
333 Id. at 583 (Thomas, J., dissenting) ("Because, like most Members of this Court, I cannot logically distinguish the issue here from the principles underlying the Court’s decision in Apprendi, I respectfully dissent.").
prendi.\textsuperscript{334} Harris certainly suggests the formal limitations of the Apprendi rule. Adopting for a moment Justice Thomas's characterization of conflict between Harris and Apprendi,\textsuperscript{335} not all the Justices have been entirely consistent in their voting patterns. Justice Scalia has voted inconsistently—joining the majority opinion in Apprendi and Justice Thomas's Apprendi concurrence but then joining Justice Kennedy's majority and plurality opinion in Harris. Justice Kennedy has also voted inconsistently—joining the majority opinion in Apprendi, but then writing the majority and plurality opinion in Harris. In addition to these "inconsistencies," Justice Breyer refused to recognize the reconciliation of McMillan with Apprendi in Harris.\textsuperscript{336} These factors combined, the Harris precedent illustrates more than a modicum of instability.

Contrary to Justice Thomas's assertions, the three Apprendi decisions can be reconciled, but only on narrow, formal grounds. If the Apprendi rule means only that all factors, except recidivism,\textsuperscript{337} that increase the statutory maximum authorized by a conviction must be proven to the jury beyond a reasonable doubt,\textsuperscript{338} then Apprendi, Ring, and Harris are consistent. In Apprendi, the defendant was sentenced beyond the maximum penalty in the statute of conviction. In Ring, the jury conviction did not authorize the death penalty. Rather, the legislature removed the aggravating factors for separate determination by the judge; absent the judge's findings, death could not be imposed. In Harris, the defendant was sentenced at a mandatory minimum level, not above the statutory maximum for the crime. If the principle of Apprendi is consistently limited in this way, then the Sentencing Guidelines would likely be upheld as constitutional under the Supreme Court's post-Apprendi decisions.

\textsuperscript{334} Id. at 572 (Thomas, J., dissenting); see supra text accompanying note 330.

\textsuperscript{335} If a conflict in fact exists, it is a conflict between a broad rationale and a narrow rule, with Justice Thomas characterizing Apprendi as representing the broad rationale endorsed by his concurrence.

\textsuperscript{336} Nonetheless, Justice Breyer is unlikely to declare unconstitutional a sentencing scheme that implicates the Sentencing Guidelines. See Justice Stephen Breyer, Justice Breyer: Federal Sentencing Guidelines Revisited, CRIM. JUST., Spring 1999, at 28 (commenting upon the efficacy of the Guidelines and noting his own involvement with their development).

\textsuperscript{337} See infra note 381.

\textsuperscript{338} Incidentally, this is an almost verbatim statement of the holding of Apprendi. See Apprendi v. New Jersey, 530 U.S. 466, 490 (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.").
B. Sentencing High: Apprendi’s Effect on Drug Convictions in the Lower Courts

Lower courts have wrestled with Apprendi’s effects on sentencing under the Guidelines, particularly in the context of drug convictions. The United States Code prescribes different statutory maximums for drug-related convictions based on the amount of drugs proved present. Under 21 U.S.C. § 841, it is unlawful for any person to knowingly or intentionally “manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance” or “create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.” Subsection (b) of § 841 sets out separate ranges of punishment for this prohibited behavior based on the amount of the drug manufactured, distributed, dispensed, possessed, or created. Section 846 makes it unlawful to attempt or to conspire to commit any of the acts prohibited in the subchapter, including § 841, and provides the same penalties for such attempt or conspiracy as for the corresponding act. Sections 841 and 846, therefore, provide several statutory maximums. The factual mass of the drugs in evidence determines the applicable statutory range.

Given the statutory scheme of § 841, Apprendi requires drug quantity to be proven to a jury beyond reasonable doubt to establish the appropriate statutory maximum. If the jury fails to find the quantity of drugs supporting the charge, the judge alone cannot find that quantity under the preponderance standard to qualify for an increased statutory maximum. Such a judicial finding would violate the defendant’s rights to due process and a jury trial. When a judicial finding under the preponderance standard increases the statutory maximum penalties, the rule of Apprendi is violated. This interpretation led to a flurry of federal appeals for defendants convicted of drug offenses in which the court determined the quantity under the preponderance standard and sentenced the defendant to a higher

340 Id. § 841(b).
341 Id. § 846.
342 See, e.g., United States v. Nordby, 225 F.3d 1053, 1058–59 (9th Cir. 2000) (holding that because amount of marijuana was not proven to jury, the judge’s finding that the defendant possessed a specified amount “increase[d] the penalty for [the] crime beyond the prescribed statutory maximum” and violated the rule of Apprendi (quoting Apprendi, 530 at 490)).
343 Id. at 1057.
344 Id. at 1059.
penalty than would have been available for an unspecified amount conviction. 345

Despite this apparent Apprendi requirement, some courts have upheld convictions under the higher statutory maximum, even though amount was not proven to the jury. In United States v. Nealy, 346 the Eleventh Circuit held that Apprendi “did not recognize or create a structural error that would require per se reversal.” 347 Relying upon the doctrine of harmless constitutional error, 348 the court held that failure to prove the amount of drug possessed by the defendant was harmless because the “amount was uncontested at trial and sentencing.” 349 The Nealy court then affirmed the defendant’s conviction although the sentence was based on the higher of the § 841 statutory maximums, and although the amount of drug possessed had not been proven to the jury. 350

In United States v. Heckard, 351 the Tenth Circuit also upheld a drug conviction sentence despite lack of proof of amount to the jury. In reviewing the district court’s sentence for plain error, the appellate court held that no substantial rights of the defendant were affected by failure to prove the amount of drugs to a jury because the defendant’s sentence fell within the lower statutory maximum. 352 Other circuits have reached similar results. 353

The federal circuits have thus indicated a willingness to limit the effects of Apprendi, even in drug cases. Combining these courts’ reasoning, an Apprendi error only occurs when the defendant contests the amount of drugs present; the prosecution fails to prove the amount,

346 232 F.3d 825 (11th Cir. 2000).
347 Id. at 829.
348 Id. (citing Neder v. United States, 527 U.S. 1 (1999)).
349 Id. at 830.
350 Id.
351 238 F.3d 1222 (10th Cir. 2001).
352 Id. at 1235.
353 See, e.g., United States v. Chavez, 230 F.3d 1089, 1091 (8th Cir. 2000) (upholding a life sentence for defendant although the jury did not find specific drug quantities because the statutory maximum for drug charges was a life sentence); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) (upholding a twenty-year sentence imposed under § 841(b)(1)(A) for defendant convicted of possessing cocaine base with intent to distribute although quantity was not proven to the jury because a twenty-year sentence was within the statutory maximum provided under § 841(b)(1)(C) for an unspecified quantity); United States v. Angle, 230 F.3d 113, 123 (4th Cir. 2000) (upholding a sentence where drug quantity was considered by the district court because the sentence fell within the statutory range for an unspecified drug quantity conviction).
and the court sentences the defendant under the higher of available statutory maximums.

C. Stemming the Tide: Federal Reception of Other Apprendi Challenges

With the exception of drug convictions with different statutory maximums, federal courts have not attempted to apply a broad *Apprendi* rationale to the Guidelines.\(^{354}\) Sentencing under the Guidelines—within the statutory maximum for the crime of conviction—based upon facts *not proven* to the jury, has been upheld in a variety of contexts by every circuit to consider the issues.\(^{355}\) Upon *Apprendi* challenges, the federal courts of appeals have upheld the use of guideline cross-references,\(^{356}\) enhancements,\(^{357}\) and aggravating factors.\(^{358}\) Only one circuit panel expanded the *Apprendi* requirements to factors

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\(^{355}\) *Hutchison et al.*, *supra* note 6, § 6A1.3, at 1531.

\(^{356}\) See, e.g., United States v. Westmoreland, 240 F.3d 618 (7th Cir. 2001) (upholding use of a murder cross-reference under the Guidelines, although the defendant was not charged with murder nor was that conduct proven to the jury, as long as use of the cross-reference did not extend the sentence beyond the statutory maximum of the crime of conviction).

\(^{357}\) See United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000) (upholding sentencing enhancement on a conspiracy to transport illegal aliens charge based upon the intentional or reckless creation of a substantial risk of death or serious bodily injury).

\(^{358}\) See, e.g., United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001) (upholding the district court’s determination of monetary loss under a preponderance standard as a sentencing factor); United States v. Heckard, 238 F.3d 1222, 1235–36 (10th Cir. 2001) (upholding district court’s consideration of drug quantity as an aggravating or mitigating factor in establishing the offense level under the Guidelines when that consideration did not result in a sentence above the statutory maximum); United States v. Baltas, 236 F.3d 27, 40–41 (1st Cir. 2000) (upholding district court’s sentencing where drug quantity was determined by the district court under a preponderance standard but sentence did not exceed statutory maximum); United States v. Williams, 235 F.3d 858, 862–63 (3d Cir. 2000) (upholding sentencing based in part on drug quantity not proven to the jury when the sentence imposed did not exceed the applicable statutory maximum); *Angle*, 230 F.3d at 123 (allowing the use of drug quantity to act as an aggravated factor where the sentence did not exceed the statutory maximum for an unspecified quantity drug charge); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000) (upholding district court’s determination of relevant conduct—conspiracy to commit murder—on a preponderance standard to determine the offense level for a RICO charge).
that increased sentencing within the statutory range,\(^{359}\) and that panel
decision was quickly "clarified" upon rehearing.\(^{360}\)

In addition to applying only the narrow \textit{Apprendi} holding, several
courts have commented upon \textit{Apprendi}'s effect on the Guidelines. For instance, in \textit{United States v. Heckard},\(^{361}\) the Tenth Circuit panel
noted that the \textit{Apprendi} majority had "specifically avoided disrupting
the use or adequacy of the Sentencing Guidelines."\(^{362}\) The Seventh
Circuit recognized the import of Justice Thomas's concurrence and
noted the possibility that \textit{Apprendi} could be extended to cover the
Sentencing Guidelines, but declared that "the majority in \textit{Apprendi}
did not extend its rule in this manner, and we decline to extend \textit{Apprendi}
in such a fashion today."\(^{363}\) In \textit{United States v. Garcia},\(^{364}\) the Second
Circuit summarized the \textit{Apprendi} comments regarding the Guidelines
by discussing both "the alarms sounded by the dissenters" and the
footnote in Justice Thomas's concurrence.\(^{365}\) The court concluded,"Until advised to the contrary by the Supreme Court, we do not be-
lieve that a sentencing judge's traditional fact-finding has been re-
placed by a requirement of jury fact-finding."\(^{366}\) With this language
the courts have indicated their intention to follow the letter of \textit{Ap-
prendi} but to go no further without explicit guidance from the Su-
preme Court.

This reaction by the lower federal courts has not gone unnoticed
by the academy. In an early response to \textit{Apprendi}, Professor Chemer-
insky noted that courts were mostly choosing a "narrow interpreta-
tion" of \textit{Apprendi}.\(^{367}\) He also predicted that courts would "struggle
with [\textit{Apprendi}] on a daily basis"\(^{368}\) until the Supreme Court provided
further clarification. In a later article, Professor Susan Herman noted
the lower courts' reluctance to apply \textit{Apprendi} and suggested that follow-
ing the courts' decisions "is like watching the construction of a

\(^{359}\) \textit{United States v. Fields}, 242 F.3d 393 (D.C. Cir. 2001) (holding that \textit{Apprendi}
applied to role-in-offense findings under the Guidelines), \textit{reh'g}, 251 F.3d 1041 (D.C.
Cir. 2001).

\(^{360}\) \textit{United States v. Fields}, 251 F.3d 1041, 1046 (D.C. Cir. 2001) (clarifying that
\textit{Apprendi} does not reach "role-in-offense" findings because such a "finding is not a
fact that increases the penalty for a crime beyond the prescribed statutory maxi-
mum" (quoting \textit{Apprendi} v. New Jersey, 550 U.S. 466, 490 (1999))).

\(^{361}\) 238 F.3d at 1222.

\(^{362}\) \textit{Id.} at 1236 (citing \textit{Apprendi}, 530 U.S. at 481).

\(^{363}\) \textit{United States v. Westmoreland}, 240 F.3d 618, 636 (7th Cir. 2001).

\(^{364}\) 240 F.3d 180 (2d Cir. 2001).

\(^{365}\) \textit{Id.} at 183-84.

\(^{366}\) \textit{Id.} at 184.

\(^{367}\) Chemerinsky, \textit{supra} note 142, at 104.

\(^{368}\) \textit{Id.}
barricade: case after case selects from a dazzling array of procedural excuses to explain why each particular defendant should not reap *Apprendi*'s benefits." Thus, scholars have described the monumental consequences implicated by *Apprendi* but have also recognized the choice by federal courts to constrain those consequences until instructed otherwise by the Supreme Court.

IV. THE CONSTITUTIONALITY OF THE U.S. SENTENCING GUIDELINES

The federal courts have correctly interpreted the *Apprendi* decision. Despite the warnings of the dissenters, and the lone footnote in Justice Thomas's concurring opinion, the Court stated on multiple occasions that it did not determine the constitutionality (or unconstitutionality) of the U.S. Sentencing Guidelines. Absent these statements, the reasoning of the Court might have supported an assertion that the facts used to determine a sentence under the Guidelines must be charged and proven to the jury or, a fortiori, that the use of adjustments and enhancements under the Sentencing Guidelines is unconstitutional. The majority, however, refuted this characterization of its holding. To interpret *Apprendi* to require the proof of any fact relevant to sentencing—in other words, to declare sentencing under the Guidelines unconstitutional—would interpret *Apprendi* beyond its holding and in contradistinction to expressions in the majority opinion. While the majority's comments on the Guidelines may have been only dicta, those comments support and clarify the holding of *Apprendi*: facts extending punishment beyond the statutory maximum must be proven to the jury.

In *Harris*, the Court confirmed this interpretation. By upholding mandatory minimums and the *McMillan* decision, the Court suggested that its reasoning was limited to ceilings, not floors. The effect of the Guidelines is to impose constructive floors (and ceilings) *within* the applicable statutory range. But even these "floors" are not absolute—judges may depart. Because only a plurality of the Court accepted the *Harris* distinction of *Apprendi* and *McMillan*, the constitutionality of the Guidelines remains something of an open question.

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369 Herman, *supra* note 147, at 617.

370 Despite several contrary suggestions by members of the Court, a distinction can be drawn between ceilings and floors. Society should have statutory notice of the maximum penalty attached to a crime. While, ultimately, a defendant may care just as much about the minimum penalty, the mandatory minimums are something of a new phenomenon. There is no tradition of notice as to a minimum penalty because sentencing was previously indeterminate. If the *Apprendi* rule is based on the traditional right to notice as to elements of a crime, limitation of this rule to statutory maximums makes sense.
But at a minimum, *Harris* suggested that a formal interpretation of the *Apprendi* precedent is appropriate. *Apprendi* and its predecessor, *United States v. Jones*, focused on the constitutional rights of defendants to have notice of the crimes with which they are charged and to have all elements of these crimes proven to the jury beyond reasonable doubt. The constitutional substance is thus satisfied through primarily formal requirements. Indeed, Justice O'Connor suggested in *Apprendi* that the majority's requirements could be satisfied by mere formal changes to the statute under which the defendant was charged. While the majority essentially dismissed this suggestion, the formality required by *Apprendi* and discussed by Justice O'Connor warrants consideration. In the area of crime definition, formality for formality's sake is not unreasonable. Defendants should have at least constructive notice of the elements of the crime. Facts that constitute a crime should be proven to a jury. Judges should sentence within the confines of the jury conviction. The narrow and formal *Apprendi* holding is, therefore, quite reasonable.

In *Apprendi*, the defendant was subject to a higher penalty than that prescribed by the statutory maximum. If the judge found the existence of racial bias as a motivating factor, an additional sentencing scheme was provided. The defendant was never charged with acting out of racial bias, however, and did not have notice of this potential charge and higher penalty in the statute under which he pled guilty. The Sentencing Guidelines work differently. Although specific facts determined by the judge may provide higher penalty ranges within the guideline ranges, the defendant is not sentenced outside the statutory range. Sentencing under the Guidelines has not violated the formal requirements of *Apprendi* because nothing has altered the defendant's notice as to the elements of the crime under the statute.

If the formal distinctions will not support a differentiation between the *Apprendi* reasoning and the Sentencing Guidelines, then one must turn to considerations of policy. As discussed previously, Congress created the U.S. Sentencing Commission and conferred au-

372 See supra notes 273–75.
373 But see Costello, supra note 345, at 1269–70 (arguing that the Supreme Court came to an "incorrect conclusion" in *Apprendi*).
374 *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000). The facts suggest, however, that *Apprendi* did have notice of the enhanced penalty at the time of his plea entry. *Id.*
375 See supra Part I.C.2.
authority to develop the Sentencing Guidelines. Congress apparently took these steps in an effort to restore faith in sentencing and to harmonize widely variant sentencing. The effort was not made to destroy discretion but rather to structure it. The effort was also an attempt to safeguard criminal rights. In fact, the Sentencing Guidelines have brought a measure of consistency and uniformity to federal sentencing. Similarly situated criminals, under the Guidelines, will generally be sentenced within a narrowed range, a range well within the broad statutory range for the crime of conviction.

In developing the guidelines system, the legislature statutorily expressed intent to provide a coherent and fair system of punishment. While a legislative statement of good faith alone cannot save the Guidelines from constitutional flaw if one exists, it is relevant to note that Congress and the Court both apparently seek the same end—fairness to criminal defendants. Given such a unitary goal, only a manifest defect should rise to constitutional stature. An incongruous historical record—one from which the concept of mandatory minimums was absent—does not create such a defect. Furthermore, invalidation of the guidelines system has the potential to restructure the relationship between the branches—by redefining the legislature’s elements of a crime and restricting the judiciary’s control over the sentencing portion of a criminal trial.

It is difficult to conceptualize how sentencing under a broad Apprendi scheme would be accomplished. Would the Sentencing Guidelines simply disappear and unfettered judicial discretion return? Presumably, under this alternative, facts influencing sentencing would not require proof beyond reasonable doubt to a jury because they would be indeterminate. Surely one of the motivations underlying

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376 See supra Part I.A.
377 Nonetheless, many commentators have expressed concern about the adequacy of the Guidelines and their usage. See, e.g., Berman, supra note 60.
378 See supra note 370.
Apprendi—notice to defendants—would be at odds with a return of fully indeterminate sentencing.

Under a second alternative, perhaps the Guidelines would remain, but any relevant factors—beyond recidivism—would have to be charged in an indictment and proven to a jury beyond a reasonable doubt. Should this requirement take effect, the sentencing procedure might lose the aspect of individuality because prosecutors would not likely take up the procedural burden of proving such “elements.” Or, conversely, prosecutors might take up the burden selectively in high-profile cases. Should prosecutors take up these burdens of proof, defendants could be prejudiced by the introduction of extrinsic evidence relevant only to sentencing and not relevant to the elements of the crime as defined by Congress.\footnote{This reason seems to lie behind the Apprendi exception for recidivism. Justifying the exception under a broad Apprendi rationale is difficult. If all facts relevant to punishment must be proven to the jury, why the exception for recidivism? Some principle may be buried in the theories of punishment. Society may have a greater need to incapacitate an individual convicted of multiple crimes because of that individual’s apparent propensity to commit crime. And so, the recidivism factor is relevant to sentencing. Propensity to commit crime (or character) is not, however, directly relevant to the commission of any individual crime. And so, recidivism might be excepted from the factors considered by the jury in determining guilt or innocence. If, however, all facts relevant to increased punishment are effectively elements of the crime that should be proven to the jury, then, to the extent that recidivism is relevant to increased punishment, it also should be proven to the jury, and the distinction cannot be justified. \textit{Cf.} Jones v. United States, 526 U.S. 227, 235 (1999) (noting that the Court in Almendarez-Torres v. United States, 523 U.S. 224 (1998), "stressed the history of treating recidivism as a sentencing factor, and noted that, with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful").} Potentially, under such a scheme, the tail of sentencing wags the dog of the crime.\footnote{See McMillan, 477 U.S. at 88. The Chief Justice used the metaphor to explain how certain factors might be inappropriately regarded as only sentencing factors when they are, in fact, of such magnitude as to constitute an element of the offense. Such factors require proof at the conviction stage, not merely at sentencing. \textit{Id.}} In other words, the punishment drives the conviction. That the “wagging” would occur outright, in the indictment and at trial, creates a different concern than that which originally prompted Chief Justice Rehnquist’s canine metaphor in \textit{McMillan}, but it creates concern nonetheless. If all sentencing factors must be proven, then the elements of punishment would drive the conviction with the prosecution—and not Congress—in control of the elements charged.\footnote{\textit{Cf.} Jeffrey Standen, \textit{The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey}, 87 Iowa L. Rev. 775 (2002). Standen augurs the effect of Apprendi on prosecutorial strength:}
this concern, most criminal cases do not proceed to jury trial. The
effect of a broad *Apprendi* interpretation on the plea bargaining sys-
tem is enormous, partially because of the power and discretion trans-
ferred to prosecutors.384 Given these realities, it is unclear what, if
any, actual rights and values a broad *Apprendi* interpretation would
protect. It seems such an interpretation would increase the power
shift to prosecutors and effectively endorse disparity in sentencing.

Sentencing under the Guidelines within statutory ranges is not
unconstitutional. The *Apprendi* decision does not compel a contrary
answer; in fact, the majority specifically rejected the suggestion that it
had determined (or undermined) the constitutionality of the Guide-
lines. While a narrow reading of *Apprendi* may be formalistic, formal-
ism has an important role in criminal law. In *Harris*, the Court
affirmed the narrow, formal construction. Finally, for reasons of pol-
icy, the constitutionality of the Guidelines should be upheld. To de-
cide differently would invalidate decades of sentencing reform
without means for putting into practice a more desirable (read “fair”)
alternative.

**CONCLUSION**

What was constitutional before the Sentencing Guidelines cannot
be unconstitutional after the Sentencing Guidelines.385 Before the
Sentencing Guidelines, sentencing courts had discretion to consider
real offense factors and harms. The Guidelines structured the appro-
ropriate factors for consideration and effectively provided that the fac-
tors would receive uniform weight in federal sentencing courts. The
Guidelines—as evidenced by legislative history, the Commission’s Mis-
tion Statement, and the Guidelines’ very structure—are essentially de-
dsigned to cabin judicial discretion and promote fairness to offenders
in sentencing, not to remove elements of a crime from the jury’s
consideration.

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384 For a comprehensive discussion of this problem, see Stephanos Bibas, *Judicial
Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097

dissenting).
In determining relevant conduct and departures under the Guidelines, a sentencing court is merely exercising judicial discretion to consider real offense factors and harms in a structured way. It is not determining the elements of the crime. While sentence severity may increase, as long as punishment is not increased beyond the statutory maximum, the sentencing court has not sentenced the defendant to a different crime than that proven to the jury. Tradition, theory, and pragmatism do not counsel or compel a different constitutional requirement.

While the various Justices in Apprendi expressed somewhat different opinions on the matter, no Justice explicitly held that the Guidelines were unconstitutional. In fact, the majority specifically rejected the dissenters' suggestion that Apprendi compelled an invalidation of sentencing under the Guidelines. It reserved that question for another day.

Should the Court decide that sentencing under the Guidelines is unconstitutional, it could drastically change the dynamics of federal sentencing. In the process, it would go no further toward providing an analytically sound definition of a crime or a coherent theory of criminal punishment. Despite the Court's best efforts, some factors not relevant to the "crime" itself will undoubtedly be considered in fashioning punishment—whether by the judge or jury. Congress has decided that this unavoidable circumstance is best resolved through structured judicial discretion under the Sentencing Guidelines. The Court should respect this legislative determination because the Sixth Amendment right is maintained under the Guidelines structure.

If or when the Supreme Court answers the remaining Apprendi "question for another day," it should uphold the constitutionality of the Sentencing Guidelines. While notice to defendants and the right to a full jury trial are constitutional necessities, not every fact relevant to sentencing is an "element" of the "crime," nor must every fact relevant to sentencing be proven to a jury beyond reasonable doubt. The Court has already recognized this distinction in excepting proof of recidivism from the Apprendi requirements. To answer the question differently under the ambit of Sixth Amendment protection would be an unreasonable distortion of the constitutional right without the promise of greater justice.

386 And through the exercise of discretion in charging, by the prosecutor as well.