Structuring Sentencing: *Apprendi*, the Offense of Conviction, and the Limited Role of Constitutional Law

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INTRODUCTION

Every year hundreds of thousands of convicted criminal defendants are sentenced for their crimes, often through the implementation of a broad range of laws of relatively recent vintage such as mandatory minimum provisions and regulations of judicial discretion like the Federal Sentencing Guidelines.[1] The

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1. The United States Department of Justice reports that 65,656 defendants were convicted of *felonies* in federal courts in 2000 and 927,717 defendants were convicted of *felonies* in state courts in 1998, the most recent years for which the respective data is compiled. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF

policies underlying these sentencing laws are perhaps the most hotly contested issues in all of criminal procedure, with legislative amendments and calls for reform being made every year.[2] Despite their tremendous importance and the constant political activity concerning them, however, the constitutionality of these laws is surprisingly uncertain—the United States Supreme Court has heard an astounding eight cases in six years on that single issue.[3] With the stroke of a pen, a majority of the Court could redefine the constitutional criminal procedure of sentencing, strike down many or all of these sentencing laws, and potentially overturn the sentences imposed on millions of federal and state defendants nationwide.[4]

After the decisions in *Jones v. United States*[5] and *Apprendi v. New Jersey*,[6] which invalidated criminal sentences on Sixth Amendment grounds because the defendant's maximum penalty had been enhanced hy findings of fact made by the sentencing judge rather than the trial jury, many observers predicted that the Court had embarked on a journey that would lead it to do exactly that.[7] The strident

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CRIMINAL JUSTICE STATISTICS 2001, at 414, 444 (Ann L. Pastore & Kathleen Maguire eds., 2002).

2. *See, e.g.*, Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1004 (2001); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); *see also, e.g.*, Harris v. United States, 536 U.S. 545, 570-72 (2002) (Breyer, J., concurring) (criticizing use of statutory mandatory minimum penalties); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 1 (1988). In March and April 2003, for example, Congress nearly enacted fundamental changes to the federal sentencing guidelines as a rider to child protection legislation, although the scope of the amendments was reduced in conference committee. *See* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, CHAMPION, June 2003, at 6 (describing adoption and provisions of "Feeney Amendment" to Pub. L. No. 108-21 (2003)); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310, 310-14 (2003) (same).

3. In order of decision, those cases are: Almendarez-Torres v. United States, 523 U.S. 224 (1998); Monge v. California, 524 U.S. 721 (1998); Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Cotton, 535 U.S. 625 (2002); Harris v. United States, 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); State v. Blakely, 47 P.3d 149 (Wash. 2003), *cert. granted sub nom.*, Blakely v. Washington, 124 S. Ct. 429 (2003).

4. A constitutional holding invalidating a sentencing law would not necessarily provide relief to all defendants previously sentenced under that law because the decision might not be applied retroactively to already-final convictions, and many defendants likely would find their claims precluded by procedural doctrines on direct review or collateral attack. *See, e.g.*, Nancy J. King & Susan R. Klein, *Apres* Apprendi, 12 FED. SENTENCING REP. 331 (2000) (discussing procedural barriers to relief).

5. 526 U.S. 227 (1999).

6. 530 U.S. 466 (2000).

7. *See, e.g.*, Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction between Sentencing Factors and Elements of Crime*, 69 FORDHAM L. REV. 1399, 1400 (2001); Ethan Glass, Comment, *Whatever Happened to the Trial By Jury? The Unconstitutionality of Upward Departures Under the United States Sentencing Guidelines*, 37 GONZ. L. REV. 343, 359-62 (2001/2002); Thomas M. Morrow, Note, Apprendi v. New Jersey*: In the "Sleeper Decision of 2000," the Supreme Court Restores Constitutional Protections to (Some) Criminal Defendants*, 38 HOUS. L. REV. 1065, 1087-91 (2001); Elizabeth A. Olson, Comment, *Rethinking Mandatory*

dissents in those 5-4[8] cases lamented as much. They objected to the Court's "watershed change in constitutional law,"[9] for "cast[ing] doubt on sentencing practices and assumptions followed not only in the federal system but also in many States,"[10] and decried that it would "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of" these cases.[11] The prediction about the effect on federal court dockets, at least, certainly came true: within two years, there were thousands of *Apprendi* claims raised at all levels,[12] and six circuits announced en banc decisions related to *Apprendi*.[13]

Two years later, however, the Court slammed on the brakes, seemingly stopping the impact of *Apprendi* in its tracks. In *Harris v. United States*[14] a different five-justice majority[15] ruled that it was constitutional for the imposition of an enhanced mandatory minimum sentence to be based on a determination by the sentencing judge and not on a trial jury finding. This holding apparently preserved the constitutionality of most modern sentencing laws, in particular statutory mandatory minimum sentences and the Federal Sentencing Guidelines. The Court's newly promulgated doctrine distinguished between findings of fact that establish or increase a convicted defendant's *maximum* sentence on the one hand, and findings of fact that determine or increase the defendant's *minimum* punishment on the other. Yet while the results of *Apprendi* and *Harris* each commanded a narrow majority of the Court, at least five justices also agreed that the distinction between

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Minimums After Apprendi, 96 NW. U. L. REV. 811, 814 (2002); Freya Russell, Casenote, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing:* Apprendi v. New Jersey *and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CAL. L. REV. 1199, 1224-29 (2001); Mark H. Allenbaugh, *Grid & Bear It*, CHAMPION, Mar. 2002, at 35; Alan Ellis et al., *Apprehending and Appreciating* Apprendi, CRIM. JUST., Winter 2001, at 17, 19, 21-22; Jon M. Sands & Steven G. Kalar, *An* Apprendi *Primer: On the Virtues of a "Doubting Thomas"*, CHAMPION, Oct. 2000, at 18, 20, 24, 66-68.

Others predicted the *Apprendi* decision would have more modest effects. *See, e.g.*, Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 621-24 (2002); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating* Apprendi, 12 FED. SENTENCING REP. 320 (2000); Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 792-801 (2002).

8. *See infra* note 49 and accompanying text.

9. *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

10. *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting).

11. *Apprendi*, 530 U.S. at 551 (O'Connor, J., dissenting); *see also* King & Klein, *supra* note 4 (discussing procedural obstacles for federal and state defendants seeking to raise *Apprendi* claims).

12. *See* Ring v. Arizona, 536 U.S. 584, 619-21 (2002) (O'Connor, J., dissenting) (citing 77% increase in second or successive habeas petitions and 1802 Court of Appeals decisions on account of *Apprendi*, and 18% of all certiorari petitions as including an *Apprendi* claim).

13. *See* United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (en banc); United States v. Vasquez, 271 F.3d 93 (3d Cir. 2001) (en banc); United States v. Promise, 255 F.3d 150 (4th Cir. 2001) (en banc); United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc); Browning v. United States, 241 F.3d 1262 (10th Cir. 2001) (en banc); United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) (en banc).

14. 536 U.S. 545 (2002).

15. *See infra* notes 102-03 and accompanying text.

the two results was illogical.[16] Even though his vote was dispositive, Justice Scalia, one of the Court's most prolific opinion-writers, was silent in *Harris*.[17] And the *Harris* dissenters condemned the end of the supposed incipient Sixth Amendment revolution with the same vigor that their now-victorious counterparts had feared its arrival.[18] For an issue of such surpassing importance to the legislative design of criminal sentencing laws, the Court's inability to find a stable justification for its constitutional doctrine is deeply troubling.

The intellectual quandary found in the Court's opinions in the *Apprendi* line of cases results from imprecision in analyzing the constitutional issue. In adjudicating the constitutionality of the various sentencing provisions it has considered, the Court has analyzed the constitutional question solely in terms of the Jury Trial guarantee of the Sixth Amendment and has relied almost exclusively upon an originalist method of interpreting that clause. This narrowly drawn analysis is confounded by a factual and historical posture that dooms the inquiry from the start, and has led the Court to its present intractable divisions over the constitutional law of sentencing.

The Court's holdings in *Apprendi* and *Harris* are eminently defensible as a matter of constitutional law—and entirely logical—when analyzed in the proper way. Rather than focusing only on the Sixth Amendment, the constitutional law of sentencing must be examined through a much broader perspective. In addition to the trial jury and sentencing judge, the powers held by the legislature and prosecutor also must be considered. Similarly, instead of the original understanding of a single clause, the constitutional law of sentencing derives from structural reasoning about the allocations of power to those four institutions found in the criminal procedure provisions of the Constitution.[19]

This broader analysis is the constitutional structure of criminal procedure established by the Constitution's text. At the core of the Constitution's institutional balance of power in criminal procedure is the concept of a criminal defendant's offense of conviction: the crime that is enacted, charged, tried to verdict, and punished. Many well-known constitutional protections, including the Sixth Amendment right to trial by jury, apply to one or more of the first three stages of a criminal offense. The constitutional issue raised by the *Apprendi* line of cases

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16. *See infra* note 103 and accompanying text.

17. *See infra* notes 100, 123-24 and accompanying text; *see also* Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENTENCING REP. 79 (2002) (analyzing Justice Scalia's position in *Harris*).

18. *See, e.g.*, Harris v. United States, 536 U.S. 545, 577, 579, 582 (2002) (Thomas, J., dissenting).

19. Reliance on broader perspectives of constitutional structure instead of focusing on specific clauses in isolation has become an increasingly prominent method of constitutional argument in recent years. *See generally* CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1999); CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998); Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999) (discussing structural constitutional reasoning underlying Supreme Court's derivation of individual right to travel as enforced in *Saenz v. Roe*, 526 U.S. 489 (1999)).

involves the relationship of the concept of the offense of conviction to the sentencing stage of a criminal case.

Analyzing the structural framework of constitutional criminal procedure demonstrates two fundamental conclusions about the constitutional law of sentencing. One is that a defendant's sentence is unconstitutional if it exceeds the maximum penalty provided for the offense of conviction established by the guilty verdict—the principle safeguarded by the *Apprendi* rule. The other is that sentencing laws that regulate the determination of a defendant's sentence within the maximum penalty provided by the offense of conviction are consistent with the constitutional structure of criminal procedure and therefore are constitutional—the doctrine promulgated in *Harris*.

The constitutional structure analysis concludes that some allocation of power among the four institutions—legislature, prosecutor, trial jury, and sentencing judge—is both unavoidable and necessary. More significantly, subject to the narrow constitutional limitation provided by the *Apprendi-Harris* rule, the legislature is the institution vested with the authority to determine that allocation with respect to the definitions of criminal offenses and the imposition of sentences for their violations. One legislature might enact offenses and a sentencing scheme in which nearly all power to determine a defendant's sentence rests in its hands and those of the prosecutor. By contrast, another legislature might do the opposite and enact a system in which the sentencing judge plays a nearly dispositive role in setting the defendant's punishment. The constitutional structure analysis explains why the Constitution equally permits both of these choices (and others) and justifies the outcomes of *Apprendi* and *Harris* far more persuasively than the Court's opinions. Within the wide bounds permitted by the constitutional structure of criminal procedure, the legislature may design and implement a wide variety of sentencing laws without violating the Constitution.

Part I of this Article summarizes the historical developments that led to the *Apprendi* line of cases. After reviewing the constitutional history of sentencing, it describes how recent statutory innovations created the new constitutional question the Court faces. It then analyzes the *Apprendi* line of cases and describes the Sixth Amendment interpretive impasse that has arisen in the Court's decisions.

Part II explains the constitutional structure of criminal procedure and applies that analysis to the problem of the constitutional law of sentencing presented in the *Apprendi* line of cases. It justifies both the *Apprendi* rule and the *Harris* rule and rebuts several counter-arguments. Finally, it describes the consequences of the constitutional structure analysis for the future of the constitutional criminal procedure of sentencing.

I. THE *APPRENDI* LINE OF CASES

Compared to many other areas of criminal procedure, there is remarkably little constitutional law governing the procedures for sentencing criminal defendants convicted of non-capital crimes.[20] In the last two decades, however, legislatures

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20. The Court has developed a significant body of doctrine mandating special Eighth Amendment rules for sentencing hearings in capital cases. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 606 (2002) (citing *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring)); *id.* at 610 (Scalia, J., concurring); *id.* at 614 (Breyer, J., concurring). For a discussion of effects that the Court's Sixth Amendment holdings in *Apprendi* and *Ring* may have on the Court's

have enacted sweeping changes to the laws governing the factfinding and decisionmaking that occurs when a specific offender's particular sentence is determined. These new enactments reshaped the law and practice of sentencing procedure in manners previously unknown in the country's history. In turn, the Supreme Court was forced to reexamine its limited prior forays into the constitutional criminal procedure of sentencing in light of these new laws. As it did so, the Court struggled with the same difficult interpretive problems that arise whenever legal, social, or technological innovations outrun a Constitution written in the late eighteenth century.[21]

A. Brief Summary of the Constitutional History of Sentencing

The constitutional protections applicable to the trial of criminal offenses, at which the defendant's guilt or innocence is adjudicated, have long been clear. Most importantly, after indictment by a federal grand jury or the filing of state charges through an appropriate instrument, the defendant has the right to a trial by jury at which the prosecution must prove guilt of the charged offense beyond a reasonable doubt.[22] These protections—proper charge, jury trial, and standard of proof—apply to each constituent component of the offense: the so-called "elements" of the offense.[23] For example, if a drug offense consists of (1) knowingly (2) possessing (3) with intent to distribute (4) between 500 and 5000 grams of powder cocaine,[24] then the prosecution must establish each of these four elements under those procedures. Over the years, the Court frequently has encountered appeals in which one or more of these procedures was not followed for one or more elements of an offense,[25] and sometimes has reviewed statutes that circumvented these requirements.[26]

Eighth Amendment jurisprudence, see Adam Thurschwell, *After* Ring, 15 FED. SENTENCING REP. 97 (2002).

21. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001); Turner Broad. Co. v. FCC, 512 U.S. 622 (1994); *see also infra* note 218 and accompanying text.

22. *See, e.g.*, *Harris*, 536 U.S. at 549; *id.* at 574-75 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 476-77 & n.3. The defendant may waive the right to trial by jury in favor of a bench trial, although there is no constitutional right to do so. *See* FED. R. CRIM. P. 23(a) (conditioning bench trial on prosecution consent); United States v. Singer, 380 U.S. 24, 36 (1965) (upholding constitutionality of Rule). The Sixth Amendment right to jury trial does not attach to petty offenses, for which less than six months' imprisonment is available. *See* Baldwin v. New York, 399 U.S. 66, 73 (1970).

23. *See, e.g.*, *Harris*, 536 U.S. at 549 ("Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts."); *Apprendi*, 530 U.S. at 478.

24. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B)(ii)(II) (2002); *see also* United States v. Cotton, 535 U.S. 625, 628-29, 632, 633 n.3 (2002).

25. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 627 (2002) (omission of element of offense from indictment); Neder v. United States, 527 U.S. 1, 4 (1999) (failure to submit element of offense to petit jury).

26. *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); Leslie Yalof Garfield, *Back to the Future: Does* Apprendi *Bar a Legislature's Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351 (2003) (discussing implications of *Apprendi* line of cases for earlier affirmative defenses precedents); *see also, e.g.*, *Harris*, 536 U.S. at 557-58; *Apprendi*, 530 U.S. at 484-85 & n.12.

On the other hand, for the vast majority of the nation's history, constitutional criminal procedure had very little effect on the sentencing process. In the early years of independence many criminal offenses carried mandatory determinate sentences, such as a specified length of imprisonment.[27] In such a context, "sentencing" was merely a pro forma imposition of that preordained penalty. By the mid-nineteenth century, Congress and most state legislatures had abandoned fixed penalties and replaced them with a punishment range for each offense, from which the sentencing judge would select the most appropriate penalty for each offender in the exercise of the judge's discretion.[28] In the twentieth century, when the rehabilitative model of criminal punishment was predominant, executive branch parole officers could release a defendant upon his correction before the expiration of the judicially imposed term of incarceration.[29] In this era of indeterminate sentencing, the judge's discretion was virtually unlimited.[30] Moreover, so long as the judge imposed a lawful sentence in compliance with the statute, appellate review ordinarily was unavailable.[31] Likewise, for much of this period there was virtually no meaningful federal review of state criminal convictions, much less the sentences imposed.[32]

Beginning in about the early 1980s, a large systemic change in sentencing law and practice occurred. Legislatures across the country began to abolish indeterminate sentencing and extensive judicial discretion in favor of determinate sentencing guidelines and mandatory minimum sentences.[33] Parole and the rehabilitative model of criminal punishment similarly were discarded in many jurisdictions, including the federal system.[34] Legislatures also introduced a right to appeal a sentence that did not comply with (or misapplied) the applicable sentencing laws or guidelines.[35] Nonetheless, just as under the prior indeterminate sentencing regimes, an enormous range of relevant conduct and other factors continued to be taken into consideration at sentencing. The consequences of those findings of fact for the defendant's sentence now were governed by determinate

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27. *See, e.g.*, *Harris*, 536 U.S. at 558 (citing *Apprendi*, 530 U.S. at 481); *Apprendi*, 530 U.S. at 479-80 & n.7; Mistretta v. United States, 488 U.S. 361, 364 (1988); *cf.* STITH & CABRANES, *supra* note 2, at 9.

28. *See, e.g.*, *Harris*, 536 U.S. at 558 (citing United States v. Tucker, 404 U.S. 443, 446 (1972)); *Apprendi*, 530 U.S. at 481 (citing Williams v. New York, 337 U.S. 241, 246 (1949)); STITH & CABRANES, *supra* note 2, at 10-13.

29. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 363-64 (1989); STITH & CABRANES, *supra* note 2, at 18-22.

30. *See, e.g.*, Witte v. United States, 515 U.S. 389, 397-98 (1995); Williams v. New York, 337 U.S. 240, 246 (1949); STITH & CABRANES, *supra* note 2, at 9-22, 28-29.

31. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447. *Cf. Apprendi*, 530 U.S. at 481-82 & n.9 (asserting that maximum statutory penalty for offense of conviction was restraint on lawful sentence by judge); STITH & CABRANES, *supra* note 2, at 9, 170-71.

32. *See, e.g.*, United States v. Cotton, 535 U.S. 625, 629-30 (2002); Wainwright v. Sykes, 433 U.S. 72, 78-81 (1977).

33. *See, e.g.*, *Harris*, 536 U.S. at 558-59; Douglas A. Berman, *Appreciating* Apprendi*: Developing Sentencing Procedures in the Shadow of the Constitution*, 37 CRIM. L. BULL. 627, 629-36 (2001); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 227-39; STITH & CABRANES, *supra* note 2, at 38-48.

34. *See, e.g.*, *Mistretta*, 488 U.S. at 367; STITH & CABRANES, *supra* note 2, at 38-48.

35. *See, e.g.*, 18 U.S.C. § 3742 (2000); *Mistretta*, 488 U.S. at 368.

sentencing provisions or guidelines, rather than judgments made in exercise of the judge's discretion.[36]

This new sentencing regime, which was unlike anything that preceded it in our nation's history, was bound to be—and was—challenged on many grounds.[37] Combined with the previously unavailable appeals of sentences that the new system also generated, the constitutional issues that became the *Apprendi* line of cases appeared for the first time.

B. Emergence of New Constitutional Issues

Under the historical system of wide judicial discretion at sentencing, the basic premise of the Supreme Court's constitutional law of sentencing was well settled: "Judicial factfinding in the course of selecting a sentence . . . does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."[38] As the Court in *Jones v. United States* explained, the extensive historical practice of judicial discretion conclusively repudiated the argument that "every fact with a bearing on sentencing must be found by a jury [as an element of the offense]; we have resolved that general issue and have no intention of questioning its resolution."[39] Once the elements of the offense were proven beyond a reasonable doubt to the jury at trial, the sentencing judge constitutionally could find additional facts at sentencing in the course of determining the appropriate punishment for the offender.

What changed in the new era, therefore, was the very kind of laws used to govern judicial decisionmaking in the sentencing process. Legislatures enacted provisions, either comprehensive guidelines systems or stand-alone statutory sections, which had a precise and definite effect on the calculation of the defendant's sentence but by their terms were *not* elements of substantive criminal offenses—they were based on findings of fact made by a preponderance of the evidence by the sentencing judge, rather than beyond a reasonable doubt by a trial jury.[40] Because such laws had never existed before, the Supreme Court confronted an entirely new constitutional issue: whether judicial factfinding in applying the determinate sentencing laws to defendants was equivalent for constitutional

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36. *See, e.g.*, *Harris*, 536 U.S. at 560; United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam); Witte v. United States, 515 U.S. 389, 399 (1995); STITH & CABRANES, *supra* note 2, at 66-77.

37. *See, e.g.*, *Witte*, 515 U.S. at 406 (rejecting Double Jeopardy challenge); *Mistretta*, 488 U.S. at 396-97, 412 (rejecting separation of powers challenge to United States Sentencing Commission that promulgated Federal Sentencing Guidelines used to sentence petitioner); United States v. Cardenas-Alvarez, 987 F.2d 1129, 1134 (5th Cir. 1993) (rejecting Eighth Amendment disproportionality and Equal Protection challenges to Guidelines sentence); United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990) (requiring clear and convincing evidence for application of significant upward departure under Guidelines).

38. *Harris*, 536 U.S. at 558.

39. 526 U.S. 227, 248 (1999); *see also, e.g.*, *Harris*, 536 U.S. at 549-50; *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

40. *See, e.g.*, *Mistretta*, 488 U.S. at 363-68 (challenging Federal Sentencing Guidelines); McMillan v. Pennsylvania, 477 U.S. 79, 81-82 & n.1 (1986) (challenging mandatory minimum in stand-alone statutory sentencing provision); *cf. Harris*, 530 U.S. at 550-51 (challenging mandatory minimum in offense-defining statute).

purposes to the previously approved factfinding under an indeterminate sentencing regime.

In *McMillan v. Pennsylvania*, the Court coined the label "sentencing factors" to describe these new determinate sentencing provisions and suggested that they were presumptively constitutional.[41] The statute in *McMillan* authorized the sentencing judge to find by a preponderance of the evidence that the defendant visibly had possessed a firearm during his offense, and mandated imposition of a minimum sentence of five years' imprisonment upon that finding.[42] The Supreme Court rejected the defendant's argument that the visible-firearm-possession finding had to be made as an element of the offense and held that application of that "sentencing factor" to the defendant's sentence was constitutional.[43]

After *McMillan* initially sustained the constitutionality of sentencing factors in principle, two significant problems emerged. First, as in *Jones*, legislatures began to write statutes that had unclear meanings—provisions that might be interpreted as defining either several crimes and their "elements," or instead a single crime with accompanying "sentencing factors." Second, as in *Apprendi*, defendants argued that some provisions, although denominated as "sentencing factors" that would be proven by a preponderance of the evidence to the sentencing judge, had an effect on their sentences that, for constitutional purposes, should be interpreted as creating an "element" of an aggravated criminal offense that must be proven beyond a reasonable doubt to the trial jury. Thus, despite *McMillan*, the Court had not resolved definitively the constitutionality of *all* varieties of the new determinate sentencing laws that legislatures had adopted.[44] The *Apprendi* line of cases arose as additional statutes were challenged and new constitutional arguments were raised.

C. Apprendi *Doctrine Appears*[45]

In 1998, the Supreme Court decided *Almendarez-Torres v. United States*,[46] the first case in what became the *Apprendi* line of cases. The federal immigration crime at issue in *Almendarez-Torres* provided for an enhanced maximum sentence if the offender had prior felony convictions, and the defendant received a longer term of

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41. 477 U.S. at 86, 90; *see also Apprendi*, 530 U.S. at 485 (stating that in *McMillan* "this Court, for the first time, coined the term 'sentencing factor'").

42. *See McMillan*, 477 U.S. at 81-82 & n.1.

43. *See id.* at 84-93.

44. *See* Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281, 284-85, 302-03, 306 (2001); STITH & CABRANES, *supra* note 2, at 2-3, 22, 149.

45. These decisions are analyzed in greater detail in other sources. *See, e.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103-23 (2001) [hereinafter Bibas, *Fact-Finding*]; Andrew M. Levine, *The Confounding Boundaries of "*Apprendi*-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 390-409 (2002); Priester, *supra* note 44, at 282-83; Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 251-58 (1998) [hereinafter Priester, *Sentenced*].

46. 523 U.S. 224 (1998). The same reasoning and result appeared as a side issue in a later 1998 decision, *Monge v. California*, a Double Jeopardy case involving a recidivism sentence enhancement. *See* 524 U.S. 721, 729 (1998); *id.* at 740-41 (Scalia, J., dissenting).

imprisonment than he otherwise could have without the recidivism finding.[47] Although the prior convictions had not been alleged or established under the procedures applicable to elements of the offense, five justices concluded that the Due Process Clause's mandate of fundamental fairness was not violated by imposing the longer sentence on a recidivist as a sentencing factor.[48] Four justices dissented, maintaining that the original understanding of the Sixth Amendment right to trial by jury required the contrary result.[49]

In *Jones*[50] and *Apprendi*[51] (decided in 1999 and 2000 respectively), the tables were turned. In *Jones*, the federal carjacking crime provided for enhanced maximum sentences depending on the harm suffered by the victim; the defendant was sentenced under the subsection applicable to causing serious bodily injury, which had not been alleged or established as an element.[52] In *Apprendi*, the state hate crime enhancement appeared in a separate statute written expressly as a sentencing factor (with factfinding by a judge at sentencing by a preponderance of the evidence), but it had the effect of extending the defendant's sentence for the underlying firearms offense beyond the maximum available without that finding.[53] Five justices applied an originalist Sixth Amendment interpretation to overturn both defendants' sentences, ruling that the factual findings at issue had to be made as elements of the offense rather than as sentencing factors.[54] In his *Apprendi* concurring opinion, Justice Thomas repudiated his prior acceptance of the fundamental fairness position and joined the Sixth Amendment originalism side.[55] The four dissenting justices in *Apprendi* continued to apply the Due Process Clause fundamental fairness analysis and concluded there was no violation of that principle in either case.[56]

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47. *See Almendarez-Torres*, 523 U.S. at 227 (discussing 8 U.S.C. § 1326 (1994)).

48. *See id.* at 247; Apprendi, 530 U.S. at 552-54 (O'Connor, J., dissenting); *see also* Priester, *supra* note 44, at 292-96; Priester, *Sentenced*, *supra* note 45, at 263-66, 283.

49. *See Almendarez-Torres*, 523 U.S. at 248-49 (Scalia, J., dissenting); *see also* Priester, *supra* note 44, at 286-92; Priester, *Sentenced*, *supra* note 45, at 266-67, 283-84. The fundamental fairness majority was Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer; the originalist dissent was Justices Stevens, Scalia, Souter, and Ginsburg.

50. 526 U.S. 227 (1999).

51. 520 U.S. 466 (2000).

52. *See Jones*, 526 U.S. at 230-32 (interpreting 18 U.S.C. § 2119 (1992 & Supp. V)).

53. *See Apprendi*, 530 U.S. at 468-69, 474.

54. *See id.* at 497; *Jones*, 526 U.S. at 252. A case decided three weeks before *Apprendi* presented "a similar situation" to *Jones* concerning the construction of a different federal criminal statute, but the Court decided the case on statutory interpretation grounds with only passing mention of the constitutional issue. Castillo v. United States, 530 U.S. 120, 124 (2000) (construing 18 U.S.C. § 924(c)(1) (1988 & Supp. V)) ("[E]ven apart from the doctrine of constitutional doubt . . . [we] conclude that the relevant words create a separate substantive crime."). A week later the Court likewise made only brief mention of *Jones*. *See* Carter v. United States, 530 U.S. 255, 273 (2000) (construing 18 U.S.C. § 2113(a)-(b) (1994 & Supp. IV)) ("[T]he constitutional questions that would be raised by interpreting the valuation requirement to be a sentencing factor persuade us to adopt the view that the valuation requirement is an element.") (citing *Jones*, 526 U.S. at 239-52).

55. *See Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (calling his prior position, "an error to which I succumbed"); *see also id.* at 499-523 (Thomas, J., concurring); Priester, *Sentenced*, *supra* note 45, at 296 nn.231-32.

56. *See Apprendi*, 530 U.S. at 547, 552-54 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 268-71 (Kennedy, J., dissenting). Interestingly, the groups of justices do not correspond to

1. The *Apprendi* Rule

The *Apprendi* constitutional rule is the following: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, *whether the statute calls it an element or a sentencing factor*, must be submitted to a jury, and proved beyond a reasonable doubt."[57]

Thus, the label given to the fact by the legislature is not dispositive if the *effect* of the finding of fact is to increase the sentence beyond the otherwise available maximum penalty.[58] For this reason, the key components of the *Apprendi* rule are determining what the "prescribed statutory maximum" is and what it means for a finding of fact to "increase" the sentence beyond it.[59]

The Court defined the *Apprendi* rule in terms of the Sixth Amendment right to a jury trial, and more specifically the right to have the jury make the findings of fact that all the elements of the offense have been proven.[60] In *Apprendi*, the Court described this principle as "the facts reflected in the jury verdict."[61] In his concurring opinion, Justice Scalia restated the principle as "the right to have the jury determine those facts that determine the maximum sentence the law allows."[62] Thus, under *Apprendi* the determination of the prescribed statutory maximum sentence is based upon the jury's findings of fact.

First, a court applying the *Apprendi* rule must determine which facts the jury found beyond a reasonable doubt when it entered a guilty verdict. The jury instructions given by the trial judge, which list the elements of the offense and tell the jury that it must find each element to convict, are the determinative source.[63]

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the conventional wisdom of the justices' political blocs. *See infra* notes 120-24 and accompanying text. *But see* Mark Tushnet, *The Conservatism in* Bush v. Gore, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 171 (Bruce Ackerman ed., 2002) (discussing Bush v. Gore, 531 U.S. 98 (2000)) ("When the Court reached the dispositive question in *Bush v. Gore*, the Justices divided along what everyone perceived to be partisan lines."). The originalist majority in *Apprendi* was Justices Stevens, Scalia, Thomas, Souter, and Ginsburg; the fundamental fairness dissenters were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

57. *Harris*, 536 U.S. at 550 (quoting *Apprendi*, 530 U.S. at 490) (emphasis added; internal quotations omitted); *see also* United States v. Cotton, 535 U.S. 625, 627 (2002); Ring v. Arizona, 536 U.S. 584, 600 (2002); *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

58. *See Apprendi*, 530 U.S. at 494; *see also, e.g.*, *Ring*, 536 U.S. at 605; *id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83).

59. *See Harris*, 536 U.S. at 550 (quoting *Apprendi*, 530 U.S. at 490); *see also* Priester, *supra* note 44, at 286-301.

60. The right to have the jury's findings of fact made by proof beyond a reasonable doubt derives from the Due Process Clause. *See In re* Winship, 397 U.S. 358, 364 (1970); *see also, e.g.*, *Harris*, 536 U.S. at 549; *id.* at 575 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 477.

61. *Apprendi*, 530 U.S. at 483; *see also, e.g.*, *Ring*, 536 U.S. at 588-89, 597; *Harris*, 536 U.S. at 557; *Apprendi*, 530 U.S. at 482 n.9.

62. *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring); *see also, e.g.*, *Ring*, 536 U.S. at 604; *Apprendi*, 530 U.S. at 495; *id.* at 519 (Thomas, J., concurring); Monge v. California, 524 U.S. 721, 737-39 (1998) (Scalia, J., dissenting).

63. *See Jones*, 526 U.S. at 243-44; *see also, e.g.*, *Ring*, 536 U.S. at 588-89, 592-93; *Apprendi*, 530 U.S. at 470-71, 474 (elements established by guilty plea to count 18); United States v. Zidell, 323 F.3d 412, 428 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 178 (2003);

Therefore, if the jury instructions omitted a fact—and accordingly the jury was not told that it must find the fact to convict—then that fact is not reflected in the jury's verdict.[64] Evaluating the jury instructions and the jury's verdict (for example, acquittals on certain counts and convictions on others) establishes which facts the jury found as elements of the offense.[65]

United States v. Wheat, 278 F.3d 722, 739-40 (8th Cir. 2001), *cert. denied*, 537 U.S. 850 (2002); *cf.* United States v. Cotton, 535 U.S. 625, 628 (2002) (noting pre-*Apprendi* jury instruction regarding drug quantity).

Like other defects in jury instructions, *Apprendi* errors are not per se reversible error. The failure to instruct the jury on an element of the offense may be a harmless error not requiring reversal. *See* Neder v. United States, 527 U.S. 1, 17 (1999) (holding, in case where materiality element of fraud charge was omitted from jury instructions, that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"); *see also id.* at 35 (Scalia, J., dissenting) (arguing for narrower scope of harmlessness for erroneous jury instructions on elements of offenses). When the omitted element is a fact that increases the statutory maximum sentence, such as an aggravating factor for purposes of imposing a death sentence, that *Apprendi* error likewise may be harmless. *See Ring*, 536 U.S. at 609 n.7 (remanding capital case where pecuniary-gain and heinousness aggravating factors were not decided by jury for determination whether "any [*Apprendi*] error was harmless because a pecuniary gain finding was implicit in the jury's verdict" convicting defendant of felony murder in the course of an armed robbery); *see also, e.g.*, United States v. Matthews, 312 F.3d 652, 665-67 (5th Cir. 2002), *cert. denied*, 538 U.S. 938 (2003); United States v. Peters, 283 F.3d 300, 314 (5th Cir. 2002), *cert. denied*, 536 U.S. 934 (2002).

Similarly, an *Apprendi* error often will fail to meet the strict requirements of plain error review when the defendant failed to properly preserve an objection to the error. *See Cotton*, 535 U.S. at 631-33 (defective indictment). This is particularly true where evidence of the fact at issue is "overwhelming and uncontroverted." *Id.* at 634; *see also, e.g.*, United States v. Guevara, 298 F.3d 124, 126-28 (2d Cir. 2002), *cert. denied*, 538 U.S. 936 (2003); *Wheat*, 278 F.3d at 740-42.

On the other hand, it is important to distinguish harmless error review and plain error review cases from those in which there is in fact no *Apprendi* error because the relevant finding of fact did *not* increase the defendant's sentence beyond a prescribed statutory maximum. *See Cotton*, 535 U.S. at 628, 632, 633 n.3 (noting that findings of drug quantity did increase defendants' sentences above 20-years maximum in 21 U.S.C. § 841(b)(1)(C), resulting for some defendants in a sentence of life imprisonment under § 841(b)(1)(A)); *see also, e.g.*, *Zidell*, 323 F.3d at 427-28 (defendant's sentence within statutory range); *Peters*, 283 F.3d at 314.

64. *See Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6; *see also, e.g.*, *Zidell*, 323 F.3d at 427-28 (failing to label fact as element in jury instructions was harmless where instructions nevertheless required jury to find fact beyond a reasonable doubt); United States v. Barbosa, 271 F.3d 438, 456-57 (3d Cir. 2001); *cf. Cotton*, 535 U.S. at 628-29, 632 (discussing *Apprendi* error in failure to allege in indictment element of offense of drug quantity, and noting that jury instruction also did not treat drug quantity as an element); Castillo v. United States, 530 U.S. 120, 128 (2000) (supporting conclusion that statutory fact was element of offense and not sentencing factor by noting that "a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol, which factual belief underlay its firearm 'use' conviction").

65. By convicting the defendant of an offense pursuant to the judge's instructions, the jury thereby makes *explicit* findings of fact that each instructed element was proven beyond a reasonable doubt—e.g., that the defendant "used" a firearm in connection with a crime of violence. *See Castillo*, 530 U.S. at 128 (describing possible situation of "the jury's belief that

Second, the court compares these jury findings to the facts contained in the relevant criminal statute under which the defendant has been charged. The statute ordinarily will include facts that constitute the various conduct, circumstances, and results comprising the crime.[66] To the extent that the statute links specific facts to specific maximum sentences, the facts necessary for each such maximum sentence are elements of the offense.[67] In this way, the court determines the "prescribed statutory maximum" sentence and whether the sentence has been unconstitutionally "increased" above that level by a finding of fact not made as an element of the offense.

For example, the federal carjacking statute construed in *Jones* provided a fifteen-year maximum sentence for carjacking, which was defined, in essence, as taking a motor vehicle from the person of another by force or intimidation while possessing a firearm.[68] In addition, the statute provided a maximum sentence of twenty-five years if serious bodily injury resulted, and a maximum sentence of life if death resulted.[69] In *Jones*, the Court held that because the jury had not been instructed on serious bodily injury, and its verdict therefore did not include a finding of serious bodily injury, the prescribed statutory maximum sentence authorized by the jury's verdict was fifteen years, and accordingly the defendant's sentence of twenty-five years violated the (subsequently named) *Apprendi* rule.[70] Similarly, in *Apprendi*, the defendant's sentence was unconstitutional because the findings of fact admitted in the guilty plea established elements authorizing a prescribed statutory maximum sentence of ten years while the fact used to justify the defendant's sentence of twelve years had been proven only as a sentencing factor.[71] Thus, when a statute includes multiple maximum sentences, each level creates a separate offense (like the three tiers of carjacking in *Jones*).[72] Likewise, notwithstanding that a statute purports on its face to create a sentencing factor, the

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he actively used the pistol, which factual belief underlay its firearm 'use' conviction"). It also is possible that the jury's explicit findings of fact may *necessarily imply* that the jury also found additional facts that the instructions did not actually include—in which case the *Apprendi* violation would be harmless. *See Ring*, 536 U.S. at 609 n.7 (remanding for harmlessness determination relating to possible "implicit" finding in verdict) (citing *Neder*, 527 U.S. at 25 (same)); *see also Neder*, 527 U.S. at 35 (Scalia, J., dissenting) (agreeing that "[t]he failure of the court to instruct the jury properly . . . *can* be harmless, if the elements of guilt that the jury *did* find necessarily embraced the one omitted or misdescribed") (emphasis in original).

66. *Cf.* MODEL PENAL CODE § 1.13(9) (1985).

67. *See Ring*, 536 U.S. at 597, 602; *Apprendi*, 530 U.S. at 474, 484; *see also, e.g.*, Harris v. United States, 536 U.S. 545, 550, 557 (2002) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime . . . by those who framed the Bill of Rights."); *Cotton*, 535 U.S. at 632; *Apprendi*, 530 U.S. at 483 n.10 (referring to "statute of indictment"); Priester, *supra* note 44, at 301-03.

68. *Jones*, 526 U.S. at 230 (construing 18 U.S.C. § 2119(1)).

69. *See id.*

70. *See Ring*, 536 U.S. at 600-01; *Jones*, 526 U.S. at 231; *see also id.* at 229, 251-52.

71. *See Ring*, 536 U.S. at 601-02; *Harris*, 536 U.S. at 564-65 (quoting *Apprendi*, 530 U.S. at 494); *Apprendi*, 530 U.S. at 468-69, 491-92.

72. *See Jones*, 526 U.S. at 243-44 & n.6, 252; Priester, *supra* note 44, at 287-90, 301-03.

proof of the fact nevertheless must be an element if the maximum sentence is increased (like the hate crime enhancement in *Apprendi*).[73]

Significantly, the *Apprendi* rule requires that a finding of fact be an element of the offense *only* if the finding increases the statutory maximum sentence as determined by this two-stage analysis. Sentencing factors that regulate the sentence imposed, but do not produce a sentence exceeding the maximum authorized by the offense elements established by the jury's verdict, are consistent with the *Apprendi* rule.[74] Such sentencing factors may be proven by a preponderance of the evidence to the sentencing judge so long as the statutory maximum sentence determined by the two-stage analysis is not exceeded.[75] The Court accordingly adopted a narrow, formalistic reading of the Sixth Amendment that preserves the jury's function as the adjudicator of the worst possible fate the defendant faces.[76]

The *Apprendi* dissenters rejected the proposition that the jury's verdict of guilty for a particular offense, and the findings of fact underlying that verdict, have any significance for Sixth Amendment purposes.[77] Under their view, "the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as [in *Harris*])."[78] These justices instead would frame the constitutional review of a defendant's sentence solely in terms of whether the sentence comports with the requirement of fundamental fairness in the Due Process Clause.[79]

2. The Recidivism Exception

The *Apprendi* rule contains a significant proviso that creates a limited exception to the scope of the rule. The proviso—"other than the fact of a prior

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73. *See Ring*, 536 U.S. at 602-04; *Apprendi*, 530 U.S. at 474, 491-96; Priester, *supra* note 44, at 301-03.

74. *See Apprendi*, 530 U.S. at 478, 494 & n.19; *see also, e.g.*, *Ring*, 536 U.S. at 611-12 (Scalia, J., concurring); *Harris*, 536 U.S. at 549-50.

75. *See Apprendi*, 530 U.S. at 483 n.10, 485. Sentencing factors that do not increase the sentence beyond the prescribed statutory maximum therefore need not be proven as elements of the offense. *Harris*, 536 U.S. at 564 (quoting *Apprendi*, 530 U.S. at 483 n.10); *Apprendi*, 530 U.S. at 476, 481, 494 & n.19; *id.* at 519 (Thomas, J., concurring); *Jones*, 526 U.S. at 248.

76. The *Apprendi* rule ensures that "the jury's role . . . [does not] shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping." *Jones*, 526 U.S. at 243-44. Justice Scalia put the point more bluntly: "the dissenters . . . are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee . . . the right to have a jury determine those facts that determine the maximum sentence the law allows." *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring) (emphasis in original).

77. *Apprendi*, 530 U.S. at 532-36 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 265-71 (Kennedy, J., dissenting).

78. *Harris*, 536 U.S. at 569 (Breyer, J., concurring).

79. *See Apprendi*, 530 U.S. at 552-54 (O'Connor, J., dissenting) (citing Almendarez-Torres v. United States, 523 U.S. 224, 242-43 (1998) and McMillan v. Pennsylvania, 477 U.S. 79, 86-90 (1986)); *id.* at 562-63 (Breyer, J., dissenting); *see also supra* note 56 and accompanying text.

conviction"[80]—excludes the fact of the defendant's recidivism from the requirement that facts that increase the statutory maximum sentence must be elements of the offense. The consequence of this exception is that, if the fact that increases the statutory maximum sentence is recidivism, then that fact constitutionally may be proven as a sentencing factor.[81]

The proviso developed as a result of the progression of the Court's cases. In *Almendarez-Torres*, the Court upheld sentences that were increased above the otherwise applicable statutory maximum based on a finding of recidivism.[82] Four justices dissented and argued that the enhanced sentences were unconstitutional because the fact that increased the maximum sentence was not proven as an element of the offense.[83] When the majority shifted in *Jones*, and stabilized in *Apprendi*, the Court accepted the position of the previously dissenting justices and adopted the *Apprendi* rule.[84] In neither case was recidivism the maximum-enhancing fact, however, and the Court apparently felt constrained by this factual and procedural posture not to overrule *Almendarez-Torres*.[85] Yet the *Apprendi* Court directly called into question the continuing validity of the recidivism exception, and Justice Thomas specifically disclaimed his prior participation in the (five-justice) *Almendarez-Torres* majority.[86] Nevertheless, the Court has not yet granted certiorari to reconsider *Almendarez-Torres*, and any possible *Apprendi* rule issue in the recent "three strikes" cases was mooted because the defendants' recidivism strikes in fact had been proven as elements of the offense.[87]

Notwithstanding the seemingly weak support on the Court for retaining the recidivism exception to the *Apprendi* rule, the exception is not without justification. Unlike all other facts used to increase the sentence beyond the otherwise applicable statutory maximum, reliance on the fact of a prior conviction involves no more than

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80. *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6 (1999)); *see also, e.g.*, *Harris*, 536 U.S. at 550 (quoting *Apprendi*, 530 U.S. at 490).

81. *See, e.g.*, United States v. Moore, 286 F.3d 47, 51 (1st Cir. 2002), *cert. denied*, 537 U.S. 907 (2003) ("In the post-*Apprendi* era, we have ruled with a regularity bordering on the monotonous that, given the explicit exception and the force of *Almendarez-Torres*, the rationale of *Apprendi* does not apply to sentence-enhancement provisions based upon prior criminal convictions."); United States v. Aparco-Centeno, 280 F.3d 1084, 1088-90 (6th Cir. 2002), *cert. denied*, 536 U.S. 948 (2002).

82. Almendarez-Torres v. United States, 523 U.S. 224, 230, 243-47 (1998); *see also* Monge v. California, 524 U.S. 721, 728-29 (1998).

83. "However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime." *Monge*, 524 U.S. at 741 (Scalia, J., dissenting); *see also id.* at 739-41 (Scalia, J., dissenting); *Almendarez-Torres*, 523 U.S. at 248-49, 251, 256, 258-60 (Scalia, J., dissenting).

84. *See* Priester, *supra* note 44, at 291 n.64 (noting shift); Priester, *Sentenced*, *supra* note 45, at 296 & nn.231-32 (same).

85. *See Apprendi*, 530 U.S. at 490 ("Apprendi does not contest . . . [*Almendarez-Torres*'] validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.").

86. *Apprendi*, 530 U.S. at 488-90 & n.14-15; *id.* at 520-21 (Thomas, J., concurring).

87. *See* Ewing v. California, 123 S. Ct. 1179, 1182 (2003); Lockyer v. Andrade, 123 S. Ct. 1166, 1170 (2003). These cases involved the same California "three strikes" statute at issue in *Monge*, although without the failure to follow the required procedures that had been present in that case. *Monge*, 524 U.S. at 724-25. Similarly, the *Ring* case also did not raise a recidivism enhancement issue. *See* Ring v. Arizona, 536 U.S. 584, 597 n.4 (2002).

"accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt."[88] The prior conviction means that the defendant *already* has received the constitutional rights to which he is entitled when the guilty verdict was obtained in the prior prosecution, and therefore the *fact* that the defendant has such a conviction is derivative of that proceeding.[89] Because of its narrow scope, the recidivism exception does nothing more than avoid "double-dipping" by criminal defendants. That is, the exception serves as a kind of estoppel: if the defendant previously received the procedural protections applicable to elements of the offense when convicted of that offense, then he is not entitled to receive them again in establishing the simple fact that he was so convicted. Such an exception therefore is perfectly consistent with the Court's Sixth Amendment analysis.

D. Apprendi*'s Aftermath*

What remained to be seen after *Apprendi* was whether the majority's Sixth Amendment originalism would be extended in future cases to further limitations on the enactment and application of sentencing factors. In a section of his concurring opinion in *Apprendi* now-tellingly not joined by Justice Scalia, Justice Thomas had called for several such extensions, including mandatory minimum sentences and capital cases.[90] Many observers believed that the Court might apply the *Apprendi* principle at least to facts that determine a "prescribed statutory minimum sentence" as well as the maximum.[91] Even if limited to the same formalistic structure as *Apprendi*, such a rule would require that findings of fact that determine the low as well as the high end of the possible *statutory* term of imprisonment be proven as elements of the offense.[92] Some observers predicted even greater changes, such as

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88. *Apprendi*, 530 U.S. at 496.

89. *See* Jones v. United States, 526 U.S. 227, 249 (1999); *see also Apprendi*, 530 U.S. at 488 (discussing "the certainty that procedural safeguards attached to any 'fact' of prior conviction"). Although the Court has not directly addressed the point, it is possible that the recidivism exception presumes that the fact of a prior conviction is uncontested or incontrovertible. *See id.* at 488-90 (noting that "Almendarez-Torres had *admitted* the three earlier convictions" and suggesting that recidivism exception to the *Apprendi* rule might not be justified "if the recidivist issue were contested") (emphasis in original). For example, the defendant might contest identity, arguing that the alleged prior conviction is in fact *not* his, but rather a crime committed by a different person of the same name. *Cf.* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 408 & nn.134-35 (2002) (noting that identity may be a contestable fact).

90. *See Apprendi*, 530 U.S. at 518-23 (Thomas, J., concurring).

91. *See, e.g.*, Allenbaugh, *supra* note 7, at 38 ("Prior opinions by the Supreme Court Justices indicate strongly that the Court will [perhaps] overrule . . . *McMillan*."); Levine, *supra* note 45, at 409-12; Olson, *supra* note 7, at 813.

92. *See* Harris v. United States, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting). In a prior article, I proposed an interpretation of the *Apprendi* principle providing that when a statute is offense-defining, any mandatory minimum sentences in the statute should be elements of the offense, but when a statute is not offense-defining the factfinding to increase a minimum sentence permissibly could be as a sentencing factor. *See* Priester, *supra* note 44, at 291 n.63. Under the view set forth in that article, offense-defining statutes must be clearly demarcated from sentencing-regulating statutes (or non-statutory regulations like the Federal Sentencing Guidelines), and so long as this separation is observed a sentencing-regulating

the outright overruling of *McMillan* or a holding that the determinate sentencing effects of the Federal Sentencing Guidelines be elements of the offense rather than sentencing factors.[93]

In 2002, the Court stood behind the *Apprendi* rule but apparently terminated any potential expansions of its reasoning. In *Ring v. Arizona*,[94] the Court abandoned previous dicta[95] and held that the *Apprendi* rule invalidated the capital sentencing process of at least five states (overruling the pre-*Apprendi* precedent of *Walton v. Arizona*).[96] Applying the *Apprendi* rule in the manner discussed above, a divided Court ruled that the "prescribed statutory maximum" penalty for the trial jury's conviction of a capital offense was life imprisonment because the finding of *additional* statutory aggravating factors at the sentencing hearing was mandatory before a death sentence could be imposed—and, therefore, under *Apprendi*, a jury, not a judge, must find those additional factors.[97]

On the other hand, in *Harris v. United States*,[98] the federal firearms statute provided for a maximum sentence of life imprisonment, and the challenged factfinding affected only the statute's mandatory *minimum* sentences of five, seven, or ten years.[99] In *Harris*, the four-justice plurality opinion applied an originalist

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provision may have a determinate effect on the sentence (within the *Apprendi*-defined statutory maximum) without thereby becoming an offense-defining provision. *See id.* at 284-86, 289, 301-03. In *Harris*, the Supreme Court declined to treat *statutory* mandatory minimum sentences (even in otherwise offense-defining provisions) differently than non-statutory requirements (like the Guidelines). As a matter of statutory interpretation, however, a court might conclude that inclusion of a mandatory minimum in an otherwise offense-defining statute, rather than enactment as a clearly demarcated sentencing-regulating provision, indicated legislative intent to make that mandatory minimum a statutory element of the offense.

93. *See, e.g.*, Fuchs, *supra* note 7, at 1419-26 (discussing the potential effect of *Apprendi* on the sentencing guidelines); Glass, *supra* note 7, at 358-62; Levine, *supra* note 45; Russell, *supra* note 7, at 1201.

94. 536 U.S. 584 (2002).

95. *See id.* at 600-03 (citing *Apprendi*, 530 U.S. at 497 and Jones v. United States, 526 U.S. 227, 251 (1999)).

96. *See Ring*, 536 U.S. at 588-89, 609 (overruling Walton v. Arizona, 497 U.S. 639 (1990)). The Court apparently invalidated the capital sentencing systems of five states: Arizona, Colorado, Idaho, Montana, and Nebraska. *See id.* at 608 n.6. *Ring* also calls into question the systems of four other states: Alabama, Delaware, Florida, and Indiana. *See id.*; *see also id.* at 620-21 (O'Connor, J., dissenting).

97. *See id.* at 592-93, 597, 600-05, 609. In *Ring* seven justices joined the result. The five-justice majority from *Apprendi* agreed that given the formalism of the challenged capital sentencing scheme, in which a sentence of death was not available absent findings of fact above and beyond those necessarily contained in the jury's guilty verdict, those facts were governed by the *Apprendi* rule. *See id.* at 586, 589, 609. The four *Apprendi* dissenters each expressly reaffirmed their continued opposition to that holding. *See id.* at 613 (Kennedy, J., concurring); *id.* at 614 (Breyer, J., concurring); *id.* at 619 (O'Connor, J., dissenting); *see also Harris*, 536 U.S. at 569 (O'Connor, J., concurring). Justice Kennedy, however, agreed that because it did exist, it had to cover the *Ring* situation. *See Ring*, 536 U.S. at 613 (Kennedy, J., concurring). Justice Breyer agreed with the Court's result in *Ring* for Eighth Amendment reasons only. *See id.* at 618-19 (Breyer, J., concurring). In dissent, Justice O'Connor, joined by Chief Justice Rehnquist, simply would have retained *Walton*. *See id.* at 619 (O'Connor, J., dissenting).

98. 536 U.S. 545 (2002).

99. *See id.* at 550-51, 554.

analysis of the Sixth Amendment that accepted the reasoning and result in *Apprendi* as sound and explained why the original understanding did not extend any further. The plurality then held that the factfinding used to impose on the defendant the seven-year mandatory minimum sentence for brandishing the firearm constitutionally could be made as a sentencing factor and not as an element.[100] Justice Breyer's concurring opinion accepted neither *Apprendi* nor the plurality's originalist analysis; instead, he again maintained that fundamental fairness permits sentencing factfinding that increases the maximum sentence, minimum sentence, or anything in between.[101] The four-justice dissenting opinion adopted the much broader originalist Sixth Amendment interpretation previously set forth in Justice Thomas's concurring opinion in *Apprendi*.[102] And a majority of the Court agreed that the difference between the holdings of *Harris* and *Apprendi* is illogical.[103]

The *Harris* plurality described its interpretation of the Sixth Amendment and *Apprendi* rule as follows:

> If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between the government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.[104]

So long as the finding of fact does not implicate the maximum-increasing prohibition of the *Apprendi* rule, it need not be an element of the offense and instead may be a sentencing factor.[105] Thus, the plurality limited *Apprendi*'s Sixth Amendment rule to its exact terms alone: the only facts that constitutionally must be elements of the offense are those that are used to determine the maximum sentence for the convicted defendant (as in *Jones*, *Apprendi*, and *Ring*).[106] Any other factfinding—whether pursuant to statute or non-statutory provisions like the Sentencing Guidelines—that determines the calculation of a sentence less than the maximum authorized by those elements constitutionally may be established as sentencing factors.[107] The underlying premise of this Sixth Amendment analysis is

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100. *See id.* at 556-68; *id.* at 569 (O'Connor, J., concurring); *id.* at 570 (Breyer, J., concurring); *Ring*, 536 U.S. at 604 n.5.

101. *See Harris*, 536 U.S. at 569-72 (Breyer, J., concurring).

102. *See id.* at 572-73, 575-80 (Thomas, J., dissenting). Justice Kennedy's plurality opinion was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia; Justice Thomas's dissenting opinion was joined by Justices Stevens, Souter, and Ginsburg.

103. *See id.* at 583 (Thomas, J., dissenting). Noting the implications of Breyer's concurring opinion, Justice Thomas concluded that "[t]his leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding." *Id.*

104. *Id.* at 566.

105. *See id.* at 565; *see also Ring*, 536 U.S. at 604 n.5 (describing *Harris*).

106. *See Harris*, 536 U.S. at 557, 562-63, 567-68.

107. *See id.* at 558-59, 565, 568.

that when the jury determines the maximum available sentence, it thereby authorizes the imposition of any sentence less severe than that maximum.[108]

When the scope of the Sixth Amendment right to jury trial is restricted to the maximum sentence, the *Harris* plurality's reasoning is easily understood. Historically, the selection of a sentence less than or up to the jury-authorized maximum was an exercise of the trial court's discretion, and any findings of fact that were made were not elements of an offense.[109] The plurality reasoned that findings of fact made pursuant to legislatively enacted determinate sentencing restrictions on the exercise of the Court's discretion underneath the authorized maximum, as in *McMillan*, are equivalent for Sixth Amendment purposes because—like the exercise of judicial discretion in an indeterminate sentencing regime—they do not alter the maximum penalty but only the selection of the specific sentence.[110] So long as the maximum-setting procedure required by *Apprendi* is observed in determining the "outer limits" of the possible sentence, the plurality concluded that all other findings of fact relevant to the sentence may be made as sentencing factors without interfering with or undermining the jury's role in a criminal case.[111]

The dissenting justices in *Harris* rejected the plurality's interpretation of the restricted scope of the Sixth Amendment right to trial by jury. Instead, they asserted that the Sixth Amendment applies not merely to the prescribed statutory maximum sentence covered by the *Apprendi* rule, but also to the prescribed statutory *minimum* sentence—that is, any fact that "alters the statutorily mandated sentencing range" must be proven as an element of the offense and not a sentencing factor.[112] Like the determination of the maximum sentence, the determination of the

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108. *See id.* at 554, 557, 565-66. The jury's "authorization" of the maximum sentence is metaphorical and purely formal. By serving as the institution that determines which facts have been proven by the government as elements of the offense, the jury "authorizes" a maximum punishment for the defendant. *Cf.* Bibas, *Fact-Finding*, *supra* note 45, at 1134 n.249, 1182-83 (noting that the jury does not authorize punishment in any literal sense because the jury does not consider punishment when adjudicating offenses); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 338 (2003) (criticizing exclusion of punishment from jury consideration).

109. *See Harris*, 536 U.S. at 558-59; *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting).

110. *See Harris*, 536 U.S. at 549-50, 560, 565; *see also id.* at 560-62 (discussing *McMillan*); *Apprendi*, 530 U.S. at 546-47 (O'Connor, J., dissenting); *id.* at 559 (Breyer, J., dissenting). Thus, the *Harris* Court preserved considerable deference to legislative decisions about regulating the sentencing of offenders. *See Harris*, 536 U.S. at 550, 559-60, 565-69; *see also id.* at 569-70 (Breyer, J., concurring); *Apprendi*, 530 U.S. at 524, 548-59 (O'Connor, J., dissenting); *id.* at 559 (Breyer, J., dissenting).

111. *Harris*, 536 U.S. at 564 (quoting *Apprendi*, 530 U.S. at 483 n.10 (2000)); *see also id.* at 562, 565, 567.

112. *Id.* at 577 (Thomas, J., dissenting). Additionally, the dispute over the framing of the Sixth Amendment analysis in *Harris* reveals an interesting semantic problem in the *Apprendi* line of cases. Various opinions on both sides of the divide have used the word "range" to describe the restrictions on the court's sentencing authority that the jury must find and to which the *Apprendi* rule applies. This confusion may be attributable to Justice Scalia's use of the word "range" in *Jones*, which was quoted and relied upon in subsequent cases. *See Jones*, 526 U.S. at 253 (Scalia, J., concurring) ("prescribed range of penalties"). While this use of the word "range" easily could be interpreted to mean not only the maximum penalty (at issue in *Jones*) but also the corresponding statutory minimum

statutorily compelled minimum sentence constrains the authority of the sentencing judge in imposing punishment on the defendant, and both such constraints equally affect the defendant's constitutional interests.[113] A change in the sentencing range from five-years-to-life to seven-years-to-life, for example, has this effect.[114] "Whether one raises the floor or raises the ceiling it is impossible to dispute that the

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sentence, in light of *Harris* it seems that Justice Scalia did not in fact mean anything more than the maximum sentence. *Cf.* Levine, *supra* note 45, at 399, 426 (commenting on apparent inconsistency between Justice Scalia's language in *Jones* and joining the plurality opinion in *Harris*).

The problem, however, is that this single word—depending on the context—has been used in at least three ways by the justices. Sometimes the sentencing "range" seemingly refers *only* to the crime's prescribed *maximum* sentence. *See Harris*, 536 U.S. at 566 ("If the . . . trial jury has found, all the facts necessary to impose the maximum, . . . [t]he judge may select any sentence within the range . . . ."); *Apprendi*, 530 U.S. at 474 ("The finding is legally significant because it increased . . . the maximum range within which the judge could exercise his discretion . . . ."); *see also, e.g.*, *Harris*, 536 U.S. at 560, 563-64, 567; *Apprendi*, 530 U.S. at 483 n.10; *id.* at 543-44 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 233, 242-44, 248-51; *id.* at 258 (Kennedy, J., dissenting); Monge v. California, 524 U.S. 724, 735 n.2 (1998) (Stevens, J., dissenting).

In other instances, the word "range" apparently refers *both* to the prescribed *maximum and minimum* sentences for the offense. *See Harris*, 536 U.S. at 576 (Thomas, J., dissenting) ("[W]ith a finding that a defendant brandished a firearm, the penalty range becomes harsher."); *id.* at 577 (Thomas, J., dissenting) (The plurality's conclusion "is in effect to claim that the imposition of a 7-year, rather than a 5-year, mandatory minimum does not change the constitutionally relevant sentence range."); *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting) ("the Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or the maximum penalties") (emphasis in original); *see also, e.g.*, *Harris*, 536 U.S. at 572, 580, 582-83 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 470, 488; *id.* at 513, 519, 521-22 (Thomas, J., concurring); *id.* at 540, 542, 552, 554 (O'Connor, J., dissenting); *id.* at 559, 562, 564 (Breyer, J., dissenting); *Monge*, 524 U.S. at 737-38 (Scalia, J., dissenting).

And there are many occasions for which the intended meaning is ambiguous or unclear. *See, e.g.*, *Harris*, 530 U.S. at 549, 558-62, 565; *Apprendi*, 530 U.S. at 474, 481, 490 n.16; *id.* at 501, 503, 519 n.9, 520 (Thomas, J., dissenting); *id.* at 541, 544, 546-48 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 243, 248; *id.* at 252 (Stevens, J., concurring); *id.* at 253 (Scalia, J., concurring); *id.* at 267 (Kennedy, J., dissenting); *Monge*, 524 U.S. at 729; Almendarez-Torres v. United States, 523 U.S. 224, 235-36, 243, 245 (1998).

It is no surprise, then, that the plurality opinion in *Harris* states that "*Apprendi* mean[s] that those facts setting the *outer limits* of a sentence . . . are the elements of the crime" while sentencing factors may be used "[w]ithin the *range* authorized by the jury's verdict." *Harris*, 536 U.S. at 567 (emphasis added). By contrast, the *Harris* dissent insists that a fact must be an element "if the fact alters the statutorily mandated sentencing *range*, by increasing the mandatory *minimum* sentence." *Id.* at 577 (Thomas, J., dissenting) (emphasis added).

Given this fundamental disagreement over the definition of the very word used to describe the relevant constraints on the sentence, the attempt to analyze the issue in Sixth Amendment terms becomes all the more difficult.

113. *See Harris*, 536 U.S. at 576-79 (Thomas, J., dissenting); *see also id.* at 575 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)) (emphasizing prosecution's entitlement upon jury verdict).

114. *See id.* at 575-76 (Thomas, J., dissenting); *id.* at 579 (Thomas, J., dissenting) ("When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is by definition an element of a separate legal offense.") (internal citations and quotations omitted).

defendant is exposed to greater punishment than is otherwise prescribed."[115] This interpretation of the Sixth Amendment consequently requires that *McMillan* be overruled.[116]

In the 2003 Term, the Court granted certiorari in *Blakely v. Washington* to review the constitutionality of the application of the State of Washington's sentencing guidelines.[117] The sentencing judge imposed an "exceptional sentence" above the presumptive guidelines sentence but less than the nominal maximum term for the Class B felonies to which Blakely pled guilty.[118] The Court must determine whether the findings of fact that justified the exceptional sentence are equivalent to the calculation of a sentence within the statutory maximum as in *Harris*, or instead are equivalent to an increase in the prescribed statutory maximum as in *Jones*, *Apprendi*, and *Ring*.[119] The Court's answer in *Blakely* will

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115. *Id.* at 579 (Thomas, J., dissenting).

116. *See id.* at 580-83 (Thomas, J., dissenting); *see also Jones*, 526 U.S. at 253 (Stevens, J., concurring). *But see Harris*, 536 U.S. at 557; *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting). The extent to which the four *Harris* dissenters would extend their constitutional rule beyond the *statutory* sentencing range to other legally binding restrictions on sentencing discretion, such as the Federal Sentencing Guidelines, is unclear. *See Harris*, 536 U.S. at 580 (Thomas, J., dissenting) ("*McMillan* . . . cannot withstand the logic of *Apprendi*, at least with respect to facts for which the legislature has prescribed a new statutory sentencing range."); *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., dissenting) ("[T]he Guidelines 'have the force and effect of laws.'") (quoting Mistretta v. United States, 488 U.S. 361, 413 (Scalia, J., dissenting)).

117. 124 S. Ct. 429 (2003). The opinion below is *State v. Blakely*, 47 P.3d 149 (Wash. Ct. App. 2002), *appeal denied*, 62 P.3d 889 (Wash. 2003).

118. Blakely pled guilty to two Class B felonies: one count of second degree domestic violence kidnapping and one count of second degree domestic violence assault. *See Blakely*, 47 P.3d at 153. Under Washington's statutory sentencing guidelines, the presumptive sentencing range was 49-53 months for the kidnapping count and 12-14 months for the assault count, served concurrently. *See id.* at 154. The guidelines provide that a sentencing judge may impose an exceptional sentence outside this presumptive range, however. *See id.* at 157 (citing edition of Washington Code under which Blakely was sentenced, WASH. REV. CODE § 9.94A.120(1)-(2) (1998)). An exceptional sentence may be justified by findings of fact from a non-exclusive list of statutory factors, *see id.* (citing WASH. REV. CODE § 9.94A.390 (1997)), made by the sentencing judge by a preponderance of the evidence, *see id.* at 158 (citing WASH. REV. CODE § 9.94A.370(2) (1998)). Based on two such aggravating factors, the state appellate court affirmed the sentencing judge's exceptional sentence of 90 months for the kidnapping count, concurrent with 14 months on the assault count. *See id.* at 154, 158 & n.3. The state appellate court held that the sentence did not violate *Apprendi* because the prescribed statutory maximum for the two counts to which Blakely pled guilty was not the presumptive sentence of the statutory guidelines, but rather the ten-years maximum sentence available for Class B felonies. *See id.* at 159 (citing State v. Gore, 21 P.3d 262 (Wash. 2001)); *see also* Brief for Petitioner at 2-4, Blakely v. Washington, No. 02-1632 (Dec. 4, 2003).

119. *Compare, e.g.*, Brief of Petitioner at 13-18, *Blakely* (No. 02-1632) (arguing that exceptional sentences under Washington's statutory guidelines are governed by *Apprendi* and *Ring*), *and* Brief Amicus Curiae of the American Civil Liberties Union and the American Civil Liberties Union of Washington, in Support of Petitioner at 6-13, Blakely v. Washington, No. 02-1632 (Dec. 4, 2003) (same), *and* Brief Amicus Curiae of the National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums in Support of Petitioner at 3-12, Blakely v. Washington, No. 02-1632 (Dec. 3, 2003) (same), *with, e.g.*, Respondent's Brief in Opposition to Petition for Writ of Certiorari at 11-14,

continue to elaborate the constitutional criminal procedure of sentencing, but if the Court persists in its Sixth Amendment analysis its reasoning is likely to add further confusion, not greater clarity.

E. The Court's Sixth Amendment Impasse

After *Ring* and *Harris*, the Court's Sixth Amendment constitutional jurisprudence for the *Apprendi* line of cases has reached an interpretive impasse. The narrow majority of *Jones* and *Apprendi* fractured in *Ring* and *Harris*, revealing the troubling nature of the Court's present approach to the constitutional issues involved.

The fundamental fairness group of four justices continues to repudiate *Apprendi* and rejects any Sixth Amendment obstacles to sentencing fact-finding and sentence enhancements, even those that increase the otherwise applicable maximum sentence.[120] They maintain that only the Due Process Clause restricts legislative authority to adopt sentencing factors, and they have yet to argue for invalidation of a statute or sentencing factor under that test.

The originalist group of five justices has splintered. Four justices appear ready to adopt the broad Sixth Amendment rule advocated by Justice Thomas.[121] These justices assert that a fact must be an element if it "alters the statutorily mandated sentencing range, by increasing the mandatory minimum sentence" or the maximum sentence.[122]

Finally, Justice Scalia consistently has followed an originalist position, from his dissenting opinion in *Almendarez-Torres* through the *Harris* plurality.[123] He stands alone, however, in limiting the rule derived from originalism to the maximum-increasing principle.[124]

Blakely v. Washington, No. 02-1632 (Sep. 12, 2003) (arguing that Washington's statutory guidelines are governed by *McMillan* and *Harris*).

120. Unlike Justice Breyer, who wrote separately to insist upon the fundamental fairness analysis, Chief Justice Rehnquist and Justices O'Connor and Kennedy joined an originalist opinion in *Harris*; their *Ring* opinions rejecting *Apprendi*, however, signal their continuing objection to its rule and their preference for evaluating sentencing laws under the fundamental fairness analysis instead. *See supra* note 97 and accompanying text.

121. Justices Stevens, Souter, and Ginsburg consistently joined the opinions proposing and adopting the *Apprendi* principle. *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); Jones v. United States, 526 U.S. 227, 243 n.6 (1999); Almendarez-Torres v. United States, 523 U.S. 224, 248-49 (1998) (Scalia, J., dissenting); Monge v. California, 524 U.S. 721, 740-41 (1998) (Scalia, J., dissenting); *see also Jones*, 526 U.S. at 253 (Stevens, J., concurring). Although they did not join Justice Thomas's concurring opinion in *Apprendi*, they subsequently joined his dissenting opinion in *Harris* grounded in the same reasoning. *See Harris*, 536 U.S. at 575-77 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 499, 501-18 (Thomas, J., concurring). While there may not be complete agreement among these justices on methodology, the outcomes for which they have voted strongly suggest that their (unstated) views extend at least as far as the results for which Justice Thomas has advocated. Interestingly, Justice Thomas's dissenting opinion in *Harris* makes reference to a different, non-originalist theory long espoused by Justice Stevens. *See Harris*, 536 U.S. at 576, 578 (quoting and applying McMillan v. Pennsylvania, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting)); *see also Apprendi*, 530 U.S. at 484.

122. *Harris*, 536 U.S. at 577 (Thomas, J., dissenting).

123. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring); *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring); *Jones*, 526 U.S. at 253 (Scalia, J., concurring); *Monge*, 524 U.S. at

The resolution of this interpretive impasse cannot be found in the modes of constitutional analysis used by the Court. Instead, a different constitutional theory for the *Apprendi* line of cases is needed, one that addresses the constitutional rights and powers of constitutional criminal procedure in a more stable and cohesive way.

II. A NEW CONSTITUTIONAL INTERPRETATION FOR *APPRENDI-HARRIS* DOCTRINE

The Supreme Court's chosen framework for analyzing the *Apprendi* line of cases has resulted in an impasse in constitutional interpretation that is incapable of resolution on its current terms. Examined as a question involving the Jury Trial Guarantee of the Sixth Amendment and Due Process Clause principles, the Court has become mired in disputes over originalism and precedent that are intractable. Narrow, shifting majorities and pluralities have crafted a constitutional rule that has thin support on the Court. Legislatures, lower courts, scholars, and attorneys must wonder about the future of both *Apprendi* and *Harris* when doctrine arises on such a closely divided and bitterly contested basis.

Yet the holdings adopted by the Court are sound and eminently defensible as a matter of constitutional interpretation—with a different method of analysis. From this alternative perspective, the *Apprendi-Harris* rule is solidly grounded and internally consistent. The problems that so far have plagued the Court's cases disappear, and disputes about the nuances of rough analogies in the history and case law can be set aside in favor of a constitutional interpretation addressed specifically to the implications of the new statutes under review in challenges to modern sentencing practices.

This alternative analytical framework is the constitutional structure of criminal procedure. It provides a clearer and more persuasive method of analysis for considering all of the issues raised. Structural constitutional reasoning more accurately frames the constitutional inquiry not solely in terms of the defendant's Sixth Amendment right to a jury trial, but rather through the rubric of a broader concept: the defendant's offense of conviction and the constitutional consequences that follow from the offense's enactment, charge, trial, and punishment. This perspective not only better explains the necessity of the *Apprendi* rule but also reveals why the *Harris* doctrine is equally correct. Accordingly, the constitutional structure analysis should be the new constitutional interpretation for this hotly contested area of criminal procedure.

A. Defining the Problem: The Constitutional Text

In addressing the issues presented in the *Apprendi* line of cases, the crucial starting point in the analysis is the proper scope of the constitutional question. Relying on the text of the Constitution's criminal procedure provisions, the Court correctly has identified the question as the constitutional implications of the defendant's "offense of conviction": the crime that is charged and for which the

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740-41 (Scalia, J., dissenting); *Almendarez-Torres*, 523 U.S. at 248-49 (Scalia, J., dissenting); *cf. Harris*, 536 U.S. at 557-68.

124. In hindsight, it appears that Justice Scalia may have foreshadowed this divergence by joining only parts of Justice Thomas's concurring opinion in *Apprendi*—and not the part calling for *McMillan* to be overruled. *See Apprendi*, 530 U.S. at 499-523; *cf. supra* note 103 and accompanying text.

jury convicts. Where the Court has gone wrong is the limitation of its consideration of the implication of the offense of conviction solely in terms of the Sixth Amendment right to jury trial. The constitutional structure analysis provides a broader perspective and a superior constitutional interpretation.

1. So Close and Yet So Far: The Court's Limited Analysis

The Court has recognized that the text of the Constitution establishes the basic framework for analyzing the *Apprendi* line of cases.[125] Although of course the words of the text do not speak in literal terms of "elements of the offense" and "sentencing factors" as the Court has come to define those categories, the provisions governing criminal procedure nonetheless identify the locus for considering the constitutional implications of the challenged statutes.

All of the constitutional provisions relating to criminal procedure have at their core a single unifying concept: that a criminal prosecution involves an *offense* that must be alleged and proved—the offense of conviction. For example, the Fifth Amendment requires a grand jury allegation for an "infamous crime," proscribes double jeopardy for the "same offence," and prohibits compulsory self-incrimination "in any criminal case."[126] Similarly, the Sixth Amendment protects a wide range of procedural rights, including trial by jury and notice of the accusation, "[i]n all criminal prosecutions."[127] Article II empowers the President to pardon convicted criminals of their "Offenses against the United States."[128] On the other hand, the text of the Constitution nowhere imposes any similar specific procedural requirements for sentencing an offender who already has been convicted.[129]

Despite the serious and sometimes spirited differences on the Court concerning the proper analysis of the *Apprendi* line of cases under the Sixth Amendment right to jury trial, the various contrasting perspectives nonetheless agree that the locus of the analysis is the one suggested by the text of the Constitution: the offense of conviction. The *Apprendi* majority, the *Harris* plurality, and the *Harris* dissent each are premised on the necessity of an offense of conviction; what the diverging opinions dispute is which facts must be established as elements of that offense and which instead may be sentencing factors. Even the *Apprendi* dissenters, who

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125. *See, e.g.*, *Harris*, 536 U.S. at 549; *id.* at 574-75 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 476-77; *id.* at 499 (Thomas, J., concurring); *see also* Priester, *Sentenced*, *supra* note 45, at 271-75. The *Apprendi-Harris* issue therefore is unlike other areas of constitutional law in which judicial doctrine has diverged notoriously from the text. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999) ("We have, as a result, sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."); Washington v. Glucksberg, 521 U.S. 702, 719-22 (1997) (describing doctrine of substantive due process).

126. U.S. CONST. amend. V. The Due Process Clauses of the Fifth and Fourteenth Amendments also proscribe deprivations of life, liberty, or property without due process of law. *See id.* amends. V, XIV, § 1.

127. *Id.* amend. VI; *see also id.* art. III, § 2 cl. 3 (requiring trial by jury for "all Crimes").

128. *Id.* art. II, § 2, cl. 1.

129. *Cf. id.* amend. VIII (prohibiting excessive fines or bail and cruel and unusual punishments); *id.* art. I, § 3, cl. 7 (providing that impeached and removed federal officer remains "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

disclaimed any Sixth Amendment limitation on the effect of factfinding at sentencing, appear to concede that the severity of the offense of conviction might sometimes be relevant to the fundamental fairness standard.[130]

But the agreement that the concept of an offense of conviction is necessary to applying the Sixth Amendment right to jury trial has not answered the specific question at issue in the *Apprendi* line of cases: "the seemingly simple question of what constitutes a 'crime'" and, more specifically, "which facts are 'elements' or 'ingredients' of a crime" to which these rights attach.[131] If a fact qualifies as an element of the offense of conviction for purposes of these constitutional provisions, then the defendant's Sixth Amendment rights attach to that fact. If a fact is instead a sentencing factor, then by definition its determination is *not* the establishment of a "crime" for constitutional purposes and the defendant does *not* have the right to a jury trial or proof beyond a reasonable doubt, among others, for that determination. Whether a fact is an element of the offense or a sentencing factor has dispositive importance for application of the defendant's constitutional rights.[132]

Thus, the justices agree that the defendant must be convicted of a criminal offense, after which the sentence may be imposed; they disagree about the limitation upon the resulting sentence that the offense of conviction creates. Answering that question of constitutional interpretation requires analysis of which facts must, as a matter of constitutional law, be elements of the offense of conviction. The distinction between elements and sentencing factors has constitutional significance because otherwise "legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor."[133] Hence, every argument that seeks to resolve the *Apprendi-Harris* constitutional issue, including the Court's hopelessly stalled Sixth Amendment analysis, necessarily reaches a conclusion about what facts constitutionally must be elements of the offense of conviction and what facts need not be.

The enterprise of determining the scope of the offense of conviction for purposes of the constitutional law of sentencing is not unique to the *Apprendi* line of cases. The Supreme Court long has accepted the principle that the punishment inflicted on a convicted offender may be "cruel and unusual" in violation of the Eighth Amendment if the sentence imposed is "grossly disproportionate" to the offense involved.[134] As with *Apprendi-Harris* doctrine, the application of Eighth

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130. *See, e.g.*, *Apprendi*, 530 U.S. at 552-54 (O'Connor, J., dissenting); *id.* at 562-63 (Breyer, J., dissenting); Almendarez-Torres, 523 U.S. at 242-43.

131. *Apprendi*, 530 U.S. at 499-500 (Thomas, J., concurring); *see also Harris*, 536 U.S. at 563; *id.* at 575 (Thomas, J., dissenting); Monge v. California, 524 U.S. 721, 737-38 (1998) (Scalia, J., dissenting).

132. *See, e.g.*, *Harris*, 536 U.S. at 549-50; *Apprendi*, 530 U.S. at 494 & n.19. Similar results occur in other areas of criminal procedure when the application of a statute is determined not to involve adjudication of a criminal offense. For example, the Court has sustained the use of civil forfeiture against property tainted by its use to facilitate illegal narcotics activity and has held that such forfeiture—when it is civil, not criminal or punitive, in nature—does not implicate the Double Jeopardy Clause. *See* United States v. Bajakajian, 524 U.S. 321, 331-32 (1998); United States v. Ursery, 518 U.S. 267, 270-71 (1996).

133. *Harris*, 536 U.S. at 550.

134. U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted"); Ewing v. California, 538 U.S. 11, 30-31 (2003); *id.* at 35 (Breyer, J., dissenting); Lockyer v. Andrade, 538 U.S. 63, 72 (2003); *id.* at 77 (Souter, J., dissenting); Harmelin v. Michigan,

Amendment proportionality doctrine turns on the analysis of the constitutional question in terms of a constitutional concept of an offense of conviction—that is, the scope of the "offense" against which the proportionality analysis is performed.[135] For this reason, proportionality doctrine provides a useful illustration of the kind of analysis required in the *Apprendi* line of cases.

In 2003, a sharply divided Court in *Ewing v. California*[136] upheld a recidivist sentence imposed under California's "three strikes" law. Ewing had been sentenced to a term of twenty-five years to life and argued that his sentence was grossly disproportional to this particular conviction for a $1200 theft.[137] The plurality and dissenting opinions in *Ewing* apparently reached agreement on the proper two-step method for evaluating proportionality claims, but they disagreed on the outcome of that analysis.[138] And the divergence in application of the proportionality analysis to

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501 U.S. 957, 997 (1991) (Kennedy, J., concurring) (citing Weems v. United States, 217 U.S. 349 (1910)). Only two Justices on the current Court reject the existence of the proportionality requirement. *See Ewing*, 538 U.S. at 31-32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring); *cf. id.* at 32-35 (Stevens, J., dissenting) (responding to concurring justices).

At the same time, however, the Court candidly has acknowledged that "[o]ur cases exhibit a lack of clarity regarding what factors may indicate a gross disproportionality." *Andrade*, 538 U.S. at 72. The ultimate outcomes of the Court's recent proportionality cases are relatively easy to describe. The Court has not invalidated a sentence to a term of years from which the defendant ultimately may be released. In *Rummel v. Estelle*, the Court upheld a life sentence with the possibility of parole where the offender had three convictions for theft in the amounts of approximately $80, $28, and $120. 445 U.S. 263, 263, 265-66, 284-85 (1980). In *Hutto v. Davis*, the Court similarly upheld conseeutive sentences of twenty years' imprisonment for a recidivist convicted of possession with intent to distribute and distribution of nine ounces of marijuana. 454 U.S. 370, 370, 374-75 (1982) (per curiam). Davis had several prior drug convictions. *Id.* at 372 n.1; *id.* at 380 n.10 (Powell, J., concurring). In *Lockyer v. Andrade*, the Court ordered the denial of habeas corpus relief to a state prisoner with eight prior convictions who had been sentenced to consecutive terms of twenty-five years to life for two thefts totaling about $150. 538 U.S. 63, 65-69, 78 (2003). And in *Ewing v. California*, the Court upheld a sentence of twenty-five years to life for theft of about $1200 in goods by an offender with at least fourteen prior convictions on ten different occasions (most committed while on probation or parole from a prior offense). 538 U.S. 11, 16-19, 30 (2003).

Even a sentence with no potential for release may be constitutional. In *Harmelin v. Michigan*, the Court affirmed a life sentence without the possibility of parole for a *first offense* of cocaine possession where an enormous quantity of narcotics was involved. 501 U.S. 957, 961, 997 (1991); *see id.* at 1002, 1009 (Kennedy, J., concurring). The plurality opinion noted that the nearly 700 grams involved constituted *at least* 32,500 (and possibly over 60,000) individual doses of cocaine. *Id.* at 1002 (Kennedy, J., concurring). In *Solem v. Helm*, however, the Court did hold unconstitutional a life sentence without the possibility of parole upon the offender's conviction for writing a false check for $100, his seventh non-violent felony. 463 U.S. 277, 277, 279, 281 (1983).

135. Unlike *Apprendi-Harris* doctrine, which fundamentally concerns the *procedures* by which certain facts must (or need not) be proven, proportionality doctrine concerns the *substantive* constitutionality of a sentence.

136. 538 U.S. 11 (2003).

137. *See id.* at 14-21 (describing California statute, procedural history of case, and defendant's criminal history).

138. The first step is a threshold comparison of the severity of the sentence to the gravity of the offense. *Ewing*, 538 U.S. at 27-32; *id.* at 36-37 (Breyer, J., dissenting). In many cases it will be clear at this first step that the sentence is *not* grossly disproportional

the facts of *Ewing* derived entirely from a dispute over the proper framing of the constitutional question. More precisely, the two positions disagreed on the significance of Ewing's status as a recidivist in evaluating the severity of his sentence in comparison to his offense of conviction for Eighth Amendment purposes.

Justice O'Connor's plurality opinion expressly noted this dispute by declaring that "Ewing incorrectly frames the issue" when evaluating "the gravity of the offense compared to the harshness of the penalty."[139] The plurality insisted that:

> The gravity of his offense was not merely "shoplifting three golf clubs." Rather, Ewing was convicted of felony grand theft for stealing nearly $1,200 worth of merchandise after previously having been convicted of at least two "violent" or "serious" felonies. . . . In weighing the gravity of Ewing's *offense*, we must place on the scales not only his current felony, but also his long history of felony recidivism.[140]

Thus, the plurality opinion considered Ewing's recidivism to relate directly to the gravity of his current "offense." And in light of his long history of recidivism, dismissing his claim was routine.[141] "Profound disappointment with the perceived lenity of criminal sentencing (especially for repeat felons) led to passage of three strikes laws in the first place."[142] For Eighth Amendment purposes, the plurality argued, *who* committed the crime was as important to evaluating its gravity as *what* the crime was.[143]

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and the sentence accordingly will be affirmed. *See id.* at 30-31 (rejecting claim at first step); *id.* at 36 (Breyer, J., dissenting) ("[i]f a claim crosses that threshold—itself a *rare* occurrence") (emphasis in original). If the threshold analysis does not definitively resolve the constitutional question but instead leaves doubts as to gross disproportionality, then the Court proceeds to additional intra-jurisdictional and inter-jurisdictional comparisons of sentences for comparable offenses. *See id.* at 23 (citing *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring)); *id.* at 36-37 (Breyer, J., dissenting) (same). With this additional information the Court then considers whether the challenged sentence is grossly disproportional in violation of the Eighth Amendment. *See id.* at 42-48 (Breyer, J., dissenting) (performing such comparisons).

Of the seven Justices who applied this analysis to the facts of *Ewing* in light of the previously described precedent, three concluded that Ewing's claim failed at the first step, while four argued that the sentence was grossly disproportional after applying both steps. *See id.* at 29-31 (plurality opinion joined three justices); *id.* at 52-53 (Breyer, J., dissenting for four justices). Justices Scalia and Thomas refused to apply the proportionality requirement but concurred in the result with the plurality opinion. *See supra* note 134.

139. *Ewing*, 538 U.S. at 28.

140. *Id.* at 28-29 (emphasis added); *see also id.* at 30 n.2 (asserting that the California legislature intended this interpretation of the recidivism sentencing statute).

141. *See id.* at 28-30.

142. *Id.* at 24 n.1.

143. This broader, functional interpretation of the offense of conviction is analogous to the reasoning of the *Harris* Court, which emphasized deference to legislative policy choices subject to the narrow limitation of the *Apprendi* rule. *See supra* note 110. In fact, the *Ewing* plurality grounded its interpretation of the proportionality analysis partly on this basis: "Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions . . . [in] not merely punishing the offense of conviction . . . [but also] in dealing in a harsher manner" with recidivists. *Ewing*, 538 U.S. at 29. The functional interpretation also is similar to the *Apprendi* dissent's assertion that

Justice Breyer's dissenting opinion, by contrast, examined the issue very differently by focusing on the "sentence-triggering criminal *conduct*."[144] Rather than considering Ewing's recidivism to relate to the gravity of his offense, the dissent maintained that "the sentence-triggering behavior here ranks well toward the bottom of the criminal conduct scale."[145] The dissent rejected the plurality's claim that recidivism was relevant to the seriousness of the offense:

> This case, of course, involves shoplifting engaged in by a recidivist. One might argue that any crime committed by a recidivist is a serious crime potentially warranting a 25-year sentence. But this Court rejected that view . . . . Our cases make clear that, in cases involving recidivist offenders, we must focus upon the *offense that triggers the life sentence*, with recidivism playing a relevant, but not necessarily determinative, role.[146]

Unlike the plurality opinion, the dissent evaluated the gravity of the offense solely on the basis of the conduct and surrounding circumstances of its commission, *not* the character or history of the person who committed it.[147] Facts relating to the offender and his criminal history ultimately may justify a severe penalty, the dissent conceded, but they do not make the "offense" itself worse.[148]

Therefore, the Eighth Amendment analytical dispute concerning proportionality ultimately concerns the proper definition of the constitutional offense of conviction. Even though the text of the Eighth Amendment—"nor [shall] cruel and unusual punishments [be] inflicted"—does not expressly mention it, both positions in *Ewing* agreed that proportionality must be evaluated by reference to an offense of conviction; the justices disagreed about which facts may be considered part of that offense.[149]

The question of constitutional interpretation involved in the *Apprendi* line of cases presents the same analytical problem. Notwithstanding the strident

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only a Due Process Clause fundamental fairness test should govern challenges to sentences. *See supra* notes 79, 107, 108-11, 130 and accompanying text.

144. *Id.* at 37 (Breyer, J., dissenting) (emphasis added; internal citations omitted).

145. *Id.* at 40 (Breyer, J., dissenting).

146. *Id.* at 41 (Breyer, J., dissenting) (original emphasis removed and new emphasis added; internal quotations and brackets omitted).

147. *See id.* at 37 (Breyer, J., dissenting) (separating "the offender's actual behavior or other offense-related circumstances" from "the offender's criminal history"). Likewise, the dissent considered recidivism to be one factor in weighing the offense against the penalty, not as part of the offense side of the balance only. *See id.* at 36-42 (Breyer, J., dissenting). *Cf.* Durden v. California, 531 U.S. 1184, 1184 (2001) (Souter, J., dissenting from denial of certiorari) (describing offense as "a petty theft" in which "the value of the goods taken was $43"); Riggs v. California, 525 U.S. 1114, 1114 (1999) (opinion of Stevens, J., respecting denial of certiorari) (describing offense as theft of "a bottle of vitamins from a supermarket" and separately noting that "petitioner in this case has eight prior felony convictions").

148. This literal, formalistic interpretation of the offense of conviction corresponds to the similar idea underlying the *Apprendi* rule, where the offense of conviction is defined by reference to statutory facts and the jury's guilty verdict. *See supra* notes 61-76 and accompanying text.

149. The dispute between the plurality and dissent in *Ewing* over the meaning of the "offense" of conviction, *see supra* notes 140-49 and accompanying text, also might be seen as something of a semantic one similar to the problematic use of the word "range" in *Harris* and other *Apprendi* cases, *see supra* note 112.

disagreements over the *scope* of the offense of conviction for purposes of *Apprendi-Harris* doctrine, all sides in the debate presume the requirement of an offense of conviction. What the dispute concerns, therefore, is which facts constitutionally must be established as elements of that offense.

Thus, the Court properly has analyzed the *Apprendi* line of cases in terms of the constitutional implications of the offense charged in a criminal case and for which the defendant is convicted by the jury. This analysis has a solid basis in the text of the Constitution and serves as a useful template for considering the fundamental principles involved. The Court is asking the right question but answering it poorly. The constitutional concept of the offense of conviction is the correct focus for the analysis. It is the Court's narrow reliance solely on the Sixth Amendment that dooms its search for analytical clarity.

2. The Full Perspective: The Constitutional Structure of Criminal Procedure

The Court has failed because it has not taken full advantage of the insight provided by analyzing the constitutional issue in terms of the concept of the offense of conviction. Instead of an exclusive emphasis on what the offense of conviction means only for the Sixth Amendment right to jury trial, the Court should take a broader view. Within the framework of the offense of conviction, the Court should look to the constitutional structure of criminal procedure in analyzing which institutions—legislature, prosecutor, jury, and judge—must play which roles in defining criminal offenses, establishing convictions, and imposing sentences for them.

The questions of constitutional interpretation presented in the *Apprendi* line of cases implicate the powers of four traditional institutions of constitutional criminal procedure and the balance among them. The relationship between elements of the offense and sentencing factors is considerably more complex than simply an allocation of decision-making authority between trial jury and sentencing judge. The prerogatives of the legislature and the role of the prosecutor cannot be overlooked. The balance of power among these four institutions creates the constitutional structure of criminal procedure.

The Constitution regulates the constitutional structure of criminal procedure in a familiar way: preventing the exercise of tyrannical power by any one institution through a combination of checks, balances, and individual rights.[150] As described above, the constitutional provisions governing criminal procedure all rely upon the core concept of an offense of conviction—the criminal offense enacted by the legislature, charged by the prosecution, tried to a jury, and punished at sentencing. The concept of an offense of conviction is the heart of the Constitution's structural framework in criminal procedure and determines the manner in which powers are separated in the constitutional criminal procedure of sentencing.

First, the legislature ultimately controls the agenda in the constitutional criminal procedure of sentencing in each jurisdiction. The legislature determines what criminal offenses will exist and defines the terms of the offenses by providing

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150. *See, e.g.*, Loving v. United States, 517 U.S. 748, 756-58 (1996); Mistretta v. United States, 488 U.S. 361, 381-83 (1989); Morrison v. Olson, 487 U.S. 654, 710-12 (1988) (Scalia, J., dissenting); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3 (3d ed. 2000).

their elements.[151] If the legislature refuses to criminalize certain conduct, then persons may engage in it freely without fear of criminal sanction; when the legislature enacts a criminal statute that proscribes specified conduct, individuals who do not conform their actions to the law will face the consequences. Constitutional doctrines like the principle of legality and the prohibitions on ex post facto crimes, for example, ensure that this premise is respected.[152] It is equally without question that defendants may not be sentenced to a greater punishment than the legislature has provided.[153] The legislature decides what punishment may be imposed for violation of the offenses in two ways: first by determining generally what kind of sentencing scheme will be used and second by determining the amount of punishment that will be available within that scheme for each offense. While these legislative powers are significant, each of them is severely constrained by the fact that participation of other institutions is necessary to implement the criminal laws against persons who violate them.

Second, action by the executive branch is necessary to enforce criminal offenses. The Constitution's Bill of Attainder Clauses prohibit Congress and the states from enacting direct imposition of criminal punishment by legislative action.[154] Accordingly, even independent of ordinary separation of powers principles in constitutional law, the constitutional structure of criminal procedure includes a specific textual mandate of executive branch enforcement of legislatively enacted crimes. Once an alleged criminal offense is reported, discovered, or otherwise investigated, a prosecutor must prepare and file charges against the alleged perpetrator. In the federal system and some states felony charges must be filed by means of an indictment approved by a grand jury; the

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151. At the federal level and in most states, all criminal offenses are statutory. *See generally* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.1 (2d ed. 2003); *see also, e.g.*, Liparota v. United States, 471 U.S. 419, 424 (1985) (discussing lack of federal common law crimes). In those states that have retained judicially defined common law offenses, the legislature has either expressly or implicitly authorized the enforcement of such offenses by not abrogating them by statute.

152. *See also, e.g.*, U.S. CONST. art. I, § 9, cl. 3 (prohibiting federal ex post facto laws); *id.* § 10, cl. 1 (prohibiting state ex post facto laws); Rogers v. Tennessee, 532 U.S. 421, 467-71 (2001) (Scalia, J., dissenting); United States v. Lanier, 520 U.S. 259, 264-72 & n.5 (1999). *See generally* 1 LAFAVE & SCOTT, *supra* note 151, at § 1.2(b); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 84 (1998) ("A criminal defendant in a civilian court . . . is never at any loss to know not only the criminal acts with which he is charged but also the exact laws that makes those acts a crime.").

153. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 481-83 & nn.9-10 (2000) (citing United States v. Tucker, 404 U.S. 443, 447 (1972) and Williams v. New York, 337 U.S. 241, 246 (1949)); *id.* at 544-49 (O'Connor, J., dissenting) (arguing that legislatively enacted sentencing factors or findings of fact in determinate sentencing schema need not be elements of offense); Rutledge v. United States, 517 U.S. 292, 297 (1996) (citing cases); *see also* REHNQUIST, *supra* note 152, at 85 ("In the federal courts, and in most state courts, the sentence is imposed by the judge, rather than by the jury, but the judge is bound to sentence within the limits set forth in the statute.").

154. U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress); *id.* § 10, cl. 1 (prohibiting the states); *see also, e.g.*, United States v. Brown, 381 U.S. 437 (1965). Impeachment is not criminal punishment for such purposes. U.S. CONST. art. I, § 3, cl. 7 (providing that impeached and removed federal officer remains "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"); *id.* art. II, § 2, cl. 1 (providing that presidential pardon does not foreclose impeachment); *id.* art. III, § 2, cl. 3 (expressly excluding cases of impeachment from Article III jury trial guarantee for "all Crimes").

constitutional requirement that the defendant have notice of the accusation requires the filing of a charging instrument (usually an information) for all crimes in all jurisdictions.[155] The executive's decision whether to proceed with a prosecution is virtually unreviewable, although charges may be dismissed after they are filed in extreme cases of prosecutorial misconduct[156] or if they violate the prohibition against a defendant being "twice put in jeopardy" for the "same offense."[157] And most basically, of course, the prosecutor is constrained to charging criminal offenses enacted by the legislature, and the charging instrument must delineate the specific crimes with which a defendant is being charged.[158] Finally, depending on the sentencing scheme that is in place and the severity of the punishment provided for the offense, the prosecutor's charging decision may have comparatively greater or lesser importance in determining the defendant's ultimate punishment.

Third, the charges filed by the prosecution are adjudicated in a court. Unless the prosecution withdraws the accusation,[159] the charges are resolved under the extensive procedural protections the Constitution provides for the trial of criminal offenses. The *Apprendi* line of cases has focused on the Sixth Amendment right to trial by jury, but other rights like the Confrontation Clause and Compulsory Process Clause may be equally relevant to the defendant's defense of the crime charged in the "criminal prosecution."[160] The Due Process Clause requirement of proof beyond a reasonable doubt also places a significant limitation on the prosecution's ability to obtain a conviction.[161] And even in the large percentage of cases that end with a guilty plea rather than a jury trial verdict, the concept of the criminal offense matters tremendously. The Court has held that the Due Process Clause requires that a guilty plea be knowing, intelligent, and voluntary, which

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155. *See, e.g.*, U.S. CONST. amends. V-VI; Hamling v. United States, 418 U.S. 87, 117 (1974); FED. R. CRIM. P. 7(c); 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 19.2(c), 19.2(f), 19.3(a) (1999 & 2002 pocket part).

156. *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (regarding selective prosecution); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (regarding prosecutorial misconduct in grand jury); Blackledge v. Perry, 417 U.S. 21 (1974) (regarding vindictive prosecution). Although the decision *whether* to prosecute is virtually unreviewable, most jurisdictions provide a procedure for judicial oversight of the *sufficiency* of the allegations in the charge; grand jury approval of federal felony indictments is required by the Fifth Amendment. U.S. CONST. amend. V; *see generally* 4 LAFAVE ET AL., *supra* note 155, at chs.14-15.

157. *See, e.g.*, U.S. CONST. amend. V; *Rutledge*, 517 U.S. at 297-300 (1996) (applying Double Jeopardy analysis set forth in *Blockburger v. United States*, 284 U.S. 299 (1932)); United States v. Dixon, 509 U.S. 688 (1993).

158. *See Apprendi*, 530 U.S. at 483 n.10 (referring to "statute of indictment"); *cf.* FED. R. CRIM. P. 7(c)(1) (requiring counts for offenses in indictments or informations).

159. In some cases the presiding judge may dismiss the charges on legal grounds. For example, the defendant might challenge the court's jurisdiction to try him, argue that the statute cannot be construed to apply to his conduct, or assert that the statute is unconstitutional on grounds unrelated to criminal procedure, such as the First Amendment or substantive due process. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (challenging a criminal conviction under doctrine of substantive due process); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (challenging a criminal statute under First Amendment); United States v. Lopez, 514 U.S. 549 (1995) (challenging the constitutionality of federal criminal statute); United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999) (challenging the interpretation of criminal statute as applied to defendants' conduct).

160. U.S. CONST. amends. V-VI.

161. *See supra* note 60 and accompanying text.

includes the requirement that the defendant understand the offense charged and the penal consequences of admitting guilt to it.[162] Whether the defendant is convicted at trial or pleads guilty, the outcome is a judgment of conviction for a specific offense.[163]

Fourth and finally, the convicted offender will be sentenced pursuant to the sentencing scheme enacted by the legislature. Depending on the nature of that scheme, the judge's authority at sentencing could vary from ministerial imposition of a determinate sentence to the exercise of unbridled discretion in selecting a penalty from a very wide range of available sanctions. Unlike the trial protections, the Constitution does not contain any provisions that expressly govern the procedures applicable at sentencing. Instead, at least the minimum requirements of the Due Process Clause will apply to the extent there is a sentencing proceeding more meaningful than ministerial imposition of a statutory determinate sentence.[164] Nonetheless, the constitutional structure of criminal procedure necessarily imposes another requirement: that whatever occurs at sentencing not constitute a "criminal prosecution" or amount to convicting the defendant of an additional "offense" without the protections applicable to trials. While the Constitution does not prescribe what sentencing must be, by clear implication it does command what sentencing must *not* be: a usurpation of the well-defined procedures for enacting, charging, and convicting defendants of crimes.

It is important, moreover, to clarify the scope of the constitutional structure of criminal procedure. Although the form of structural constitutional interpretation is the same, that scope differs in several ways from the archetype of constitutional structure analysis: the division of power among the three branches of the federal government. Notably, the constitutional structure of criminal procedure does not

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162. *See, e.g.*, Mitchell v. United States, 526 U.S. 314 (1999); Bousley v. United States, 523 U.S. 614 (1998); Henderson v. Morgan, 426 U.S. 637 (1976); *see also* FED. R. CRIM. P. 11(c)-(d).

163. *Cf.* FED. R. CRIM. P. 32(d) (providing for entry of judgment for convictions for counts charged). Professor Bibas argues that consideration of the role of the jury as one of the institutions holding power in criminal procedure is "anachronistic" because of the nearly complete predominance of guilty pleas in criminal adjudication. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1100-01, 1174-78; Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 465-66, 475 (2002) [hereinafter Bibas, *Institutional Allocations*]. No different from a jury verdict, however, a guilty plea must establish the elements of an offense of conviction.

164. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). Professor Michaels has thoroughly catalogued the range of constitutional procedural rights applicable to trials that have been held to apply, or not to apply, at sentencing. Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771 (2003). Michaels concludes that courts have required application of rights aimed at ensuring the "best estimate" of the appropriate sentence for the offender, but have rejected application of rights that provide "special protection" for the defendant's liberty or autonomy. *Id.* at 1775-79, 1855-62. This description is consistent with the results in the *Apprendi* line of cases, Michaels explains, because (like the "best estimate" principle) those cases protect the defendant's "residual liberty interest" in receiving a fair sentence after a conviction, an interest that is far lesser in magnitude than the liberty interest in the threshold guilt/innocence determination. *Id.* at 1858-62; *see also id.* at 1842 ("Whether the judgment is discretionary and concerned with rehabilitation, or tightly guided and concerned with offense characteristics, allowing consideration of more relevant evidence increases the average accuracy of judgments at a cost of more errors harmful to the defendant.").

concern the classical "separation of powers" doctrines relating to the allocation of power by Articles I, II, and III of the Constitution.[165] Instead, it derives from the allocation of power by different provisions: those that govern criminal procedure and create the constitutional concept of the offense of conviction (primarily the rights granted in the Fifth and Sixth Amendments, but also the Bill of Attainder Clauses and other provisions previously mentioned).[166] Although the legislative, executive, and judicial branches each are implicated, the powers at issue are those relating to the offense of conviction that must be enacted, charged, proved, and punished. Furthermore, constitutional criminal procedure commands the participation of a fourth institution, the trial jury, whose decisionmaking authority serves as a check on all three other institutions.[167] And perhaps most significantly, the constitutional structure of criminal procedure derives from provisions that, unlike federal "separation of powers" doctrines, also are binding on the states.[168] Accordingly, the constitutional structure analysis governs both federal and state criminal offenses and sentencing laws.

The constitutional structure of criminal procedure involves the balance of power between the four institutions: legislature, prosecutor, trial jury, and sentencing judge. Each institution plays a significant role in determining the defendant's offense of conviction and the punishment that may be imposed for it. This broader perspective for evaluating the constitutional law of sentencing provides a better analysis of the issues involved than the narrow Sixth Amendment focus used by the Court.

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165. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998); Clinton v. Jones, 520 U.S. 681 (1997); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

166. *See supra* notes 125-33 and accompanying text; *see also* U.S. CONST. art. I, §§ 9, cl. 3 and 10, cl. 1; *id.* art. III, § 2, cl. 3.

167. Although the jury is involved in the courtroom proceedings of a criminal case, it is not merely a subsidiary institution of the judicial branch. Rather, citizen participation in the adjudication of guilt—and particularly the power of jury nullification—protects against the abuse of power by legislatures, prosecutors, and judges. For this reason, the jury serves as a fourth institution in the constitutional structure of criminal procedure that is independent of the other three. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are part of the State—and an increasingly bureaucratic part of it at that."); Jones v. United States, 526 U.S. 227, 243-48 (1999) (discussing historical importance of jury and jury nullification); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 161-78 (1997) (arguing for a greater role for juries); AKHIL REED AMAR, THE BILL OF RIGHTS 81-118, 268-78 (1998) (same); Iontcheva, *supra* note 108 at 314, 338, 381-83 (arguing that legislatures should enact statutes providing for jury sentencing to increase democratic deliberation about criminal punishments).

168. The Court has "incorporated" into the Due Process Clause of the Fourteenth Amendment all of the relevant criminal procedure provisions of the Bill of Rights except the requirement of a grand jury indictment. *See generally* 1 LAFAVE ET AL., *supra* note 155, at § 2.6(b). The Constitution's text expressly prohibits states from enacting ex post facto crimes and Bills of Attainder. *See* U.S. CONST. art. I, § 10, cl. 1.

B. The New Framework: Constitutional Structure and Institutional Balance of Power

By changing the focus from a single right held by defendants to the broader level of institutional roles and allocations of power in constitutional criminal procedure, the Court will find clearer reasoning about the relationship between criminal offenses and trial rights on the one hand, and sentencing factors and calculations of punishment on the other. To date the Court has emphasized the balance between trial juries and sentencing judges without adequately considering the powers of legislatures and prosecutors at all stages of a criminal case. A fuller picture of the relevant powers in criminal procedure breaks the Court's impasse and explains its holdings more effectively.

The constitutional structure analysis justifies the *Apprendi-Harris* rule in terms that withstand scrutiny far better than the ones the Court has used. The *Apprendi* requirement that the facts that determine the defendant's maximum sentence be elements of the offense follows from the allocation of institutional powers by the Constitution's criminal procedure provisions. Similarly, the *Harris* rule permitting the determination of mandatory minimum sentences or other restrictions on the imposition of the sentence beneath the maximum established by the offense of conviction also follows from the same reasoning. Accordingly, the constitutional structure analysis provides a superior constitutional interpretation for resolving the questions raised in this area of criminal procedure.

1. Explaining the *Apprendi* Rule

The constitutional structure analysis provides a cogent explanation for why the *Apprendi* rule is a constitutional requirement. The Constitution's provisions governing criminal procedure establish a system of adjudication in which the defendant is charged with and tried for an offense that provides a basis for judgment and punishment. This structure compels the conclusion that the defendant may not be sentenced except pursuant to that offense, and the *Apprendi* rule is a constitutional requirement that protects this principle.

The fundamental premise of the constitutional structure analysis of the *Apprendi* rule is the incontestable proposition that the power to impose punishment for violation of a criminal offense requires an exercise of legislative authority. As discussed above, defendants may only be charged with, tried for, and convicted of criminal offenses authorized by the legislature, and defendants may not be sentenced to a greater punishment than the legislature has provided. Imposing a higher sentence than was authorized by law would be unconstitutional for the simple reason that the court lacked the power to take such action.

In light of the requirement that a defendant not be sentenced to a more severe penalty than the legislature has authorized for the offense of conviction, the dispute over the *Apprendi* rule is distilled to a single issue: for constitutional purposes, *how* does a court determine what maximum sentence has been authorized by the legislature for a convicted defendant? The majority and dissent in *Apprendi* provide different answers to this question.

The position taken by the *Apprendi* majority is that the maximum sentence imposed on the defendant must be defined by reference to the offense of conviction established by the guilty verdict. As described above, the facts found beyond a reasonable doubt by a jury (or facts admitted in a guilty plea colloquy) are compared to the terms of the offenses under which the defendant has been charged

and convicted to determine the maximum sentence authorized by those facts.[169] Likewise, if a fact is used to increase the maximum sentence beyond an otherwise applicable statutory level—whether a nested statute like *Jones* or an add-on enhancement like *Apprendi*—then that fact must be proven as an element of the offense.[170]

Under the majority's position, therefore, the specific offense under which the defendant is charged and convicted is the *only* statute that may be used to determine the authorized maximum punishment. This rule does not preclude the legislature from enacting nested statutes or separate sentencing provisions. By requiring that the defendant's maximum sentence be determined only by reference to the findings of fact established by the guilty verdict, however, the rule limits the sentences that may be imposed. For example, if serious bodily injury is not proven as an element of the offense in a § 2119 case, or the requisite quantity of cocaine is not proven as an element in a non-recidivist § 841 case, then the defendant's maximum sentence must be determined without reference to those facts—that is, fifteen years under § 2119(1) or twenty years under § 841(b)(1)(C).[171] Conversely, if the prosecution seeks to impose a certain maximum sentence provided by statute, then it must be certain to prove all the facts that the terms of the statute make necessary for authorizing that level of punishment.

The *Apprendi* dissenters, by contrast, reject the significance of the offense of conviction and determine the legislature's authorized maximum sentence by reference to any applicable statutes. The jury's verdict of guilty exposes a defendant to punishment, but the facts found in that verdict are not controlling; rather, any relevant statute may be considered by the sentencing judge so long as the sentence ultimately imposed on the defendant is consistent with Due Process.[172] If the legislature wishes to increase the maximum penalty on the basis of a fact not proven as an element of the offense, it may enact a statute that does so.[173]

Under the dissenters' view, the criminal offense for which the defendant has been charged and convicted is necessary but not sufficient for evaluating what maximum punishment the legislature has authorized for the offender. Conviction for an offense is only a threshold step for imposing punishment and not also a restrictive determination that limits the subsequent penalty. In essence, the dissenters maintain that the offense of conviction established by a guilty verdict is formally irrelevant to the determination of the offender's maximum sentence (although they concede the possibility that in an extreme case a sentencing provision might violate the Due Process Clause).

Thus, the disagreement between the *Apprendi* majority and dissent rests on different conclusions about the relationship between the constitutional concept of the offense of conviction and the legislature's power to authorize the maximum penalty for crimes. The majority position maintains that the two are inextricably

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169. *See supra* notes 57-76 and accompanying text.

170. *See id.*; *see also Apprendi*, 530 U.S. at 468-69, 491-92 (holding state statute unconstitutional because statute denied protections of element of offense to finding of fact that increased defendant's maximum sentence above otherwise applicable statutory maximum).

171. 18 U.S.C. § 2119; 21 U.S.C. § 841; *see also supra* notes 68-71 and accompanying text.

172. *See supra* notes 56, 77-79, and 120 and accompanying text.

173. *See, e.g.*, *Apprendi*, 530 U.S. at 564 (Breyer, J., dissenting); *id.* at 552-54 (O'Connor, J., dissenting).

linked: that the legislatively authorized maximum punishment must be a maximum penalty *for the specific offense* of which the defendant has been convicted. The dissenters' position, on the other hand, asserts that maximum punishments may be authorized *independent of offenses* and that conviction for a specific offense does not restrict the application of other relevant laws that increase that penalty above the maximum otherwise provided in the offense itself.

The question of *how* a court determines the legislatively authorized maximum punishment for an offender therefore depends on whether the Constitution's provisions governing criminal procedure require a connection between the criminal offense of conviction and the resulting maximum punishment. A constitutional structure analysis provides a clear answer to this dilemma and explains why the majority's *Apprendi* rule is a constitutional requirement.

The constitutional structure of criminal procedure requires that the imposition of a sentence on a convicted offender not constitute a "criminal prosecution" or amount to convicting the defendant of an additional "offense" without the protections applicable to trials. To allow otherwise, as the *Apprendi* dissent seeks to do, would distort the constitutional scheme of separating powers in criminal procedure by nullifying the procedures for enacting, charging, and convicting defendants of crimes. Contrary to the argument made by the *Apprendi* dissenters, the Constitution does not permit the imposition of a sentence completely independently of the offense of conviction established in the guilty verdict. At the same time, the constitutional requirement is fairly limited and defined in the negative: the sentence imposed must not contravene the offense of conviction. The Constitution does not require a specific kind of sentencing scheme, such as determinate or wide judicial discretion or narrow judicial discretion. But whichever scheme is adopted cannot be used to impose convictions on offenders for crimes that were not properly enacted, charged, or proven as required by the constitutional structure of criminal procedure.

The *Apprendi* rule that the maximum sentence must be defined by reference to the facts established in the guilty verdict is a constitutional requirement that protects this constitutional structure of criminal procedure and ensures that sentencing proceedings do not contravene the importance of trial adjudications of the charged offenses. The rule is necessary not because defendants have a freestanding "right" to have the jury determine the facts that establish the maximum penalty for its own sake, but because failing to protect the integrity of trial verdicts on (or guilty pleas to) specific offenses will destroy the constitutional structure of criminal procedure. The *Apprendi* rule is an individual right because the defendant is the beneficiary and the party who raises the objection, but as a theoretical matter the rule is best justified not by the defendant's interest in a particular sentencing range but on this structural basis.

The *Apprendi* rule is a recent pronouncement by the Supreme Court for the simple reason that for most of our nation's history, the need to ensure that the imposition of a sentence did not interfere with or contradict the guilty verdict simply did not exist.[174] Only in the late twentieth century did legislatures for the first time begin seriously to attempt a meaningful integration of individualized punishment with determinate sentencing. Laws such as mandatory minimum sentences and the Federal Sentencing Guidelines permitted the desired legislative control of judicial decisionmaking without abandoning the modern enterprise of

174. *See supra* notes 22-44 and accompanying text (summarizing history).

making the punishment fit not only the crime but also the offender who committed it. These new laws placed previously non-existent strains on the constitutional structure of criminal procedure.

The difficulty the Supreme Court faced in responding to these new concerns flows from the constitutional structure itself. Legislatures have the power to make all of the important initial decisions about the criminal law and procedure in their jurisdiction. Offenses exist and are defined as the legislature chooses. Whether sentences will he determinate or indeterminate is up to the legislature as well. And the appropriate level of punishment that should be available for each offense can be set by statute too. Thus, at least presumptively, legislatures have power both to define offenses and regulate sentences.[175]

By preserving the integrity of the core concept of the offense of conviction it is possible to acknowledge these considerable legislative powers without abrogating the constitutional structure of criminal procedure. Legislatures define the offenses that prosecutors charge and try before juries, or to which defendants plead guilty. The fundamental status of the offense of conviction to these three aspects of the constitutional structure must be carried over to the fourth: sentencing. Just as a defendant may only be charged with an offense enacted by the legislature, and may only be convicted of a crime for which he has been charged,[176] a defendant also may only be sentenced for a crime for which he has been convicted. What the Constitution's structure commands, therefore, is that legislatures not be permitted to exercise their offense-defining and sentencing-regulating powers in a way that contravenes the limitation of the sentence to the terms of the offense of conviction.

Implementing this constitutional structure analysis as a matter of constitutional law results in a guiding principle for the criminal procedure of sentencing: offenses must be defined by the legislature with sufficient clarity that courts can determine their scope and ensure that the sentence imposed on the defendant is consistent with the offense of conviction. The constitutional structure analysis necessitates a prohibition on any action at a sentencing hearing that inflicts a punishment not authorized by the legislature for the offense. Such an action would occur, for example, if the sentencing judge punished a defendant for an offense for which he has not been convicted or, conversely, if the judge's sentence amounted to "convicting" the defendant of an additional offense that was not charged or that is not supported by a guilty verdict.

If the core concept of the offense of conviction is not protected by this principle, the entire structure of criminal procedure in the Constitution will be destroyed. Legislative intent to grade between more serious and less serious crimes can be defeated if the lower penalties for the less serious offenses do not limit the sentence. The constitutional requirements of the Indictment Clause and the Notice Clause would be fruitless if the charging instrument provides no guidance about the possible penalty because a resulting sentence is not constrained by the offense

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175. *See* Priester, *supra* note 44, at 284-85, 301-08 (elaborating on offense-defining and sentencing-regulating powers of the legislature). *But see* Kyron Huigens, Harris, Ring, *and the Future of Relevant Conduct Sentencing*, 15 FED. SENTENCING REP. 88 (2002) (arguing that normative architecture of criminal law prohibits legislative specification of sentencing facts except as elements of offenses).

176. By definition, lesser-included offenses are fully encompassed within the charged offense, and therefore instructing a jury on lesser-included offenses not specifically listed in the charging instrument is constitutional. *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000); *see also* FED. R. CRIM. P. 31(c).

charged. And, as the Court itself has noted, the requirement of a trial jury verdict beyond a reasonable doubt (or of a knowing, intelligent, and voluntary guilty plea) would become meaningless if the judgment of conviction did not restrict the scope of the penalty.[177] Only if the offense of conviction binds the range of punishment available at sentencing can this constitutional edifice be preserved. To do otherwise would vitiate the significant constitutional protections guaranteed by the constitutional structure.

The foregoing analysis provides the constitutional structure justification for the *Apprendi* rule that the facts that determine the defendant's maximum sentence must be proven as elements of the offense. To preserve the constitutional structure of criminal procedure it is necessary for the legislature to differentiate clearly between laws that define offenses and laws that regulate sentencing. And one necessary component of that differentiation is the mandate that the defendant's offense of conviction establish the maximum punishment available at sentencing.

A simple example illustrates the point and reveals why the nuances of the Court's *Apprendi* rule are necessary for resolving more complex statutes actually enacted by legislatures. Consider a hypothetical jurisdiction with unrestricted judicial discretion at sentencing and two relevant offenses: Robbery, punishable by up to five years' imprisonment, and Murder, punishable by up to life imprisonment. Defendant Fred is indicted by a grand jury for one count of robbery. He refuses to plead guilty and goes to trial, where he is convicted by the jury. At sentencing the prosecution introduces evidence that Fred not only robbed the victim but also killed him. Fred vigorously contests the evidence that he caused the death and claims that the victim died coincidentally of an unrelated ailment, but the judge concludes by a preponderance of the evidence that Fred caused the victim's death.

Assume first that the judge sentences Fred to imprisonment for five years. The judge might even give Fred his reasons: for example, as a first-time offender the judge normally would have sentenced Fred to six months in jail, but because a death resulted from the robbery the full five years was imposed. In this situation, there is no constitutional difficulty. For purposes of the constitutional structure analysis, Fred's offense of conviction was enacted by the legislature, charged by the prosecution, tried to a jury, and punished within the terms of the offense of conviction. It is true that the sentencing judge made a finding of fact (that a death resulted) and exercised judgment (to impose five years rather than some lesser amount of punishment) in performing the sentencing function, but that has been part of our system of criminal justice since the beginning. Whenever there is a sentencing proceeding other than imposition of a literally determinate, ministerial sentence, there always will be findings of fact and exercises of judgment involved. A sentencing judge must evaluate whether, compared to other offenders, the defendant is more or less dangerous to society, deserving of a severe penalty, capable of rehabilitation, remorseful or unrepentant, likely to offend again, or a nearly infinite number of other things. What lies at the heart of the conclusion that there is no constitutional difficulty with the five-years sentence based on a sentencing finding that a death resulted is this: because the sentence imposed is authorized by the offense of conviction, the constitutional structure has been

177. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 482-84 (2000); Jones v. United States, 526 U.S. 227, 243-44 (1999) (insisting that "the jury's role [must not] shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping").

respected. Fred has not been "sentenced" for murder because five years is an available punishment for robbery, nor has Fred been "convicted" of homicide because the finding of a resulting death was used to determine the penalty within the range available for robbery. Fred's offense of conviction has retained its significance in his case and the sentence is constitutional.

Now assume instead that the judge sentences Fred to life imprisonment. In this contrary situation, it is easy to see the constitutional problem. Robbery and murder are separate offenses enacted by the legislature. Fred was charged with, tried for, and convicted of only robbery. His offense of conviction is robbery. Yet he has been sentenced to life imprisonment, a sentence that is not available for robbery as defined by the legislature. In this simple hypothetical, it is patent that the court has acted ultra vires—Fred's sentence is simply not authorized by the offense of conviction established by the verdict in his case. By imposing a sentence of life imprisonment, the court either has "sentenced" Fred for a murder for which he was not convicted or has "convicted" Fred of murder without providing him with the procedural protections in charging and at trial to which he is constitutionally entitled. The Constitution cannot permit such a violation of the structure of criminal procedure. Accordingly, Fred's sentence of life imprisonment—or for that matter any term of imprisonment between five years plus one day and life—is unconstitutional.

The reality of legislative enactments that define offenses or regulate sentences is of course far more complex that the simple hypothetical involving Fred. Nonetheless, the finer points of the Court's *Apprendi* rule can be seen by reference to that example. The underlying principle remains that offenses must be defined by the legislature with sufficient clarity that courts can determine their scope and ensure that the sentence imposed on the defendant is consistent with the offense of conviction.

The Court's decision in *Jones* addressed the clarity with which offenses must be defined to preserve the integrity of the offense of conviction in each defendant's case. The nested statutory structure of § 2119 contained three authorized maximum sentences: fifteen years for simple carjacking, twenty-five years for aggravated carjacking causing serious bodily injury, and life imprisonment for homicidal carjacking.[178] Therefore, the legislature's own enactment did not provide for a sentence of twenty-five years (or life) for every carjacking. Only carjackings with additional aggravating facts could receive such enhanced penalties. By applying the (subsequently named) *Apprendi* rule to § 2119, the Court protected both the legislature's policy choice and the constitutional structure. The prosecution must charge serious bodily injury or death in the indictment and the trial jury must find those facts beyond a reasonable doubt before the sentencing judge may impose a sentence greater than fifteen years.[179] On the other hand, if the legislature in fact had intended that *all* carjackers be exposed to life imprisonment, then it would need only to repeal the intermediate gradations and provide for a maximum of life imprisonment for carjacking without the finding of additional facts like injury or death.[180]

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178. *Jones*, 526 U.S. at 230 (quoting 18 U.S.C. § 2119 (1988 & Supp. V)).

179. *See id.* at 243 n.6, 251-52.

180. If such an amendment were made, the legislature might be concerned that some simple carjackers would receive inordinately high sentences. This concern could be ameliorated by the use of sentencing guidelines or other sentencing-regulating provisions

Similarly, the Court's decision in *Apprendi* explained how the Constitution ensures that the sentence imposed is consistent with the offense of conviction. For the firearms crime alone the maximum penalty was ten years' imprisonment, and if the separately enacted biased-motive enhancement was applied it doubled to twenty years.[181] The charging instrument did not allege a violation of the biased-motive enhancement, nor did the defendant's guilty plea to a single count of the firearms crime establish a biased motive as part of the guilty verdict.[182] The Court concisely stated the issue as "whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count" and applied the *Apprendi* rule to hold the sentence unconstitutional.[183] Under that rule, only the facts established by the guilty verdict (whether guilty plea or jury findings beyond a reasonable doubt) can be used to determine the offense of conviction. Because only the firearms crime was part of the defendant's verdict for an offense of conviction, imposing a sentence available only under the increased maximum from the biased-motive enhancement was improper. For the state to impose that enhanced maximum sentence, the statutorily requisite fact of biased-motive must be established as an element of the offense.

The *Apprendi* rule is a necessary constitutional requirement for preserving the constitutional structure of criminal procedure. If the offense of conviction determined by the guilty verdict does not constrain the maximum penalty that may be imposed at sentencing, the separation of powers structure will break down. On the other hand, when only the facts proven as elements of the offense may be used to authorize a maximum penalty provided by statute, there is no concern that the defendant has been sentenced for a crime for which he was not convicted. Nor would the defendant have been convicted at sentencing of a crime that was not properly charged and tried. When the legislature's statutes and prosecution's charges are compared to the facts found by the jury's verdict (or admitted in a guilty plea), the constitutional offense of conviction is found. By guaranteeing that the sentence imposed is limited by the statutory terms attached to that offense and those facts, the *Apprendi* rule safeguards the constitutional structure of criminal procedure.

2. Explaining the *Harris* Rule

Just as the constitutional structure analysis explains the necessity of the *Apprendi* rule, it also provides a clear justification for the *Harris* rule. The constitutional structure inquiry is the same: whether the sentence imposed on the defendant is consistent with the offense of conviction. No different from the consideration of findings of fact that determine or increase the defendant's maximum sentence for his offense of conviction, the fundamental question is whether the application of a statutory mandatory minimum sentence (as in *Harris*) or other sentencing factors (like the Federal Sentencing Guidelines) is tantamount to punishing a defendant for an offense for which he has not been convicted or, conversely, to convicting the defendant of an additional offense that was not

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that operate within the maximum (life imprisonment) authorized by the facts found in the jury's verdict. *See supra* text accompanying notes 74, 104-11.

181. *Apprendi*, 530 U.S. at 468-69 (describing New Jersey's statutory scheme).

182. *See id.* at 469-70.

183. *Id.* at 474.

charged or that is not supported by a guilty verdict. Stated more precisely, the question is what, if any, findings of fact must be elements of the offense if they determine a defendant's sentence *within the maximum sentence* authorized by the offense of conviction in compliance with the *Apprendi* rule.

The constitutional structure analysis answers this question by determining the appropriate constitutional scope of the defendant's offense of conviction. That offense must be enacted by the legislature, charged by the prosecution, and tried to a guilty verdict before a jury or in a guilty plea. The additional inquiry required by *Harris* is whether the offense of conviction must have any consequence at sentencing beyond the *Apprendi* rule constraining the maximum punishment that may be imposed.

The consideration of the constitutional scope of the offense of conviction begins with two opposing poles of legislative activity in regulating sentencing. Both of these poles have long-accepted approval of their constitutionality. For this reason, they serve as bookends for the remainder of the analysis.

On the one hand, the *Harris* issue disappears entirely if the legislature adopts strictly determinate sentences based on the offense of conviction. For example, if all robbers receive ten years' imprisonment and all carjackers twenty-five years, then there is no need to consider the constitutionality of intermediate sentencing factors because they do not exist. Even if the legislature allows some provision for mitigation of sentences,[184] the underlying system of determinate sentences remains: the offense of conviction controls the resulting sentence. When the legislature asserts such dominance for the offense of conviction by statute, the constitutional question is moot.

On the other hand, for much of our nation's history, legislatures delegated the determination of each defendant's sentence to the judge, within a broad range provided in the statute. For example, the range for robbery might be no more than ten years' imprisonment and the range for carjacking no more than twenty-five years, and the judge would select each robber's or carjacker's penalty from within

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184. Any mitigators enacted by the legislature would have to comply with the *Apprendi* rule's requirement that findings of fact that determine the maximum sentence must be elements of the offense. For example, a statute that provides "Robbery shall be punished by up to ten years' imprisonment unless the defendant did not brandish a gun, in which case no more than five years shall be imposed" does *not* avoid the *Apprendi* rule. Under the terms of this statute, a finding of brandishing a gun is necessary to impose a sentence greater than five years. Accordingly, the *Apprendi* rule mandates that the finding be an element of the offense to impose such a sentence. *See supra* text accompanying notes 66-76; *see also* Michaels, *supra* note 164, at 1859 ("In *Ring*, the Court rejected a legislative scheme that purported to establish the maximum sentence in the statute that contained the elements proven at trial, while simultaneously employing a separate statute that forbade imposition of the maximum sentence without additional factual finding at sentencing."). This understanding of the *Apprendi* rule avoids the contrary interpretation some have suggested, which would render the rule ineffectual. *See Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 267; *see also* Bibas, *Fact-Finding*, *supra* note 45, at 1131 n.239, 1136; Bibas, *Institutional Allocations*, *supra* note 163, at 468-69. A mitigator that would comply with the *Apprendi* rule could provide that "Robbery shall be punished by up to ten years' imprisonment unless the defendant did not brandish a gun, in which case the sentence may be reduced by up to five years in the court's discretion." By making the mitigation discretionary rather than mandatory, the statute does not *require* a finding of firearm-brandishing to impose a sentence of ten years (as was the case in the prior example). *See also, e.g.*, Huigens, *supra* note 89, at 417-19, 427-29; Levine, *supra* note 45, at 385-87.

those ranges. Such exercises of judgment and discretion by judges were never thought to undermine the defendant's offense of conviction, even when the judge made findings of fact to support the particular sentence chosen.[185] When the legislature grants unregulated discretion to sentencing judges to punish defendants by some term equal to or possibly far less than the maximum sentence authorized by the offense of conviction, the constitutionality of such a sentencing scheme is firmly established.

The real question posed by *Harris* therefore resolves into whether the legislature has the constitutional power to adopt a sentencing scheme that falls somewhere between these two poles without creating additional elements of the offense by doing so. That is, does the Constitution permit the use of sentencing factors to create a scheme that has neither strictly determinate sentences for each offense nor unregulated judicial discretion to impose punishment less than the authorized maximum? The constitutional structure analysis concludes that the legislature may constitutionally enact such a scheme.[186]

The constitutional structure analysis of this issue begins with an important fundamental premise: the constitutional structure of criminal procedure does *not* mandate that determining a particular defendant's sentence is exclusively and only a judicial function. The Supreme Court emphasized this point in the seminal case of *Mistretta v. United States*, which upheld the statute creating the Federal Sentencing Commission and authorizing the promulgation of the Federal Sentencing Guidelines against challenges that the existence and composition of the Commission violated the classical constitutional separation of powers.[187] "Historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government."[188] Like the comparable systems in many states, "under the [pre-Guidelines] indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range . . . , and the Executive Branch's parole officer eventually determined the actual duration of imprisonment."[189] Although the Guidelines system of determinate sentencing greatly restricted judicial discretion and abolished parole, as well as shifted the goals of federal sentencing away from rehabilitation toward retribution and deterrence,[190] the *Mistretta* Court did not

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185. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 390 (1989) ("For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case."); STITH & CABRANES, *supra* note 2, at 29, 79; Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 259-68 (2001); Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243, 243-48 (2001).

186. As the following discussion demonstrates, the constitutional analysis is not simply that the greater power to enact strictly determinate sentences includes the lesser power to enact other forms of regulations on judicial sentencing. *Cf., e.g.*, Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 238-49 (1994) (discussing potential problems with and misapplications of greater-power-includes-lesser-power arguments).

187. 488 U.S. 361, 412 (1989).

188. *Id.* at 364; *see also id.* at 364-66, 390-91 & n.17.

189. *Id.* at 365.

190. *See id.* at 367-68.

question Congress's authority to legislate these policy changes. Crucial to the Court's approval of the existence and composition of the Commission was its conclusion that because sentencing was not exclusively a judicial function, such an independent agency of the judicial branch with judges as some of its members neither assumed powers exclusively delegated to one branch nor accumulated excessive power in one institution to the detriment of the separation of powers between branches.[191]

The rejection of exclusive judicial power over sentencing has great significance for the constitutional issue in *Harris*. If sentencing a defendant within the range authorized for the offense of conviction were solely a judicial power, then the only constitutionally permissible means for limiting judicial discretion would be by setting the upper and lower ends of the authorized range with facts proven as elements of the offense. This is the position asserted by Levine, who argues that all binding restrictions on judicial sentencing discretion must be elements of the offense.[192] Similarly, Huigens maintains that all positive law fault provisions must be elements but the exercise of judicial discretion not controlled by positive law need not be.[193] But if, as *Mistretta* holds and historical practice demonstrates, sentencing is *not* an exclusively judicial function, then the argument—that the use of sentencing factors like the Guidelines to restrict the exercise of that discretion violates the constitutional structure of criminal procedure because it unconstitutionally interferes with the judicial power—must be rejected.

The constitutional structure analysis next considers whether the constitutional structure of criminal procedure that defines the scope of the offense of conviction necessarily requires that restrictions on the lower end of the available sentence be elements of the offense just as restrictions on the maximum punishment must be. Stated differently, the Constitution's structure requires the *Apprendi* rule because the offense of conviction must limit the harshness of the punishment that can be imposed on the convicted defendant, and hence a finding of fact must be an element of the offense if it increases the maximum penalty above what otherwise would be available without that fact. The issue in *Harris* is whether that structure equally requires that facts be found as elements of the offense when they limit the ability to impose as merciful a sentence as would otherwise be available.

The key to the constitutional structure analysis is that it evaluates the constitutional inquiry not in terms of the effect of the finding of fact on the defendant as such, but rather on whether the finding of fact has an effect on the sentence that is inconsistent with the offense of conviction established by the statute, charge, and guilty verdict. The *Harris* dissent and several scholarly commentaries emphasize that the imposition of a mandatory minimum sentence or other sentencing factor may have dramatic consequences for the defendant.[194] That

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191. *See id.* at 380-82, 387-88, 390-91.

192. *See infra* text accompanying notes 252-61.

193. *See infra* text accompanying notes 262-74.

194. *See, e.g.*, Harris v. United States, 536 U.S. 545, 578-79 (2002) (Thomas, J., dissenting); Allenbaugh, *supra* note 7, at 37-40; Nancy J. Gertner, *What* Harris *Has Wrought*, 15 FED. SENTENCING REP. 83, 84-86 (2002); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1112-18 (1999); Jacqueline E. Ross, *What Makes Sentencing Facts Controversial? Four Problems Obscured by One Solution*, 47 VILL. L. REV. 965, 969, 974-88 (2002) (noting that the *Apprendi* rule does not

consequence alone, however, is not sufficient to violate the constitutional structure analysis.

The analysis at either of the poles of legislative activity is simple. In a system of strictly determinate sentences for offenses, there is no room for mercy and the constitutional issue is moot. In the opposite system of unregulated judicial discretion within wide statutory ranges, there also is no constitutional problem with findings of fact that result in a harsh or unmerciful sentence. For example, suppose a carjacking offense provided for punishment by no more than twenty-five years' imprisonment. A candid judge at sentencing might declare that his baseline sentence for carjackers is ten years, but because he finds by a preponderance of the evidence that the defendant caused serious bodily injury to the victim and also discharged a firearm, he accordingly will sentence the defendant to twenty years. Such determinations and decisions in the exercise of judicial discretion are long accepted by our constitutional doctrine and practice in the centuries before modern sentencing regulation efforts.[195] (Were the legislature to *choose* to enact a mandatory minimum provision or other restriction on judicial discretion as an element of the offense, everyone agrees that statute would be constitutional.)[196] The only constitutional question, therefore, is the application of *sentencing factors* that restrict the exercise of judicial discretion within the maximum punishment determined in compliance with the *Apprendi* rule.

The restriction of judicial sentencing discretion by a sentencing factor within the maximum authorized punishment does not violate the constitutional structure of criminal procedure because it is not inconsistent with the defendant's offense of conviction to do so. Unlike a finding of fact that increases the defendant's sentence above the maximum penalty otherwise authorized by the offense of conviction created by statute, charge, and facts established in a guilty verdict as elements of the offense, a finding of fact that supports the application of a sentencing factor beneath that *Apprendi* maximum does not result in a sentence that was not authorized by the constitutionally mandated procedures. The resulting sentence was not *precluded* by the offense of conviction, but rather was *permitted* by it. This distinction is dispositive for the constitutional structure analysis.

The contrast between the facts of *Apprendi* and *Harris* illustrates the importance of the difference. In *Apprendi*, the question was "whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count" to which the defendant pled guilty.[197] The sentencing factor therefore resulted in a sentence that was precluded by the offense of conviction—only proof of the biased-motive enhancement authorized a sentence exceeding ten years. In *Harris*, on the other hand, the comparable issue was whether the seven-year mandatory minimum sentence imposed on the § 924(c) count was permissible, given that even without the finding

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preclude sentencing findings from having substantial effect on the sentence, and proposing four limitations on the use of sentencing findings). *See contra Harris*, 536 U.S. at 566.

195. In fact, because the example assumes that the injury and firearm findings were not governed by positive law, even Huigens' highly restrictive view of the constitutional standard would permit such interstitial fault determinations in the carjacking sentence. *See infra* text accompanying notes 268-74.

196. *See, e.g.*, *Harris*, 536 U.S. at 576 (Thomas, J., dissenting) (describing mandatory minimum sentence as element of aggravated offense); Huigens, *supra* note 89, at 417-18, 427-29; Levine, *supra* note 45, at 382-83.

197. Apprendi v. New Jersey, 530 U.S. 466, 474 (2000).

of brandishing, the *Apprendi*-authorized maximum sentence was life imprisonment and the otherwise applicable mandatory minimum penalty was five years.[198] The sentencing factor clearly restricted judicial discretion by increasing the mandatory minimum penalty, but that restriction fell within the range of penalties already authorized by the offense of conviction. Had that sentencing factor not existed, a sentence of seven years nonetheless would have been available under the offense of conviction established by the statute, charge, and guilty verdict. The application of the sentencing factor therefore was consistent with the defendant's offense of conviction and did not violate the constitutional structure analysis.

Furthermore, the fundamental distinction between *Apprendi* and *Harris* reveals an important insight about sentencing generally: unless the offender is sentenced to the lowest possible penalty, *every* sentencing determination results in a deprivation of some available mercy. If, as in the earlier example, a sentencing judge exercising unregulated discretion chooses to sentence a carjacker to twenty years rather than ten based on certain determinations, that choice has imposed on the defendant twice as great a punishment as other carjackers might have received—and it certainly has denied the defendant mercy by sentencing him at the high end of the offense of conviction's available range. The only difference between that example and *Harris* is that the sentencing factor in § 924(c) appears in a statute rather than emanating from the judge's own discretion. In both situations the judge has selected a sentence from within the penalties authorized by the offense of conviction.

In *Apprendi*, Justice Scalia explained the point in slightly different terms with characteristic wit:

> I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of up to 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted).[199]

The rhetorical device of the prospective offender contemplating his punishment aside,[200] the passage identifies the core truth of the constitutional structure analysis of *Harris*: when a defendant is convicted of a crime, he indisputably faces the possibility that the maximum available punishment for the offense of conviction may be imposed. The *Apprendi* rule ensures the penalty may not be *more severe* than the maximum provided by statute for that offense. On the other hand, any sentence *less severe* than the authorized maximum is—from the perspective of the constitutional structure analysis—a windfall for the defendant. A sentencing factor that restricts judicial discretion within the penalties authorized by the offense of conviction is not equivalent to convicting the defendant of an aggravated offense that was not charged or to sentencing a defendant for a crime that was not charged or tried to verdict. Rather, it regulates the specific punishment ultimately imposed from among the penalties already made possible by the conviction for the offense

198. *Harris*, 536 U.S. at 551, 568; *id.* at 577 (Thomas, J., dissenting).

199. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

200. *Cf.* Standen, *supra* note 7, at 804-05 (criticizing bargaining analogy as not reflective of actual criminal behavior).

involved. Accordingly, the application of such a sentencing factor—for example, the mandatory minimum sentences in § 924(c) or the Federal Sentencing Guidelines—does not violate the constitutional structure analysis because it does not contravene the offense of conviction.

The constitutional structure analysis confirms the doctrine adopted by the Court in *Harris* and approves the constitutionality of the legislature's use of sentencing factors to regulate the discretion of judges in imposing sentences on convicted defendants. The Constitution does not compel legislatures into an all-or-nothing choice between strictly determinate sentences or completely unregulated judicial discretion. Rather, legislatures may enact both offense-defining statutes that provide ranges of authorized punishment for convicted offenders and sentencing-regulating provisions that constrain the judge's selection of the appropriate sentence for the individual within the offense's terms.

By examining the constitutional inquiry as a matter of the constitutional structure of criminal procedure and the fundamental significance of the concept of the offense of conviction, the constitutional structure analysis more clearly explains the dispositive distinction between *Apprendi* and *Harris*. Unlike an enhancement of the penalty above the statutory maximum, a sentencing factor's restriction on judicial discretion does not contravene that significance. Every act of sentencing by a judge, whether unregulated or constrained by mandatory minimums or other sentencing factors, inherently involves a determination of how much or how little mercy should be shown to the individual defendant before the court. For this reason, sentencing factors like the Federal Sentencing Guidelines differ only in degree of discretion, not kind of governmental action against the defendant, from the long history of unregulated judicial sentencing. The Court in *Mistretta* acknowledged this conclusion when it stated that the Guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within broad limits established by Congress."[201]

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201. Mistretta v. United States, 488 U.S. 361, 396 (1989). Stith and Cabranes argue that sentencing under the federal Guidelines is "materially different" from the exercise of judicial discretion. STITH & CABRANES, *supra* note 2, at 151. First, they assert that the approval of "real offense" sentencing in *Williams v. New York*, 337 U.S. 241 (1949), was inherently grounded in the rehabilitation-oriented, judicial-discretion sentencing systems in place at that time. *See id.* at 29, 150-51. Second, they describe the lack of a theoretical justification underlying the policy judgments established in the Guidelines actually adopted by the Sentencing Commission. *See id.* at 55-57. Third, they maintain that the imposition of a sentence under the Guidelines is no longer a moral judgment of the offender of the kind previously made by sentencing judges exercising discretion, but rather is a simple calculus that lacks moral authority. *See id.* at 82-84, 147, 150-52, 169-70. Each of these differences, however, is premised on the rigidity of the current Guidelines and the ad hoc nature of their initial promulgation and subsequent adoption. *See also id.* at 143-77 (calling for reforms in, but not abrogation of, Federal Sentencing Guidelines). For example, "a federal common law of sentencing" developed through judicial doctrine by judges with conflicting values and theories of punishment is no more assured of theoretical consistency and moral weight. *Id.* at 170. Accordingly, the differences do not establish that sentencing factors per se are different in kind from the exercise of judicial discretion at sentencing, but rather only that the current federal Guidelines have restricted judicial discretion greatly without any organizing theoretical grounding for the rules adopted to replace it. *See also* Klein & Steiker, *supra* note 33, at 238 (arguing that criticisms of Guidelines as implemented does not undermine validity of effort to ensure equality and transparency, or moral judgment, through determinate sentencing system).

Thus, the constitutional structure analysis concludes that there is only a limited role for constitutional law in restricting the power of the legislature to enact sentencing factors to regulate judicial discretion at sentencing. The Sixth Amendment right to trial by jury, for example, applies only to the determination of the statutory maximum penalty as defined by the *Apprendi* rule. The jury's primary function in the constitutional structure of criminal procedure is to enter verdicts of conviction or acquittal, thereby establishing the defendant's offense of conviction. With respect to sentencing, however, the jury's role extends only to establishing the most severe punishment—the worst-case scenario—faced by the defendant. Within that maximum exposure, finding of facts pursuant to judicial discretion or sentencing factors are constitutional, and they do not violate the right to trial by jury. Similarly, the Indictment Clause and Notice Clause do not mandate inclusion in the charging instrument of every fact that could be used to calculate the defendant's ultimate sentence, even if those facts would lead to application of a mandatory minimum punishment or other sentencing factor. As with the jury's role, under the constitutional structure analysis the only notice that must be provided by the charging instrument is the maximum punishment available upon conviction.[202] So long as the offense of conviction's statutory maximum penalty is respected, the constitutional structure analysis does not limit the use of sentencing factors to determine a defendant's sentence.

The Court's *Apprendi-Harris* rule is the correct constitutional doctrine for evaluating the application of sentencing factors to a defendant. Criminal offenses must be enacted by the legislature, charged by the prosecution, and tried to a jury or resolved by guilty plea. Those facts that determine the maximum sentence authorized for the offense of conviction must be proven as elements of the offense under the mandated constitutional procedures. Once that maximum penalty is found in compliance with *Apprendi*, however, sentencing factors may be used to regulate the exercise of judicial discretion in imposing sentence within that maximum. Applying such a sentencing factor to the defendant does not violate the constitutional structure analysis because the verdict handing down the offense of conviction has made such a punishment available. Nothing in the Constitution's structure of criminal procedures prohibits a legislature from regulating the exercise of sentencing authority through provisions of law that are not elements of the offense.

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202. This notice rule is no more detrimental from the defendant's perspective than under the historical sentencing regime of wide judicial discretion. A defendant charged with an offense in an indeterminate system can predict the worst possible sentence from the statutory maximum, but otherwise his actual sentence will depend entirely on the findings of fact and exercises of judgment made by whichever sentencing judge imposes punishment in his case. Likewise, under the Federal Sentencing Guidelines the defendant again can predict the worst possible sentence (the statutory maximum), but he also can predict his ultimate sentence with considerably more accuracy by determining the base offense level and the most likely relevant specific offense characteristics, adjustments, criminal history score, and departures. In neither case, however, does the defendant have any certainty about his ultimate sentence other than the worst-case scenario. The constitutional structure analysis affirms that such notice is all the Constitution requires with respect to sentencing.

C. Responses to Counter-Arguments

The constitutional structure analysis affirms the constitutional doctrine adopted by the Court in the *Apprendi* line of cases. By doing so it provides considerable leeway for legislatures to define crimes and their constituent elements and also to enact sentencing factors for regulating the exercise of sentencing authority by judges. At the same time it proscribes an outer limit on legislative power by commanding that one consequence of establishing a defendant's offense of conviction is the setting of the maximum punishment to which that defendant is exposed. And like the Court's decisions, the constitutional structure analysis must address several important counter-arguments that can be raised in objection to the *Apprendi-Harris* rule.

1. Consistency with Originalism and Precedent

The first objection is that the *Apprendi-Harris* rule is inconsistent with either the original understanding of the Sixth Amendment right to trial by jury or the Court's prior precedent, both of which have become highly contested on their own terms as the various opinions of the justices sharply disputed them throughout the *Apprendi* line of cases. If either of these two common methods of constitutional interpretation squarely refuted the rule, the constitutional structure analysis would face a considerable hurdle.[203] But neither originalism nor precedent stands as an obstacle to the constitutional structure analysis because it is the interpretive impasse inherent in and created by their use that requires the adoption of a new constitutional analysis for the *Apprendi* line of cases in the first place.

The principal opinions in *Jones*, *Apprendi*, and *Harris* all rely primarily on originalism to justify the constitutional rules they propose. The opinions examine a wide variety of British, colonial, Founding-era, and later sources to attempt to divine what the Framers of the Constitution would have understood to be the applicable rules and principles. The difficulty, as the scholarly commentary demonstrates, is that the meaning of this history is far from clear. In fact, even the two prominent originalist justices on the Court failed to agree on what the original understanding was. Two significant problems have emerged that defeat the application of originalism to the *Apprendi* line of cases.

One is that the content of any rules that might be found in the historical materials is highly contestable. In *Jones*, the majority opinion emphasized the importance of the colonial jury and reasoned that without the (subsequently named) *Apprendi* rule the jury's historical role would be fatally undermined.[204] The dissent, by contrast, maintained that nothing about that role suggested, much less mandated, the rule the majority followed.[205] The majority opinion in *Apprendi* again relied on

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203. There is considerable debate about the ultimate theoretical validity of these modes of constitutional interpretation in the first place. *See e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13-25 (2001); JED RUBENFELD, FREEDOM & TIME 61-65 (2001); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); CASS R. SUNSTEIN, ONE CASE AT A TIME 234-41 (1999); TRIBE, *supra* note 150, at §§ 1-14, 1-16; Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980). That dilemma is beyond the scope of this Article; even if those modes are theoretically sound, they cannot resolve the *Apprendi-Harris* issue satisfactorily.

204. *See* Jones v. United States, 526 U.S. 227, 244-48 (1999).

205. *See id.* at 270-71 (Kennedy, J., dissenting).

historical argument to explain why the jury must find the facts that determine the statutory maximum sentence.[206] Justice Thomas's concurrence (in the portions joined by Justice Scalia) expanded upon this argument with extensive discussion and analysis of nineteenth century cases and treatises.[207] In dissent, Justice O'Connor insisted that the historical record did not support the *Apprendi* rule and noted that Justice Thomas's post-Founding sources were irrelevant to the meaning of the Sixth Amendment because they antedated its adoption.[208] Finally, in *Harris* the plurality endeavored to explain why the historical evidence marshaled to justify the *Apprendi* rule did not encompass mandatory-minimum sentencing factors in addition to the now-invalidated maximum-enhancing sentencing factors.[209] Justice Thomas's dissenting opinion (not joined by Justice Scalia) rejected this interpretation and argued that the same sources that required the *Apprendi* rule also covered mandatory minimums as well.[210]

The scholarly analysis of these cases and arguments has produced a similar disagreement over what the historical evidence shows. Professor Bibas, for example, agrees with Justice O'Connor that the historical evidence does not support the *Apprendi* rule[211] and that the nineteenth century sources cited by Justice Thomas have no value in assessing the original understanding of the Sixth Amendment in any event.[212] Professor Singer, on the other hand, put forward the historical analysis later accepted by Justice Thomas.[213] And other scholars have noted the ambiguities of the historical evidence in cautioning against drawing overly broad conclusions from the relatively weak record.[214]

The second problem is that the issue presented in the *Apprendi* line of cases is one that tests the very utility of originalism as an interpretive methodology. The statutes involved in the *Apprendi-Harris* cases are recent innovations that have no directly relevant analogues in the historical record.[215] The extensive use of sentence enhancements and mandatory minimums in federal and state criminal statutes is a late-twentieth century development, as is the creation of sentencing guidelines to control the exercise of judicial sentencing authority in a binding way.[216] Justice

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206. *See* Apprendi v. New Jersey, 530 U.S. 466, 477-85 (2000).

207. *See id.* at 499-518 (Thomas, J., concurring).

208. *Id.* at 524-29 (O'Connor, J., dissenting).

209. *See* Harris v. United States, 536 U.S. 545, 558-64 (2002).

210. *Id.* at 574-77 (Thomas, J., dissenting).

211. *See* Bibas, *Fact-Finding*, supra note 45, at 1124-26 & nn.204-09.

212. *See id.* at 1128-29 & nn.212, 221.

213. *See* Knoll & Singer, *supra* note 194, at 1067-81; *see also* Apprendi v. New Jersey, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) (citation omitted).

214. *See, e.g.*, Herman, *supra* note 7, at 625-30; Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1471-77 (2001); Levine, *supra* note 45, at 444.

215. Some of the cases cited by Justice Thomas and Professor Singer are structured similarly to statutes like § 2119 or § 841, but most are not. *See generally* Apprendi v. New Jersey, 530 U.S. 466, 499-518 (2000) (Thomas, J., concurring); Knoll & Singer, *supra* note 194, at 1067-81.

216. *See* Klein & Steiker, *supra* note 33, at 255 ("There can be no historical evidence on these types of statutes because they simply did not exist."); *see also, e.g.*, Herman, *supra* note 7, at 628; Huigens, *supra* note 89, at 412-13; King & Klein, *supra* note 214, at 1476; *see also* Richard G. Singer, *The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 146-57 (2000) (discussing and criticizing historical progression of judicial interpretation of federal drug statutes, including 21 U.S.C. § 841).

Thomas properly noted in *Harris* that "[t]he Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins."[217] But when legislative innovation reaches the level of divergence from historically recognized practice that it has in this context, the attempt to adjudicate the constitutionality of those innovations by reference to history is doomed from the start. No different from other areas of constitutional law where technological, social, or other forms of innovation have outstripped an eighteenth-century text, the Court must rely on other interpretive methodologies to evaluate the challenged legislation.[218]

In combination these two problems make impossible any truly viable use of originalism to resolve the constitutional question in the *Apprendi* line of cases. If the historical record were clear, perhaps drawing an analogy to the innovative statutory schemes would be possible. Or if the statutory schemes were not so different from anything that existed previously, perhaps the lack of clarity about the historical treatment of such schemes would be easier to unravel. Taken together, however, attempting to evaluate innovative statutes in light of an ambiguous historical record is an enterprise that can lead only to the kind of close and sharp divisions that have permeated the Court's cases. Accordingly, the *Apprendi-Harris* rule is not undermined by an inconsistency with the original understanding of the Constitution.

The same dilemma confounds the application of the Court's own precedent to the *Apprendi* line of cases. The innovativeness of the statutory schemes at issue makes it unsurprising that, just as with originalism's historical record, there is no prior case law of the Court that directly addresses the constitutional questions presented. Nonetheless, there are several lines of the Court's precedent to which rough analogies can be made and from which first principles can be drawn. These include Due Process Clause cases involving proof beyond a reasonable doubt[219] and the "shifting" of facts from elements of the offense into an affirmative defense (for which the burden of proof is on the defendant),[220] and the Court's pre-*Ring* Eighth Amendment jurisprudence of capital sentencing.[221] Until the *Apprendi* line of cases began with *Almendarez-Torres* in 1998, the only prior decision that directly addressed the issue of elements and sentencing factors was *McMillan* in 1986.

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217. Harris v. United States, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting); *see also, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 483-84 (2000) ("We do not suggest that trial practices cannot change in the course of centuries . . . [b]ut practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt.").

218. *See, e.g.*, H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669-72 (1987); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1793-813 (2000); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894-900 (1996); *see also generally supra* note 203.

219. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970).

220. *See, e.g.*, Martin v. Ohio, 480 U.S. 228, 230 (1982); Patterson v. New York, 432 U.S. 197, 198 (1977); Mullaney v. Wilbur, 421 U.S. 684, 684-85 (1975); Garfield, *supra* note 26, at 1356-80.

221. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 536-37 (2000) (O'Connor, J., dissenting) (citing Walton v. Arizona, 497 U.S. 639 (1990); Clemons v. Mississippi, 494 U.S. 738 (1990); Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam)). In *Ring*, the Court overruled *Walton* in light of *Apprendi*. Ring v. Arizona, 536 U.S. 584, 589 (2002).

As with the disagreements over the meaning of the historical record, the Court divided sharply on the significance of precedent. The majority opinions in *Jones* and *Apprendi* asserted that the Due Process Clause precedent provided support for the *Apprendi* rule.[222] The dissenting opinions, by contrast, maintained that those cases were inapposite and instead emphasized the holdings of *McMillan* and the capital sentencing cases.[223] Similarly, the plurality in *Harris* argued that *Apprendi* and *McMillan* could be reconciled,[224] while the dissent claimed just the opposite and urged that *McMillan* be overruled.[225] Justice Thomas also explained why stare decisis ought not preserve *McMillan*'s holding,[226] reaffirming his position in *Apprendi* that

> it is fair to say that *McMillan* began a revolution in the law regarding the definition of 'crime.' [*Apprendi*], far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.[227]

The scholarly commentary on the relevance and decisiveness of the pre-*Apprendi* precedent is equally divided. On one side, Professor Bibas supports an interpretation of the precedent in line with the position taken by Justice O'Connor's *Apprendi* dissent: that these cases do not require or justify the *Apprendi* rule.[228] On another, Professor Huigens asserts that the same cases demonstrate that the Court intends for its doctrines to "protect[] the traditional normative architecture of criminal law"[229] and calls not only for overruling *McMillan* but also for a rule even more restrictive of legislative power than *Apprendi-Harris*.[230] Professor Singer also argues that *McMillan* should be overruled, although his argument is based primarily on case law from lower courts.[231] Others in between, including Professor Hoffmann and Professors King and Klein, treat the precedent as insightful authority but not decisive in the analysis.[232]

Once again as with originalism, the intractable struggle to reconcile tangentially related precedent with the complexities of the *Apprendi* line of cases demonstrates that precedent does not foreclose the adoption of the *Apprendi-Harris* rule. Instead, the interpretive impasse must be broken with a different method of constitutional interpretation. Originalism and precedent have prominent roles in constitutional adjudication, but they will not be dispositive—or even useful—in every situation. Given the demonstrated lack of clarity and agreement both on the

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222. *See Apprendi*, 530 U.S. at 484-90; Jones v. United States, 526 U.S. 227, 240-43, 248 (1999).

223. *See Apprendi*, 530 U.S. at 529-39 (O'Connor, J., dissenting); *Jones*, 526 U.S. at 264-70 (Kennedy, J., dissenting).

224. *See* Harris v. United States, 536 U.S. 545, 563-68 (2002).

225. *See id.* at 577-81 (Thomas, J., dissenting).

226. *See id.* at 581-83 (Thomas, J., dissenting).

227. *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring).

228. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1103-23.

229. *See* Huigens, *supra* note 89, at 387.

230. *See id.* at 393-404, 458-59; *see also infra* text accompanying notes 262-74.

231. *See* Knoll & Singer, *supra* note 194, at 1081-82, 1112 & n.260.

232. *See* Hoffmann, *supra* note 185, at 268-79; King & Klein, *supra* note 214, at 1477-85; *see also* Levine, *supra* note 45, at 390-409.

Court and in the scholarly literature concerning these methods, neither one is a barrier to the constitutional structure analysis and the rule it justifies.

2. Possibility for Legislatures to Exploit the Rule

The second objection is that the *Apprendi-Harris* constitutional rule is merely a technical, statutory-drafting hoop through which the legislature must jump. This narrow scope of the rule, the objection claims, allows the legislature to "evade" the protections the Court was attempting to institute by rather simple and formalistic compliance with the rule.[233] The objection is a form of the constant concern in discussions of constitutional criminal procedure about the extent to which the limitations imposed on governmental power by the Constitution and judicial doctrine serve as meaningful protections for criminal defendants that cannot easily be evaded by creative legislatures, prosecutors, or police officers. If the rule supported by the constitutional structure analysis really can be easily compromised simply by more precise statutory drafting, then the objection asserts that it has little, if any, meaningful value as a constitutional division between elements of the offense and sentencing factors.

The constitutional structure analysis responds to this objection not by denying the possibility that legislatures might find ways to "draft around" the *Apprendi-Harris* rule to achieve the desired results without violating the rule, but rather by refuting the underlying validity of the objection itself. The objection is invalid because it is a straw man argument. The alleged defect it sees in the *Apprendi-Harris* rule—the possibility that legislatures can evade the rule by enacting properly drafted statutes that comply with the rule—is in fact an objection to *every possible constitutional rule* in this area of the constitutional criminal procedure of sentencing. Whenever the Court defines and refines its precedent, legislatures often have an opportunity to "exploit" those decisions by amending criminal statutes to take account of the new holding. For example, after *McMillan* legislatures created additional sentencing factors like the visible-firearm-possession mandatory minimum, the Court upheld in that case, provisions they might previously have enacted as elements were it not for *McMillan*'s sanction.[234]

It cannot be denied that the *Apprendi-Harris* rule can be "drafted around" if legislatures want to minimize the benefit of the rule to criminal defendants. Criminal statutes could be amended to increase their maximum penalties, and therefore to have a greater range for the use of sentencing factors to determine the defendant's precise punishment, without violating the *Apprendi-Harris* rule. By "exploiting" the terms of the rule in this way, legislatures would avoid much of the significance of the jury's verdict as a restriction on the government's power to punish the offender. Especially if the maximum penalty authorized by the jury's verdict is a high one, then there will be considerable leeway for the Federal Sentencing Guidelines or other sentencing factors to affect the punishment

233. *Cf. Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting) (criticizing *Apprendi* rule as "a meaningless formalism"); Bibas, *Fact-Finding*, *supra* note 45, at 1131 n.239 (describing *Apprendi* rule as "simply a hoop through which legislatures must now jump"); Priester, *supra* note 44, at 308 n.141.

234. *See* King & Klein, *supra* note 214, at 1490, 1492.

imposed.[235] Such amendments thereby would reduce the benefit that the *Apprendi* holding might have had for defendants because by amending the statute to raise the maximum penalty, the legislature has eliminated the previously existing lower intermediate maximums that *Apprendi* held created elements of the offense.[236]

In light of the potential impact of *Apprendi* on the interpretation and possible amendment of criminal statutes, Professors King and Klein surveyed the legislative reaction to seven prior decisions of the Court that provided an opportunity for legislatures to disadvantage defendants and benefit prosecutors by amending substantive criminal laws.[237] For example, *Patterson v. New York*[238] sanctioned the enactment of the extreme emotional disturbance homicide mitigation as an affirmative defense for which the defendant bore the burden of proof.[239] While the legislative reaction to the decisions varied, in six of the seven instances (including *Patterson*), at least some states changed their laws to provide the prosecution with the benefit of the Court's decision.[240] King and Klein suggested ways in which

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235. *Cf., e.g., Harris*, 536 U.S. at 577-78 (Thomas, J., dissenting) (criticizing majority's holding that the change in mandatory sentencing under 18 U.S.C. § 924(c)(1)(A) from five-to-life to seven-to-life can be made as a sentencing factor).

236. The possibility for legislatures to exploit the constitutional rule adopted by the Court would have been even greater, of course, had the Court followed the path urged by the dissenters and not adopted the *Apprendi* rule. Under such a holding, it would be constitutional for "judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as [in *Harris*])." *Harris*, 536 U.S. at 569 (Breyer, J., concurring). The elements of the offense would be strictly what the legislature defines, subject only to a fundamental fairness analysis under the Due Process Clause. *See supra* text accompanying notes 79, 107-11, 130.

The means by which legislatures could exploit such a holding to disadvantage criminal defendants is obvious: not only could substantial authority be given to judges in the form of sentencing factors like the Federal Sentencing Guidelines and mandatory minimums, but also the use of sentence enhancements to increase the maximum would be permissible. Add-on enhancements like the hate crime provision in *Apprendi* could be used to impose increased terms of imprisonment. Findings about serious bodily injury or death in a § 2119 carjacking case, or about quantity of drugs in a § 841 drug case, could be used to impose enhanced sentences. And none of these enhancements would go to a jury beyond a reasonable doubt. Instead, the sentencing judge could determine them by a preponderance of the evidence. Legislatures would be able to minimize the number of elements in the offense, and leave all the significant sentencing determinations—including enhancements of the maximum penalty—to be made by the judge as sentencing factors. The procedural protections given to defendants at trial would apply only to those limited number of elements, and defendants' ability to contest the enhancing facts would be correspondingly hindered, particularly by the much lower standard of proof.

237. King & Klein, *supra* note 214, at 1488-93, 1546.

238. 432 U.S. 197 (1977).

239. *See* King & Klein, *supra* note 214, at 1490 (discussing Patterson v. New York, 432 U.S. 197 (1977)).

240. *See id.* at 1491-92, 1546. The sole decision to which no states reacted was *Martin v. Ohio*, 480 U.S. 228 (1982), which permitted the state to require the defendant to carry the burden of proof when asserting self-defense in a homicide case. *See* King & Klein, *supra* note 214, at 1490, 1494-95. Professors King and Klein and Professor Hoffmann surmise that states did not follow *Martin*'s lead because the nature of the self-defense differs from the provisions involved in the other cases. *See id.* at 1494-95; Hoffmann, *supra* note 185, at 273-79.

legislatures similarly might respond to *Apprendi*'s constitutional rule by amending "nested" sentencing statutes (like § 2119 in *Jones*) and "add-on" sentence enhancements (like the provision in *Apprendi*) to increase the relevant statutory maximum sentences and comply with the rule.[241]

In the four years since *Apprendi* was decided, it appears that legislatures have not rushed to enact massive revisions of criminal codes to exploit *Apprendi* in this way, probably because the burden *Apprendi* imposes on prosecutors is not a very great one and accordingly there has been no great demand to "amend around" the rule.[242] Most notably, although *Apprendi* altered the previously settled interpretation of the principal federal drug offense, 21 U.S.C. § 841, to require that drug type and quantity (when it increases the statutory maximum sentence) no longer be proven as a sentencing factor but as an element of the offense,[243] Congress has not yet amended the statute in response. Although *Apprendi* has imposed this additional burden in some federal drug prosecutions, apparently it is one that Congress and the United States Attorneys are for whatever reason willing to bear. At least so far, wholesale post-*Apprendi* revisions of criminal statutes to enact very high maximum sentences and rely nearly exclusively on sentencing factors have not come to pass.[244]

More important than the lack of any actual moves by legislatures to exploit the *Apprendi* rule, however, is the theoretical rejoinder to the objection. Even had legislatures responded to *Apprendi* by amending many criminal statutes to raise the maximum sentence to comply with the rule, such actions would not be dispositive against the rule's value as a constitutional protection. No matter what constitutional rule the Court adopts in the *Apprendi* line of cases, it is possible for the legislature to amend criminal statutes to disadvantage criminal defendants despite the existence of that rule. If a legislature desires to minimize the benefit to the defendants of the Court's holdings and maximize the substantive and procedural advantages given to the prosecution by the substantive criminal law, then there will be a means to "exploit" the terms of the Court's holdings to do so. This aspect of the constitutional doctrine is endemic to the constitutional question involved.

The objection is a straw man argument because even the opposite ruling in *Harris* would leave open a significant possibility for legislative exploitation of the alternative *Harris* rule to enact a sentencing scheme adverse to the interests of criminal defendants.[245] Accordingly, the objection simply is not a meritorious one.

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241. *See* King & Klein, *supra* note 214, at 1492-94.

242. *See generally id.* at 1494-95; Klein & Steiker, *supra* note 33, at 261 n.158; *see also* Hoffmann, *supra* note 185, at 273-79; Saltzburg, *supra* note 185, at 249-50.

243. *See infra* text accompanying notes 294-96; *see also* Priester, *supra* note 44, at 297-301.

244. *See, e.g.*, *Apprendi*, 530 U.S. at 490 n.16; *id.* at 540 (O'Connor, J., dissenting); *see also, e.g.*, Bibas, *Fact-Finding*, *supra* note 45, at 1136; Hoffmann, *supra* note 185, at 277-79; Huigens, *supra* note 89, at 406-07; Levine, *supra* note 45, at 410-12, 424; Saltzburg, *supra* note 185, at 249-50; Standen, *supra* note 7, at 780-83.

245. In the *Apprendi* line of cases in particular, the Court has been scrupulous about limiting the scope of its holdings to the facts of each case. *See, e.g.*, *supra* text accompanying notes 82-87 (describing how *Jones* and *Apprendi* did not overrule *Almendarez-Torres* recidivism exception despite apparent majority for doing so); *Apprendi*, 530 U.S. at 477 n.3 ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . We thus do not address the indictment question separately today."); *id.* at 497 n.21 ("The Guidelines are, of course, not before the Court.").

An alternative *Harris* rule would adopt the position taken by the *Harris* dissenters that all facts that increase either the top or bottom of the "range of punishment" to which the defendant is exposed must be proven as elements of the offense.[246] Although the exercise of judicial discretion in selecting a sentence within that range would be permitted, when findings of fact are used to impose mandatory restrictions upon the range of penalties available to the judge, those facts must be elements of the offense.[247] Such a holding not only would overrule *McMillan* but also would abolish the use of "sentencing factors" entirely.[248] The application of a sentencing factor by the sentencing judge "heightens the loss of

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It is quite possible, therefore, that an actual alternative holding in *Harris* would have been based solely on the facts and the question presented, which concerned the *statutory* mandatory minimum provision in 18 U.S.C. § 924(c)(1)(A). The Court would have held that a finding of fact must be made as an element of the offense (and not a sentencing factor) not only when it increases the statutory maximum sentence but also whenever it "alters the *statutorily mandated* sentencing range, by increasing the mandatory minimum sentence." *Harris*, 536 U.S. at 577 (Thomas, J., dissenting) (emphasis added). As with the current *Apprendi-Harris* rule, under this version of the alternate *Harris* holding, the jury's verdict would establish a set of facts that then would be compared to the criminal statutes under which the defendant has been charged to determine the statutorily mandated maximum and minimum penalty, but non-statutory sentencing factors like the Federal Sentencing Guidelines still would not create new elements of the offense; at sentencing, the judge could find additional facts by a preponderance of the evidence so long as the ultimate sentence remains within the statutory bounds defined by the jury's verdict. *See supra* notes 57-76 and accompanying text. *Cf. also supra* note 92 (discussing possible basis for distinguishing between statutes defining offense and statutes regulating sentencing).

This statutory-range-only rule would be subject to the same criticism that applies to the current *Apprendi-Harris* rule: legislatures could exploit the terms of the rule by enacting statutes with very broad penalty ranges (for example, five years to life imprisonment) and reserve all of the truly meaningful findings of fact for the sentencing hearing. Along with a high statutory maximum sentence to work around the effect of *Apprendi*, a low statutory minimum sentence would work around this narrow *Harris* alternative. Only if the legislature wanted a substantial *minimum* statutory penalty would the protection for elements of the offense come into play in practice.

Furthermore, the long-term integrity of such a narrow alternative *Harris* holding would require a persuasive distinction between the *statutory* maximum and minimum penalties established by the jury's verdict on the one hand and the *non-statutory* but nevertheless binding restrictions on judicial sentencing discretion imposed by the Guidelines. Such a distinction might not be possible because "the Guidelines 'have the force and effect of laws.'" *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring) (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)). Given the likely instability of a statutory-range-only rule, the discussion in the text assumes that an alternative *Harris* holding would, in a subsequent case, be expanded at least to all legally binding restrictions on the judge's sentencing authority. *See, e.g.*, Bibas, *Fact-Finding*, *supra* note 45, at 1147-48; Klein & Steiker, *supra* note 33, at 257; Levine, *supra* note 45, at 382-84, 435-36.

246. *Harris*, 536 U.S. at 572 (Thomas, J., dissenting); *see id.* at 576 (Thomas, J., dissenting) ("With a finding that the defendant brandished a firearm, the penalty range becomes harsher.").

247. *See id.* at 577 (Thomas, J., dissenting).

248. *See id.* at 580 (Thomas, J., dissenting) ("*McMillan* . . . cannot withstand the logic of *Apprendi*, at least with respect to facts for which the legislature has prescribed a new statutory sentencing range."). The mandatory minimum provision at issue in *McMillan* was a statute. *See* McMillan v. Pennsylvania, 477 U.S. 79, 81-82 & n.1 (1986).

liberty and represents the increased stigma society attaches" to the fact at issue.[249] Justice Thomas similarly argued that when a defendant is subject to a sentencing factor, no less than an enhancement that increases the maximum sentence, "it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed."[250] Such principles also draw no distinction between statutory and non-statutory sentencing provisions. Accordingly, the application of the Federal Sentencing Guidelines would be unconstitutional unless the Guidelines determinations that increase the defendant's maximum and minimum sentences are proven as elements of the offense.[251]

Although the Court of course has not elaborated what the contours of this broader alternative *Harris* rule would be, the scholarly commentary on the *Apprendi* line of cases has suggested two analytical approaches that provide a more complete picture. As the broader interpretation of Justice Thomas's position in *Harris* indicates, both approaches suggest the effect that legislative specification of sentencing regulations would have as a matter of constitutional law.

Levine rephrases the *Apprendi* rule to expand its scope: "Any fact . . . that has the effect, in real terms, of increasing the maximum or minimum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt."[252] Levine defines the "real terms" effect by reference to the sentencing judge's discretion: any provision that has a fixed result and that the judge is compelled to obey falls within the rule.[253] By its focus on the "real terms" of the provision's effect, Levine's rule therefore covers statutes and the Federal Sentencing Guidelines.[254]

On the other hand, Levine excludes two kinds of provisions from his rule. The first are mitigating provisions, which are excluded by definition because they *reduce* the defendant's punishment from an otherwise applicable range.[255] The second are provisions that do not increase the defendant's sentence "in real terms" because they preserve the sentencing judge's discretion as opposed to imposing a fixed, specified effect from a finding of fact.[256] For example, the current version of § 3B1.1 of the Federal Sentencing Guidelines provides for upward adjustments to a defendant's offense level of two, three, or four levels depending on whether the defendant was a manager or leader of the offense and the scope of that role.[257] Because a finding that the defendant managed more than five other persons in carrying out the offense would mandate a three-level increase, Levine's rule

249. *Harris*, 536 U.S. at 578 (Thomas, J., dissenting).

250. *Id.* at 579 (Thomas, J., dissenting).

251. Guidelines provisions that have the effect of *reducing* the defendant's Guidelines sentence, such as downward adjustments and downward departures, would not be elements of the offense under this rule because they make the punishment less harsh, not more harsh; only aggravating factors, not mitigating ones, would be covered by the rule. *See Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)"); *see also id.* at 490 n.16; *id.* at 541-43 (O'Connor, J., dissenting).

252. Levine, *supra* note 45, at 382-83.

253. *See id.* at 390, 412-14, 427, 434-35, 453.

254. *See id.* at 382-84, 412-13, 435-36.

255. *See id.* at 385-87.

256. *See id.* at 390, 440-44.

257. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1.

requires that this finding be made as an element of the offense.[258] But Levine proposes that § 3B1.1 could be amended to provide instead that the sentencing judge could increase a defendant's offense level anywhere from one to four levels as the court sees fit based on the court's assessment of the defendant's leadership role.[259] Although that finding does increase the defendant's sentence, it flows from the exercise of the court's discretion; it is not a fixed, pre-determined result from a finding of fact.[260] For that reason, Levine claims, the increase in the defendant's sentence is no different than the discretion that judges exercised before the Guidelines were adopted.[261]

Thus, under Levine's interpretation of the broader alternative *Harris* rule, any fact that has a fixed, aggravating effect on the sentence must be an element. Facts that have neither fixed effects nor aggravate the penalty, however, need not be.

Professor Huigens candidly proposes a far more radical constitutional rule.[262] Huigens begins from the premises that the "Constitution protects the traditional normative architecture of criminal law" and that "*Apprendi* attempts to restore" that architecture.[263] Huigens then describes this architecture as containing only two forms of culpability: fault for wrongdoing and eligibility for punishment.[264] (For example, Huigens characterizes mistake of fact or lack of mens rea as fault issues, and infancy or insanity as eligibility issues.[265]) From this description, Huigens derives his proposed constitutional rule: all positive law provisions relating to fault must be elements of the offense because the determination of criminal fault is the jury's role.[266]

The rule proposed by Huigens therefore is more expansive in scope than Levine's. To begin with, Huigens's rule accords with Levine's in abolishing sentencing factors as they currently exist and in requiring that provisions that have a determinate effect on sentencing be elements of the offense.[267] But Huigens is far less deferential to a legislature's labeling of a provision as mitigating than Levine. While Levine accepts the Court's argument that the political process will serve as a check against the shifting of facts from elements into sentencing factors,[268] Huigens expressly calls for overruling the Court's affirmative-defenses precedent because those cases permit the burden of proof for fault-based factors to be shifted to the

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258. *See id.* § 3B1.1(b); Levine, *supra* note 45, at 390, 453.

259. *See* Levine, *supra* note 45, at 453.

260. *See id.* at 441-44, 453; *see also* STITH & CABRANES, *supra* note 2, at 146-48 (arguing for use of "guided departures" instead of fixed departures under Federal Sentencing Guidelines regime).

261. *See* Levine, *supra* note 45, at 444.

262. *See* Huigens, *supra* note 89, at 391-92, 458-59.

263. *See id.* at 387, 391; *see also id.* at 393-414 (analyzing Court's precedent and doctrine). The Court historically has rejected arguments that the Constitution enshrines any particular theory of punishment or theory of the substantive criminal law. *See, e.g.*, Standen, *supra* note 7, at 782-83.

264. *See* Huigens, *supra* note 89, at 419-20. Huigens rejects the "consequentialist" theory of the Federal Sentencing Guidelines in favor of a "virtue ethics theory" of punishment. *See id.* at 415, 443-49.

265. *See id.* at 419-20.

266. *See id.* at 432; *see also* Kyron Huigens & Danielle Chmea, *"Three Strikes" Laws and* Apprendi*'s Irrational, Inequitable Exception for Recidivism*, 37 CRIM. L. BULL. 575, 596-600 (2001).

267. *See* Huigens, *supra* note 89 at 434-53.

268. *See* Levine, *supra* note 45, at 385-87.

defendant.[269] Instead, the only permissible kind of mitigators are those that relate to eligibility for punishment, such as insanity or status as a war veteran.[270] Unlike a mitigator related to fault (such as that the defendant formed an intent to kill under the influence of an extreme emotional disturbance rather than a clear mind), which could be rephrased as an aggravator (that is, an increased penalty when the defendant acted in cold blood), what distinguishes eligibility-based mitigators is that they have no corresponding aggravator: "[i]t is inconceivable that any judge or legislature would increase punishment on the ground that the offender has never served in a war."[271] Under Huigens's rule, only mitigators based on eligibility for punishment are not elements of the offense.

Huigens also takes a more restrictive view of the power of the legislature to regulate a sentencing judge's discretion. Revisiting Levine's proposed revision of § 3B1.1 to leave the size of the sentence increase to the court's discretion, Huigens's rule would reach the contrary result: because playing a managerial role in the offense is a fact that relates to the defendant's fault in committing the offense (not his eligibility for punishment), and a sentence increase is specified in the positive law (the Guidelines), that fact must be an element of the offense.[272] The only fault determinations at sentencing that Huigens's rule permits are those that do not come from the positive law, what he calls findings of "interstitial fault" made by the court.[273] For example, a judge may sentence for a contract killing more harshly than a mercy killing when the positive law homicide statutes do not draw a distinction between them; although these are facts relating to fault, they are interstitial.[274] By definition, findings of interstitial fault cannot be regulated by the positive law, making Huigens's rule more restrictive than Levine's.

Despite the apparently more stringent constitutional protections that would be created if the Court were to adopt either of these two alternative *Harris* rules, legislatures nevertheless still have means to exploit the terms of these rules to disadvantage criminal defendants if they are intent on doing so. Under Levine's rule, legislatures could rely more heavily on mitigators. For example, the Sentencing Commission could amend the Guidelines applicable to § 2119 to provide that a defendant will receive a downward adjustment if the defendant proves that he did *not* brandish a firearm or did *not* cause serious bodily injury, rather than the current version that requires the prosecution to prove those facts to obtain upward adjustments in the offense level.[275] Similarly, it is not clear *how much* discretion must be reserved for the judge under Levine's "real terms" requirement, and legislatures could test the limits of that reservation.[276]

More significantly, both Levine and Huigens argue for alternative *Harris* rules that could have dramatic unintended consequences for defendants as legislatures

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269. *See* Huigens, *supra* note 89, at 427-29 (arguing that *Patterson v. New York*, 432 U.S. 197 (1977) should be overruled).

270. *See id.* at 417-18, 427-29.

271. *Id.* at 418; *see also id.* at 417-18, 427-29.

272. *See id.* at 426-33.

273. *See id.* at 433-34.

274. *See id.* at 433 n.256.

275. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3.

276. Levine proposes a range of one to four offense levels in his modified § 3B1.1. Levine, *supra* note 45, at 453. Would a choice only between a one-level or two-level enhancement be sufficient, for example? Levine does not explain the contours of the discretion a court must have for the provision to fall outside the rule.

reconsider the punishments provided for criminal offenses. Both rules deliver this principle to legislatures: Positive law aggravators must be elements, but if the judge finds the same fact within the range authorized by the jury's verdict and gets to decide how much severity to attribute to it, then a new element is not created. More specifically, the lessons for the legislature are the following:

> (1) If you wish to increase either the maximum or the minimum sentence for a crime in a way that binds the sentencing judge, the facts that determine such maximum or minimum must be proven as elements of the offense.
> (2) Within the range of penalties thereby established, sentencing judges can exercise their discretion to select the appropriate punishment for an individual offender, and you cannot bind the exercise of that authority without using offense elements to do so.

A legislature intent on giving the prosecution all lawful advantages and imposing all constitutionally permissible burdens on defendants will react to these principles in one of two ways, either of which could be quite harmful to defendants' interests.

On the one hand, legislatures might throw up their hands and abandon the project of regulating judicial sentencing of offenders altogether. They could conclude that it simply is not worth the hassle to comply with the rule in a way that meaningfully restricts *judicial* decisionmaking. Rewriting the criminal code might require too much effort, prosecutors might balk at the time and cost necessary to prove all those additional elements in the thousands of cases they bring every year, or there might be some other reason. On whatever basis, a legislature might simply decide to restore the status quo ante before the modern era of regulating sentencing: repeal the Sentencing Guidelines, eliminate finely tuned sentencing provisions in criminal statutes, and provide large statutory penalty ranges for offenses. While prosecutors no doubt would lament the return of lenient judges, defendants equally would face the prospect of hanging judges now free to revive their old ways. Most of all, what defendants would lose is the predictability of the abrogated modern schemes. Many valid criticisms of modern statutes and Guidelines notwithstanding, a restoration of the prior system is not a sound idea.[277]

On the other hand and even more troubling, legislatures might react in the opposite direction by aggrandizing all power over sentencing to themselves and prosecutors. Rather than abandon the sentence-regulation project, they might take it to its logical extreme: a massively detailed criminal code in which a multitude of facts are specified and exact sentencing increases assigned to them. If the choice is between giving judges some discretion or no discretion, a legislature might choose the latter and adopt a purely determinate sentencing scheme in which judges have no discretion at sentencing but rather ministerially impose a sentence already pre-

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277. *See, e.g.*, STITH & CABRANES, *supra* note 2, at 143 ("We do not advocate a return to the pre-Guidelines system."); Klein & Steiker, *supra* note 33, at 256-59, 262 (criticizing broad elements rule as too costly and cumbersome to implement in practice and as compelling legislatures to return to unregulated judicial sentencing in response); Saltzburg, *supra* note 185, at 243-51 (arguing that *Apprendi* "perversely" provides an incentive for legislatures to restore broad sentencing ranges rather than more narrowly drawn statutes).

determined by the facts found in the jury's verdict.[278] Whether in statutes or Guidelines, the legislature could determine the precise sentence to be imposed on an offender based on the aggregation of facts that the prosecution charges and the jury finds beyond a reasonable doubt. To the extent such a system would mean that facts previously proven at sentencing by a preponderance of the evidence now are proven at trial beyond a reasonable doubt, this is a benefit to defendants. But defendants give up significant benefits too. For one, if judges no longer had any discretion at sentencing, there is no opportunity to argue for mercy—and defendants would no doubt equally be precluded from arguing for jury nullification as a means of obtaining mercy from determinate sentencing provisions proven as elements, just as they currently are prohibited from arguing for nullification as a grounds for acquittal.[279] For another, while the legislature might provide mitigators as well (to the extent permitted under the Levine or Huigens rules), it would not be required to do so, which exacerbates the loss of the ability to request the judge to impose the most lenient sentence available.

Moreover, if legislatures are serious about the endeavor of the last twenty years to limit and regulate judicial discretion at sentencing in the name of reducing unfairness and arbitrariness, then the more difficult a constitutional rule makes that enterprise, the stronger the incentive becomes to abolish judicial discretion entirely and impose determinate sentences. At a time when most scholars are calling for increased due process protections for defendants at sentencing,[280] it would be ironic if the entire process of individualized sentencing was abolished entirely in reaction to a new constitutional rule imposed by the Court in the *Apprendi* line of cases. It would be equally ironic if the desire to protect defendants from the virtually unchecked power of prosecutors to charge offenses and thereby influence the ultimate sentence after a guilty plea or trial resulted in an excision of the judge from sentencing in favor of complete power of the prosecutor to choose among the determinate-sentencing provisions enacted by the legislature.[281] If legislatures consider truth in sentencing and restricting the ability of judges to be lenient as

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278. *See* Standen, *supra* note 7, at 802-04; *see also* STITH & CABRANES, *supra* note 2, at 38-48 (describing congressional intent to deprive federal judges of discretion in creating Sentencing Guidelines); Levine, *supra* note 45, at 441-44 (arguing that findings of fact are ministerial actions that should be elements, whereas exercise of discretion about significance of facts is exercise of judicial judgment that does not create new elements).

279. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 155, § 22.1(g) (citing United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) and United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972)).

280. *See, e.g.*, STITH & CABRANES, *supra* note 2, at 154-63; Symposium, 12 FED. SENTENCING REP. 187 (2000) (commentaries by Judge José A. Cabranes, Benjamin L. Coleman, Frank O. Bowman III, Steven D. Clymer, Barry L. Johnson, Richard Smith-Monahan, Jacqueline E. Ross, and Richard Singer & Mark D. Knoll); Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147 (1993); Bibas, *Fact-Finding*, *supra* note 45, at 1175-78; Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992); Hoffmann, *supra* note 185, at 267-68; Saltzburg, *supra* note 185, at 253; Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994).

281. *See, e.g.*, Bibas, *Fact-Finding*, *supra* note 45, at 1100-01, 1170, 1178-79; Stephanos Bibas, Comment, Apprendi *and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311, 317-18 (2001) [hereinafter Bibas, *Dynamics*]; Standen, *supra* note 7, at 785-91, 802-05.

important policy (or political) goals, however, then these reactions are very possible indeed.[282]

It is worth noting that neither of these possible legislative reactions to the broad alternative *Harris* rule is definitively a negative development for all defendants in all cases. Some defendants might get more leniency if significant discretion were restored; others might benefit from strictly determinate sentences because they can prevail under the beyond a reasonable doubt standard at trial and obtain a low sentence from the jury's verdict. But overall, it cannot be said that the practical consequences of adopting such a rule would be salutary for criminal defendants.

Therefore, the objection that the *Apprendi-Harris* rule, defended by the constitutional structure analysis, might be exploited by legislatures to disadvantage criminal defendants is an invalid one because no matter what constitutional rule is chosen, it always is possible for legislatures to react to that rule by exploiting its terms to the detriment of criminal defendants. By permitting the use of sentencing factors within the maximum sentence established in the defendant's offense of conviction, the *Apprendi-Harris* rule may at first blush seem to be insufficiently protective of criminal defendants. Because all constitutional rules, including a seemingly more protective alternative *Harris* rule, can be similarly exploited by legislatures, however, the objection does not prove that the *Apprendi-Harris* rule is meaningless as a constitutional division between elements of the offense and sentencing factors.

3. Effect of *Apprendi-Harris* Rule on Plea Bargaining

The third objection to the *Apprendi-Harris* rule is that it may detrimentally alter the balance of power between the prosecution and the defense in plea bargaining. In an article published shortly after *Apprendi* was decided, Professor Bibas asserted the startling claim that the *Apprendi* rule, rather than benefiting criminal defendants, in fact harmed their interests.[283] By requiring that maximum-enhancing facts be proven as elements of the offense rather than sentencing factors, Bibas argued, *Apprendi* deprived defendants of the opportunity to contest those facts at sentencing after a guilty plea, an opportunity they previously had.[284] Moreover, by making these facts part of the plea allocution rather than the sentencing hearing, *Apprendi* increased the leverage held by the prosecution at the bargaining stage because defendants no longer could refuse to allocute to those facts.[285]

Professors King and Klein responded to these assertions by emphasizing that treatment of a fact as an element of the offense under the *Apprendi* rule works to the defendant's advantage because the defendant can insist upon proof beyond a reasonable doubt for conviction instead of merely proof by a preponderance of the evidence at sentencing.[286] They also questioned whether defendants had a meaningful opportunity to contest such facts at sentencing under pre-*Apprendi*

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282. *See, e.g.*, Hoffmann, *supra* note 185, at 264-65.

283. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1100-01.

284. *See id.* at 1153-66; *see also* Bibas, *Dynamics*, *supra* note 281, at 311-15.

285. *See id.*; *see also* Bibas, *Institutional Allocations*, *supra* note 163, at 470-73; Standen, *supra* note 7, at 798-801.

286. Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 296, 298-302, 306 (2001).

practice anyway,[287] and they concluded that Bibas's complaint about the imbalance of power in plea bargaining had little to do with *Apprendi*.[288]

Although the concern about the impact on the allocation of power in plea bargaining is important, ultimately the *Apprendi-Harris* rule probably does not have an appreciable impact on the pre-existing allocation of advantages and disadvantages in the bargaining process. To the extent it does, King and Klein have the better argument. Two examples illustrate this conclusion.

Consider first Bibas's hypothetical federal defendant, Al, charged with the principal drug offense, 21 U.S.C. § 841.[289] The prosecution has strong evidence that Al possessed two kilograms of cocaine, and relatively weaker evidence of an additional forty kilograms.[290] The provisions of the relevant statute are the following:

> § 841(b)(1)(C), fewer than 500 g: no more than 20 years' imprisonment (or no more than 30 years for a recidivist);
> § 841(b)(1)(B), 500 g or more: 5 to 40 years' imprisonment (or 10 years to life for a recidivist);
> § 841(b)(1)(A), 5 kg or more: 10 years to life imprisonment (or 20 years to life for a recidivist).[291]

Bibas applies several typical downward adjustments under the Federal Sentencing Guidelines if Al pleads guilty; correspondingly, he assumes the prosecution will invoke the statutory recidivist sentencing terms if Al instead insists on going to trial.[292] Bibas calculates Al's possible sentences as follows:

> Pleads guilty and Sentenced for 2 kg: 63-78 months.
> Pleads guilty and Sentenced for 42 kg: 121-151 months.
> Convicted at trial and Sentenced for 2 kg: 120 months (mandatory minimum).
> Convicted at trial and Sentenced for 42 kg: 240 months (mandatory minimum).[293]

Prior to *Apprendi*, when drug quantity was not an element of the offense, the only quantity that had to be established beyond a reasonable doubt (by a jury verdict or a plea allocution) was a "detectable" amount.[294] Therefore, Al could have

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287. *See id.* at 298 n.19; *see also* STITH & CABRANES, *supra* note 2, at 132-36 (criticizing "fact bargaining" under Federal Sentencing Guidelines regime).

288. *See* King & Klein, *supra* note 286, at 308.

289. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1160.

290. *See id.*

291. *See* 21 U.S.C. § 841(b)(1)(A)-(C) (2000).

292. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1162-63. Al has a prior felony drug conviction. *Id.*

293. *See id.*

294. *See, e.g.*, United States v. Zidell, 323 F.3d 412, 429 (6th Cir. 2003)

> Indeed, a demand for greater specificity in drug quantity determinations would be impossible to square with our decisions rejecting *Apprendi*-based challenges where the jury found only a detectable or unspecified amount of a controlled substance, or was not even asked to make a drug quantity finding, but where the resulting sentence fell below the default maximum set forth at § 841(b)(1)(C).

pled guilty and allocuted to 2 kg of cocaine, or possibly even less. At sentencing, the judge would have determined the quantity attributable to Al by a preponderance of the evidence and sentenced him accordingly. If Al prevailed, his sentence was 63-78 months; if he did not, it was 121-151 months. Similarly, if Al went to trial the jury would have been instructed that it had to find only a detectable quantity of cocaine and the sentencing judge would have determined by a preponderance of the evidence whether Al got 120 months (for 2 kg) or 240 months (for 42 kg).

After *Apprendi*, drug quantity is an element of the offense *when it increases the statutory maximum sentence.*[295] Thus, if the prosecution is satisfied with a sentence of no more than twenty years (240 months) under § 841(b)(1)(C), or thirty years (360 months) if the recidivist term is used, it still only needs to prove beyond a reasonable doubt a "detectable" quantity of cocaine.[296] Al can plead guilty to possessing a detectable amount of cocaine, leave to the sentencing judge the determination whether it was 2 or 42 kg, and will receive the same 63-78 or 121-151 months sentences as prior to *Apprendi* because both sentences are far less than the statutory maximum for a detectable quantity.

Even if the prosecution refuses a plea agreement of a detectable quantity, *Apprendi* still does not make Al's position worse. If the prosecution only offers a plea agreement for 2 kg, Al has two choices: either take the plea and receive 63-78 months, or reject the plea, go to trial, and risk 120 or 240 months if he is convicted. Similarly, if the prosecution demands Al plead guilty to 42 kg, Al can accept the plea and be sentenced to 121-151 months, or run the risk of 120 or 240 months if he is convicted at trial. These are precisely the same choices he faced prior to *Apprendi*. Therefore, *Apprendi* has no effect on the options Al faces when deciding whether he should plead guilty or instead go to trial.

The addition of *Apprendi* to the equation has one effect that could be relevant if Al does go to trial however. To the extent the prosecution refuses to try Al only under § 841(b)(1)(C) and forces Al to contest drug quantity at trial, proof of drug

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Id.; *see also* United States v. Sanchez, 269 F.3d 1250, 1266 & nn.28-30 (11th Cir. 2001) (en banc); United States v. Promise, 255 F.3d 150, 175-77 (4th Cir. 2001) (en banc) (Luttig, J., concurring).

295. Bibas's analysis appears to assume that drug quantity is an element of the offense because it *could* increase the statutory maximum sentence, even if the finding does not *in fact* increase the maximum for the particular defendant. *See* Bibas, *Fact-Finding*, *supra* note 45, at 1162-63, 1165. The case law developed subsequently in the Courts of Appeals requires an actual, not potential, increase in the maximum sentence for *Apprendi* to be implicated in a defendant's case.

> The analysis employed in, and the holding of, *Apprendi* make clear that any consideration of a defendant's sentence in light of *Apprendi* is to be conducted retrospectively rather than prospectively. . . . In sum, *Apprendi* is implicated only when a judge-decided fact *actually increases* the defendant's sentence beyond the prescribed statutory maximum for the crime of conviction.

Sanchez, 269 F.3d at 1263 (emphasis in original); *see id.* at 1252-53, 1268-70; *see also, e.g.*, *Zidell*, 323 F.3d at 427-29; United States v. Thomas, 274 F.3d 655, 660 & nn.2-3, 663-64 (2d Cir. 2001) (en banc).

296. *See supra* notes 63, 295 (citing cases); *see, e.g.*, United States v. Peters, 283 F.3d 300, 314 (5th Cir. 2002) ("Ronnie Peters was facing a statutory maximum of 20 years imprisonment and a $1,000,000 fine under the default sentencing provision. The judge sentenced him to 78 months' imprisonment on each count, concurrent, and waived any fine. His sentence is within the statutory maximum and does not run afoul of *Apprendi*.").

quantity to apply the maximum sentences authorized by § 841(b)(1)(B) or (A) must be beyond a reasonable doubt. If the evidence of 42 kg is weak, then Al very well may be acquitted under § 841(b)(1)(A), which carries a ten-to-life term (or twenty-to-life if the recidivism term is invoked). If he is convicted of the 2 kg beyond a reasonable doubt, then under § 841(b)(1)(B) he faces a sentence of five to forty years (or ten-to-life); and should the jury convict Al only for a quantity covered by § 841(b)(1)(C) then his sentence would be no more than twenty years (or thirty years).

Given the very high maximum sentences imposed even under § 841(b)(1)(C), it is easy to see that this added benefit of *Apprendi* is of very little practical significance to Al. Suppose Al goes to trial and is convicted by the jury under § 841(b)(1)(B) for possessing 2 kg, but is acquitted by the jury of the § 841(b)(1)(A) charge for the 42 kg. The consequence of this verdict after *Apprendi* is that Al's maximum sentence is forty years. If the sentencing judge finds no additional cocaine, then Al will receive the 120 months Bibas calculates. But the sentencing judge could find not only the 2 kg of cocaine that the jury found beyond a reasonable doubt but also the additional 40 kg of cocaine by a preponderance of the evidence. Upon that finding, the 240 months mandatory minimum sentence applies—and because that sentence is only half of the forty years maximum sentence (or the life-sentence maximum if the recidivism term is used), the judge may impose that sentence on Al.

In fact, even if Al were convicted only under § 841(b)(1)(C), the maximum sentence is *still* twenty years (or thirty years if the recidivist term is invoked) and Al *still* could be sentenced to 240 months. The jury's finding beyond a reasonable doubt is overwhelmed by the preponderance sentencing findings of the judge. Thus, as a practical matter *Apprendi* makes little difference to Al because the sentences he could receive if he goes to trial and loses are *identical* to the sentences he faced prior to *Apprendi*. As the next example shows, however, this is not a function of *Apprendi* itself but of the very high maximum sentences in § 841(b)(1).

A second example illustrates how the *Apprendi* rule, if it has any effect at all on plea bargaining and decisions whether to go to trial, benefits the defendant. Consider facts comparable to *Jones*: a carjacking charge under 18 U.S.C. § 2119.[297] The defendant, Dan, faces a maximum sentence of fifteen years' imprisonment for "simple" carjacking, and a maximum sentence of twenty-five years for "aggravated" carjacking if serious bodily injury resulted. Assume that evidence of serious bodily injury exists by a preponderance of the evidence but is questionable for proof beyond a reasonable doubt, and the prosecution agrees to forgo that and certain other available upward adjustments to Dan's sentence if he agrees to plead guilty. Accordingly, assume that when the Federal Sentencing Guidelines are applied to Dan, his sentence will be five years if he pleads guilty and twenty-three years if he goes to trial and is convicted (and the prosecution proves all the upward adjustments, including serious bodily injury, by at least a preponderance of the evidence).[298]

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297. *See supra* text accompanying notes 50-54.

298. The following are rough calculations of how five-year and twenty-three-year sentences might be arrived at under the Guidelines. Many other possible routes are available, but the basic premise—that the defendant receives a considerably lower sentence by pleading guilty than he does if he goes to trial and is convicted—holds regardless of the exact details of the Guidelines calculations for either the plea or upon conviction.

Prior to *Apprendi*, if Dan were convicted at trial, he would be sentenced to the calculated twenty-three years, even if the jury never considered the issue of serious bodily injury.[299] After *Apprendi*, by contrast, the prosecution must submit the issue of serious bodily injury to the jury if it seeks a sentence more than fifteen years. Hence, Dan knows that if the jury finds that fact beyond a reasonable doubt he will get twenty-three years, but if the jury acquits him of the aggravated charge then the most he can get is fifteen years even if the prosecution prevails on everything at sentencing (because *Apprendi* means the statutory maximum trumps the Guidelines sentence).[300]

Dan's situation rebuts Bibas's claim that *Apprendi* makes a defendant's position in plea bargaining worse. Prior to *Apprendi*, Dan faced a choice between a guaranteed five years if he pled guilty and a certain twenty-three years if he was convicted at trial. After *Apprendi*, Dan faces a choice between a guaranteed five years for the plea and either fifteen years (if the jury acquits on the serious bodily injury element) or twenty-three years (if the jury finds serious bodily injury beyond a reasonable doubt). Thus, *Apprendi* makes Dan's position stronger relative to the prosecution; the cost of going to trial is lower than it was before *Apprendi* because now there is a greater chance that Dan's sentence will be less than twenty-three years even if he goes to trial. Of course, the *value* of this benefit to Dan depends on how strong the proof of serious bodily injury is in his particular case: the weaker the prosecution's evidence, the greater likelihood that Dan will receive only fifteen years instead of twenty-three if he is convicted at trial and the more leverage Dan has for extracting a favorable plea agreement from the prosecution.

What distinguishes these two examples has nothing to do with *Apprendi* itself and everything to do with the maximum sentences provided by the statutes at issue. Under § 841, the maximum sentences are very high even in the lowest tier of penalties in § 841(b)(1)(C), especially if the recidivist terms are implicated. With a maximum sentence of twenty or thirty years authorized by a conviction for even a "detectable" quantity of cocaine, it is hardly surprising that the preponderance of the evidence findings at sentencing have a far greater impact on the defendant's fate than the jury verdict, which Bibas acknowledges.[301] Under § 2119, by contrast,

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Dan is in criminal history category IV and carjacked a cheap car worth less than $10,000. The applicable Guideline for § 2119 is UNITED STATES SENTENCING GUIDELINES § 2B3.1, which provides a base offense level of 20, with a 2-level increase for carjacking. By pleading guilty, Dan earns a 2-level downward adjustment for acceptance of responsibility, for a final offense level of 20. *See id.* § 3E1.1. In addition, the prosecution agrees not to seek other available upward adjustments to the sentence. On the Sentencing Table, the range is 51-63 months, so for simplicity I have used 60-months (five-years).

If Dan goes to trial, however, the prosecution will not forgo the other adjustments. From the base offense level of 20, Dan faces a 2-level increase for carjacking, a 4-level increase for causing serious bodily injury, and a 5-level increase for brandishing a firearm. *See id.* § 2B3.1. Dan gives up the downward adjustment for acceptance of responsibility, and the prosecution also seeks a 4-level increase for Dan's playing a leadership role in organizing others to commit the carjacking. *See id.* § 3B1.I. His final offense level is 35, which produces a range of 235-293 months; for simplicity I have used twenty-three-years (276-months).

299. In *Jones*, the defendant actually received the full maximum sentence of twenty-five-years when the judge found serious bodily injury at sentencing. *See* Jones v. United States, 526 U.S. 227, 231 (1999).

300. *See also* UNITED STATES SENTENCING GUIDELINES § 5G1.1 (2004).

301. *See* Bibas, *Insitutional Allocations*, *supra* note 163, at 315-16.

the lower "default" maximum sentence actually could come into play on a defendant's behalf—and when it does, the *Apprendi* rule's requirement strengthens the defendant's position. Considered outside the context of the draconian sentences in the federal drug statutes, any effect *Apprendi* might have on plea bargaining is salutary for defendants.[302]

By requiring that the prosecution prove additional facts at trial beyond a reasonable doubt, instead of merely at sentencing by a preponderance of the evidence, *Apprendi* gives the defendant greater leverage in negotiations. Defendants of course will continue to face substantial pressures to plead guilty, and they will continue to run the risk of significant sentences if they go to trial and lose.[303] And while *Apprendi* may not be particularly helpful to defendants charged under statutes like § 841 with high maximum sentences, it certainly does not tilt the balance of power in plea negotiations in the prosecution's favor—and in many cases it may strengthen the defendant's position. Accordingly, the third objection to the *Apprendi-Harris* rule fails.

D. Consequences of the Constitutional Structure Analysis for the Constitutional Criminal Procedure of Sentencing

The constitutional structure analysis of the *Apprendi-Harris* issue does not impose significant constitutional limitations on the exercise of legislative power in defining criminal offenses or in regulating the sentences imposed upon conviction

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302. *See* King & Klein, *supra* note 286, at 302-08. A similar analysis would apply to the Levine or Huigens alternative *Harris* rules discussed above: to the extent the rule creates additional elements of the offense, the result benefits defendants in plea negotiations. Similarly, if there were no *Apprendi* protection at all, defendants would be returned to the same disadvantageous position they held before *Apprendi* anyway. Prior to *Apprendi*, a defendant had two choices: reach a plea agreement with the prosecution that included an agreed-upon sentence, or plead guilty without an agreement and hope to prevail in achieving a favorable sentence at the sentencing hearing. *See generally* Bibas, *Fact-Finding*, *supra* note 45, at 1151-66; King & Klein, *supra* note 286, at 296-302. The effect of *Apprendi* on the former scenario is discussed in the text. In the latter seenario, prior to *Apprendi* the defendant could plead guilty to a charge, but any maximum sentence provided in the statute charged would not limit the sentence the judge imposed at sentencing because sentence enhancements above the otherwise applicable statutory maximum were permitted prior to *Apprendi*. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 469-74 (2000) (discussing sentence and procedural history of case). After *Apprendi*, if a defendant pleads guilty without a plea agreement, the statutory maximum sentence will be determined by reference to the facts to which the defendant allocated at the plea, with those facts taking the place of the facts found beyond a reasonable doubt in a jury verdict. *See supra* text accompanying notes 57-76; *Apprendi*, 530 U.S. at 469-71, 491-92 (applying *Apprendi* rule to facts established by defendant's guilty plea).

303. *See, e.g.*, Bibas, *Dynamics*, *supra* note 281, at 315-16; Bibas, *Institutional Allocations*, *supra* note 163, at 473 n.43; King & Klein, *supra* note 286, at 296-98; Klein & Steiker, *supra* note 33, at 236 (arguing that incentives to plead guilty arise from mandatory minimums and prosecution-controlled "substantial assistance" downward departures under Federal Sentencing Guidelines); *see also* Nancy J. King & Susan R. Klein, *Acceptance of Responsibility and Conspiracy Sentences in Drug Prosecutions After* Apprendi, 14 FED. SENTENCING REP. 165 (2002) (arguing that acceptance of responsibility downward adjustment should be amended in light of *Apprendi* to clearly provide reduction where defendant offered to plead guilty to lesser offense and defendant subsequently is acquitted of greater offense).

for those offenses. This is a consequence, however, of the shift in focus from the perspective of the criminal defendant to the structure of the Constitution's criminal procedure provisions. Ultimately, the Constitution simply does not restrict governmental power in sentencing the way it does in many other areas. Until a constitutional amendment changes this structure, the *Apprendi* line of cases has set forth the appropriate doctrine.

The constitutional structure analysis emphasizes the allocation of power not merely between the trial jury and sentencing judge, but also between the legislature and prosecutor. Even more significantly, the constitutional structure analysis concludes that the legislature is the body constitutionally vested with the power *to determine the allocation of power* among these institutions.[304] Many different schemes of offenses and sentences are possible, and the constitutional structure permits the legislature to choose which of them to enact into law.

Viewed at the broadest level, there are four basic types of sentencing schemes a legislature might enact. Within each of these schemes, some institutions are relatively weaker and some are relatively stronger depending on the comparative significance of elements of the offense and sentencing factors.

First, a legislature might adopt the traditional sentencing scheme, in which a wide range of punishment is available for each crime and judges have discretion to select the appropriate sentence within that wide range. Under this scheme, the legislature intentionally has delegated most of the responsibility for determining punishment, choosing to play a weaker role and granting considerable power to the sentencing judge. Moreover, by doing so the legislature has allocated comparatively weak power to the prosecutor and jury: because there are wide ranges of penalties for offenses and the judge selects the sentence, the influence of the charging decision and the guilty verdict is lessened. For example, a judge might choose to be lenient and sentence at the low end of the range for a serious crime even though the prosecutor and jury would not have wanted mercy; or the judge might sentence at the high end of the range for a minor offense because he believes the prosecutor or jury was insufficiently severe. This scheme seeks individualized punishment for the offender and places that determination almost exclusively in the hands of the judge.[305]

Second, a legislature might enact the opposite scheme, a system of strictly determinate sentences that follows mechanically from the offense of conviction. With this scheme, the legislature retains considerable power for itself by mandating the precise sentence upon conviction for each offense. And the sentencing judge performs nothing more than a ministerial exercise of imposing the preordained punishment for the offense of conviction. But the legislature does not retain complete control, of course, because the prosecutor must charge offenses and juries must convict them. If the legislature's criminal code contains a limited number of broad offenses—for example, a list of crimes akin to the traditional common law

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304. *See also* Standen, *supra* note 7, at 782-83 (arguing that unless the Supreme Court is willing to adopt a "sweeping constitutional jurisprudence" of crimes and punishments, it "must accept the ultimate hegemony of the democratic branch over the law of criminal procedure"); *id.* at 798-805 (discussing allocation of power among legislature, courts, and prosecutors and arguing that discretion to control the ultimate sentence imposed must lie with at least one of them, but also could be shared among the three depending on how the relevant laws are constructed).

305. *See* STITH & CABRANES, *supra* note 2, at 79 (noting predominance of judge in determining offender's sentence under traditional discretionary regime).

offenses without a multitude of modern nuances[306]—then the prosecutor's power to select the appropriate charge has tremendous significance and the jury's role is comparatively weaker. The cost of this scheme, however, is in the ability to obtain individualized sentencing of offenders; only the offense of conviction is considered, nothing more.[307] To the limited extent individualized punishment is available in this scheme, it rests primarily in the prosecutor's decision about which offense should be charged against the defendant. The leniency or severity of that decision dominates the determination of the punishment.

Third, a legislature might desire a strictly determinate sentencing scheme but retain individualized sentencing through a highly detailed criminal code in which numerous facts that are relevant to sentencing are included as elements of the offense. Again, the legislature controls the level of punishment for each conviction, and the sentencing judge performs no meaningful role. A highly detailed system of offenses, however, would allocate more power to the jury and less to the prosecutor. In seeking the punishment it believes appropriate for the defendant, the prosecution would charge all the offenses and facts that are relevant—for example, not simply robbery but also, perhaps, the brandishing or discharging of a firearm, a level of injury caused to the victim, the value of property taken, the leadership role in organizing others to commit the offense, the biased motive, or any number of other factors the legislature's code provides. Because all of these features are elements of offenses (having been enacted as such by the legislature), the jury plays a substantial role in determining the sentence because it would have to find each element proven beyond a reasonable doubt. By finding the proof inadequate on some of the elements, the jury would act as a check against the prosecutor's charging decision with greater effect than under a scheme with only a limited number of offenses with determinate sentences. In this way, the legislature could provide for a greater degree of individualized sentencing, but place the decisionmaking authority in the hands of the jury, not the sentencing judge or prosecutor.[308]

Fourth, the legislature might hope to achieve a middle ground that balances the powers of the four institutions without granting any one of them the nearly

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306. *Compare, e.g.*, 18 U.S.C. § 2111 (robbery within territorial jurisdiction of United States), *with, e.g., id.* §§ 1951(a) (robbery affecting interstate commerce), 2112 (robbery of property of United States), 2113 (bank robbery), 2115 (post office robbery), 2116 (railway or steamboat post office robbery), 2118 (robbery involving controlled substances), 2119 (carjacking robbery).

307. *See supra* note 184; *see also* STITH & CABRANES, *supra* note 2, at 23, 67 (noting power of prosecutor and sentencing authority when crimes are broadly defined, and increased power of prosecutor as sentence is linked more closely to offense).

308. This potential shift in power would be affected in practice, however, by the prevalence of guilty pleas. A greater number of crimes would allow prosecutors to bargain for a specific sentence. *See* Standen, *supra* note 7, at 798-801 (arguing that *Apprendi* will lead legislatures to enact more detailed criminal codes); *see also* Bibas, *Institutional Allocations*, *supra* note 163, at 470-71 (arguing that greater number of offense elements means greater shift of power from sentencing judge to prosecutor). This power could be constrained by a well-drafted criminal code with little overlap between offenses, which would restrict the ability of prosecutors to manipulate the charge applied to the defendant's conduct. *See* Standen, supra note 7, at 802-04. Finally, to the extent that all the facts being bargained over are (by statute) elements of the offense, the defendant would have a stronger position relative to the prosecution during plea bargaining than if those facts did not have to be proven beyond a reasonable doubt. *See supra* text accompanying notes 283-303.

complete prominence they respectively have under the first three schemes. Such a middle ground would involve highly detailed sentencing provisions that produce a narrow range of punishment from which the judge may select the sentence. The federal criminal code and the Federal Sentencing Guidelines are an example of this kind of scheme.[309] Congress sets both the statutory ranges of punishment and, acting through the power delegated to the Sentencing Commission, the sentencing effects of the Guidelines provisions. The legislature thus has retained more power than it has in a scheme of wide judicial discretion, but less power than if sentences were strictly determinate. Similarly, the prosecution's charging decision has importance, but many federal statutes have broad ranges of authorized penalties within which the Guidelines operate. Therefore, like the legislature, the prosecution has more power than in a scheme of wide judicial discretion, but less power than if the offense of conviction controlled the sentence rather than separate Guidelines findings.[310] Without question the jury is the weakest institution in the current federal sentencing system, because the detailed findings are not made as part of the offense of conviction, but rather afterwards at the sentencing hearing. Finally, the sentencing judge makes the Guidelines findings and then chooses a punishment within the range produced by the Guidelines calculation. Because the ranges of Guidelines punishments are narrow and Guidelines applications are subject to appellate review, the judge has less power than in a scheme of wide judicial discretion, but also has more power than in a scheme with strictly determinate sentences. Operating as a whole, this scheme achieves some degree of individualized punishment for the offender with more balanced power among the institutions than any of the other three schemes provides.

And the allocation of power in a middle ground scheme need not be the same as the one that exists in the federal system today. The sentencing guidelines regimes of many states, for example, are considerably less complex or permit noticeably more judicial discretion than the Federal Sentencing Guidelines. The Washington guidelines before the Supreme Court in *Blakely* provide for a presumptive guidelines range from which the sentencing judge may deviate based upon findings of fact justifying an exceptional sentence of a length determined by the judge, so long as the ultimate sentence imposed is no greater than the maximum penalty for the degree of offense for which the defendant was convicted.[311] Under the constitutional structure analysis, the Washington statutory guidelines system is constitutional. Similarly, the balance of power among prosecutor, jury, and judge

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309. Only about one-third of the states have adopted sentencing guidelines along the federal model, which indicates the extent to which policy arguments about the most appropriate sentencing scheme continue. *See* Klein & Steiker, *supra* note 33, at 230; *see also* Bibas, *Institutional Allocations*, *supra* note 163, at 467 (describing current federal sentencing system as a "hybrid" of determinate and indeterminate sentencing).

310. *See also* STITH & CABRANES, *supra* note 2, at 8, 130, 145-46 (arguing that Federal Sentencing Guidelines have increased power of prosecution and Sentencing Commission relative to individual sentencing judges and thereby have weakened ability of judges to serve as check on decisions made by prosecutors); Standen, *supra* note 7, at 785-91 (arguing that Federal Sentencing Guidelines in current form are a failure because Guidelines have shifted too much power from sentencing judge to prosecutor).

311. *See* State v. Blakely, 47 P.3d 149, 158-59 (Wash. Ct. App. 2002) (holding that trial court's decision that appropriate length of exception sentence was 90 months was not an abuse of discretion); *see also supra* notes 118-19 (citing sources describing and analyzing Washington guidelines regime).

could be altered by enacting the federal Guidelines factors as elements of the offense—keeping a detailed criminal code but providing for the exercise of some judicial discretion within a narrow range (rather than none, as in the third scheme). Shifting the determination of Guidelines sentencing facts from judge to jury would have the effect of increasing the procedural protections for defendants as well, which might provide a reason for a legislature with nefarious intentions to prefer the Guidelines scheme.[312] In any event, there are many possible ways the allocation of power among the four institutions might be balanced in a more nuanced way than the first three unbalanced schemes discussed, and the constitutional structure analysis allows this legislative choice.

The key insight provided by the constitutional structure analysis of *Apprendi-Harris* doctrine is that the Constitution does not command the adoption of any particular scheme of allocating institutional power over sentencing. Questions about whether sentences should be determinate or indeterminate, how influential the prosecutor's charge should be on the ultimate sentence, what level of involvement the jury should have in calibrating the appropriate punishment for the defendant, and how much discretion the judge should have to select the penalty imposed are not constitutional law questions. They are policy questions that relate to fundamental theoretical goals like retribution, deterrence, and rehabilitation.[313] They are questions of political judgment about which institutions deserve more of the public trust than others in imposing sentences in light of conditions in contemporary society. And ultimately they are questions that simply do not have a single correct answer. Choices must be made, and under the Constitution the legislature is the body that makes such choices.[314]

This is not to say that the Constitution places no limits on legislative choices, because of course the *Apprendi-Harris* rule is one such limitation. Nonetheless, the Constitution's criminal procedure provisions place only a narrow constraint on the legislature's statutory design of a scheme of criminal offenses and corresponding punishments. So long as the offense of conviction holds its significance through legislative enactment, prosecutorial charging, trial or plea to verdict, and judicial

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312. *Cf.* Allenbaugh, *supra* note 2, at 6 (criticizing recent legislation further limiting judicial discretion under Federal Sentencing Guidelines as contrary to purposes of Guidelines); *supra* text accompanying notes 281-82 (noting possibility of legislative exploitation of constitutional doctrine adverse to interests of criminal defendants).

313. *See also* Klein & Steiker, *supra* note 33, at 224-25, 238-39 (arguing that published guidelines are superior to judicial or jury sentencing discretion because of greater transparency behind sentencing judgments); *cf.* 18 U.S.C. § 3553(a)(2) (2000); Herman, *supra* note 7, at 628-30; Hoffmann, *supra* note 185, at 264-68.

314. There is reason to question whether legislatures will make these choices reasonably, of course, given the alignment of political incentives relating to substantive criminal law and sentencing. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). Professor Stuntz argues that one step toward solving these intractable political concerns would be to require, as a matter of federal constitutional law, that judges have discretion to sentence convicted defendants. *See id.* at 594-96. If mandatory minimum sentences were unconstitutional and judges also had authority to limit the maximum sentences imposed when multiple charges are stacked on the defendant, for example, then judges would have considerable ability to serve as a check on the enforcement discretion exercised by police officers and prosecutors. *See id.* Stuntz concedes his proposal is radical and without support in current constitutional doctrines, but he maintains that this reform and others may be necessary to ensure that legislatures and prosecutors face a meaningful check against their exercises of power. *See id.* at 595-96, 600.

sentencing, the Constitution permits the legislature to allocate the relative weights of these stages through a combination of elements of the offense and sentencing factors. The *Apprendi-Harris* doctrine ensures that offenses have clear maximum punishments defined by reference to charge and to verdict and thereby guarantees that the offense of conviction controls the resulting sentence. This doctrine serves only as an outer limit on the legislature's policy choices of the allocation of powers and institutional design, and it limits the trial jury's constitutional function to the determination of the defendant's maximum possible punishment for the offense of conviction. But that is all the Constitution commands. Requiring that the core constitutional nature of the offense of conviction be observed does not substantially impede legislative policy choices about sentencing goals or reform; it simply preserves the constitutional structure of criminal procedure against abrogation.[315]

It also is important to clarify what the constitutional structure analysis does and does not mean for the constitutional law of sentencing. The constitutional structure analysis does resolve the constitutional line between elements of the offense and sentencing factors for purposes of *Apprendi-Harris* doctrine. By concluding that the facts that determine the defendant's maximum possible sentence must be elements of the offense of conviction, but that other facts that regulate the particular sentence imposed within that maximum may instead be sentencing factors, the constitutional structure analysis forecloses constitutional challenges to the use of sentencing factors to impose punishment *based on their status as sentencing factors*. For example, because the application of a sentencing factor is not a conviction of an "offense" for constitutional purposes, the Double Jeopardy Clause is not implicated.[316] Similarly, because the determinations of sentencing factors are not "criminal prosecutions" of the defendant, the Sixth Amendment right to a jury trial is inapplicable.[317] On the other hand, the constitutional structure analysis does *not* preclude *independent* constitutional challenges to either sentencing provisions unrelated to the issue of the

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315. For the same reasons, the constitutional structure analysis supports the holdings of *Leland v. Oregon*, 343 U.S. 790 (1952), and *Patterson v. New York*, 432 U.S. 197 (1977), which respectively approved the constitutionality of statutes making the insanity defense and the homicide extreme emotional disturbance mitigation into affirmative defenses for which the defendant bore the burden of proof. The prosecution still must establish the requisite mens rea for murder, from which the defendant seeks to escape by asserting that the mental state was not formed with a rational state of mind (whether insanity or emotional rage). Once the prosecution has proven the intent element beyond a reasonable doubt, it is not inconsistent with the offense of conviction to require the defendant to prove an affirmative defense that excuses or mitigates. *Cf.* Mullaney v. Wilbur, 421 U.S. 684 (1975) (invalidating statute that presumed malice aforethought).

316. *See* United States v. Watts, 519 U.S. 148 (1997); Witte v. United States, 515 U.S. 389 (1995).

317. Accordingly, the constitutional structure analysis mandates only a narrow, formalistic role for the trial jury with respect to sentencing. The jury, of course, retains control over the adjudication of guilt and innocence for the charged offense. But beyond finding the defendant guilty of the offense of conviction, the jury's constitutional function includes only the authorization of the maximum possible punishment that the defendant faces. The application of sentencing factors within that maximum does not violate the Sixth Amendment right to trial by jury because those factors are not new "offenses" for constitutional purposes. By defining the constitutional concept of the offense of conviction by reference to the entire constitutional structure of criminal procedure, the constitutional structure analysis precludes a Sixth Amendment challenge to the use of sentencing factors.

constitutional offense of conviction or to the line between offense elements and sentencing factors. For example, claims that a sentencing provision unconstitutionally discriminates between defendants in violation of the Equal Protection Clause, or is unconstitutionally retroactive in violation of the ex post facto Clause, or is fundamentally unfair in violation of the Due Process Clause, would be unaffected.[318] The constitutional structure analysis affirms the constitutionality of sentencing factors and legislative regulation of judicial sentencing discretion, but it does not extend beyond the constitutional structure of criminal procedure from which it derives in the first place.

Finally, it is worth noting how the constitutional structure analysis might have altered the reaction to the *Apprendi* line of cases had the Court relied upon this reasoning in its decisions. Had the opinions in *Jones* and *Apprendi* empbasized the fundamental nature of the offense of conviction to the constitutional structure, rather than the Sixth Amendment right to a jury trial, the limited scope of the principle announced in the *Apprendi* rule would have been far more apparent. Rather than seeming to initiate a revolution in the constitutional law of sentencing, the constitutional structure perspective would have demonstrated the narrow scope of the Court's concern from the beginning. More importantly, the outcome of *Harris* would not have seemed to be a retrenchment of the doctrine announced in *Apprendi* but rather would have been a natural corollary of its constitutional structure rule. Adopting the constitutional structure analysis going forward, therefore, would clarify the nature of the inquiry for lower courts, legislatures, lawyers, and scholars in a salutary way.

CONCLUSION

The constitutional structure analysis provides a better framework for resolving the questions of the constitutional criminal procedure of sentencing presented in the *Apprendi* line of cases. By examining the constitutional inquiry not only in terms of the defendant's Sixth Amendment right to a jury trial but also the entire constitutional structure of criminal procedure, this analysis focuses the inquiry on

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318. *See, e.g.*, United States v. Zimmer, 299 F.3d 710, 717-19 (8th Cir. 2002) (rejecting ex post facto challenge to application of amended Guidelines provision); United States v. McKissick, 204 F.3d 1282, 1300-02 (10th Cir. 2000) (rejecting Equal Protection challenge to application to defendant of U.S.S.G. § 4A1.2); United States v. Parks, 89 F.3d 570, 572-73 (9th Cir. 1996) (holding that application of U.S.S.G. § 4A1.1(d) to defendant violated fundamental fairness guarantee of Due Process Clause).

For example, the multi-factor test proposed by King and Klein, which safeguards a number of constitutional values including basic Due Process guarantees, could serve as an additional outer limit on legislative power to define crimes and regulate sentences. *See* King & Klein, *supra* note 214, at 1536-46 (describing and applying test). This test might be used to supplement the constitutional structure analysis so as to preclude the most egregious exploitations of the deference to legislative judgment it provides.

As discussed above, a claim that a sentence is grossly disproportional in violation of the Cruel and Unusual Punishment Clause implicates the scope of the constitutional offense of conviction because proportionality is defined by reference to the offense of conviction. *See supra* text accompanying notes 134-49. In the Court's most recent "three strikes" cases, the prior convictions justifying the recidivist sentence were enacted, charged, and proven as elements of the offense. *See* Ewing v. California, 538 U.S. 11, 14 (2003); Lockyer v. Andrade, 538 U.S. 63, 67 (2003). Accordingly, the constitutional structure analysis would treat those facts as part of the offense of conviction, as the *Ewing* plurality did.

the key concept: the defendant's offense of conviction and the constitutional consequences that follow from that offense's enactment, charge, trial, and punishment. The consequence of this method of constitutional interpretation is a clearer and more persuasive justification for both the *Apprendi* rule requiring that the defendant's maximum sentence be determined by reference only to facts proven as elements of the offense and the *Harris* rule permitting the use of sentencing factors to regulate the particular punishment to be imposed on the defendant within that maximum.

An additional consequence of the constitutional structure analysis is the recognition that the Constitution simply does not compel significant restrictions on legislative power to adopt criminal offenses and sentencing schemes. So long as the sentence imposed on the defendants does not contravene the scope of the offense that was enacted, charged, and established in a guilty verdict by trial or plea, the structure of constitutional criminal procedure does not proscribe a particular system for determining the particular punishment. The offenses that exist, the breadth of penalty ranges for them, and whether sentences will be determinate or indeterminate or something in between is a matter of legislative policy choice, not constitutional law.

Within the outer limits mandated by the *Apprendi-Harris* rule, the allocation of power among legislature, prosecution, trial jury, and sentencing judge—and the corresponding proof by elements of the offense or sentencing factors—is subject to legislative design. That is all the Constitution requires.