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The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction between Sentencing Factors and Elements of a Crime

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THE EFFECT OF *APPRENDI v. NEW JERSEY* ON THE FEDERAL SENTENCING GUIDELINES: BLURRING THE DISTINCTION BETWEEN SENTENCING FACTORS AND ELEMENTS OF A CRIME

*Andrew J. Fuchs**

INTRODUCTION

In the recent decision of *Apprendi v. New Jersey*,[1] the United States Supreme Court promulgated the bright line rule that "[o]ther than . . . prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] This holding requires juries to make many of the determinations affecting a defendant's sentence that had previously been made by judges. As a result, these determinations must now be made using the more stringent "beyond a reasonable doubt" standard, instead of the "preponderance of the evidence standard" that judges may use.[3]

Determinations affecting a defendant's sentence fall into two categories: elements of a crime and sentencing factors.[4] An element is a fact that demands heightened due process protections, namely that a jury determine its existence using the "beyond a reasonable doubt" standard of proof.[5] By contrast, sentencing factors undergo a

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1. 120 S. Ct. 2348 (2000) (holding that the New Jersey bias crimes law is unconstitutional because the judge, rather than the jury, made the determination that there was bias involved).

2. *Id.* at 2362-63.

3. See *infra* notes 5, 7, 27 and accompanying text for further discussion regarding the distinction between these two standards of proof.

4. *See generally Apprendi*, 120 S. Ct. at 2365 (discussing the distinction between elements and sentencing factors); McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (concluding that sentencing factors require a different burden of proof than elements); Richard Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 Fed. Sentencing Rep. 203 (2000) [hereinafter Singer, *Elements*].

5. *See McMillan*, 477 U.S. at 85; Singer, *Elements*, *supra* note 4, at 204; Note, Winship *on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 Harv.

less stringent fact finding process.[6] Sentencing factors are determinations impacting the length of a defendant's sentence that a judge, rather than a jury, makes using the preponderance of the evidence standard.[7] For example, after the jury has already convicted a defendant, judges routinely decide the existence of such sentencing factors as narcotics quantity, whether anyone was injured during the commission of the crime, the extent of victim injury, or whether a weapon was involved.[8] For many years, it has been uncertain precisely which determinations are sentencing factors and which are elements.[9] The *Apprendi* decision has now definitively drawn a line[10] by defining an element as any fact that would expose a defendant to a sentence greater than the maximum statutory penalty for the crime for which the jury convicted him.[11]

The Supreme Court's decision in *Apprendi* raises the controversial issue of the fate of the Federal Sentencing Guidelines (the "Guidelines"). Currently, judges must use the Guidelines to determine a specific sentencing range within the greater legislatively created statutory range.[12] Although by its terms, the holding does not seem to affect the Guidelines, the dissenting Justices in *Apprendi* and other commentators disagree, arguing that the decision will necessarily apply, and will require juries to make every Guidelines determination that impacts a defendant's sentence. This could require the total invalidation of the Guidelines.[13] Moreover, if courts apply *Apprendi* to the Guidelines, numerous procedural difficulties would

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L. Rev. 1093, 1095-96 (1993) [hereinafter Winship *on Rough Waters*].

6. *See McMillan*, 477 U.S. at 91.

7. *See* 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, 250 (1998). A preponderance of the evidence standard only requires that it be more likely than not that the fact in question is true. *See* Black's Law Dictionary 1182 (6th ed. 1990) (defining "preponderance of the evidence" as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it"); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1300-01, 1310 (1977).

8. *See, e.g.*, Robert Batey, *Sentencing Guidelines and Statutory Maximums in Florida: How Best to Respond to* Apprendi, Fla. B.J., Nov. 2000, at 59 (examining the implications of *Apprendi* on Florida's sentencing system); Priester, *supra* note 7 at 250.

9. *See infra* notes 31-50 and accompanying text.

10. Like the previous decisions addressing this issue, *Apprendi* concerns who the Constitution requires the trier of critical facts to be and further, what the applicable burden of persuasion is for those determinations. These cases, however, do not limit a legislature's ability to create greater criminal punishment for certain components of crimes. *See generally Apprendi*, 120 S. Ct. at 2355; Underwood, *supra* note 7 at 1299-1304.

11. *See Apprendi*, 120 S. Ct. at 2362-63. For further discussion of the maximum statutory penalty, see *infra* notes 159-66 and accompanying text.

12. *See infra* notes 152-60 and accompanying text for further discussion about the Guidelines.

13. See *infra* notes 206-22, 225-30 and accompanying text.

arise, as exemplified by *Apprendi*'s application to the determination of a defendant's Guidelines penalty in cases involving the federal narcotics statute, 21 U.S.C. § 841.[14] Such difficulties would eradicate any benefits that the Sentencing Guidelines provide in eliminating disparities between sentences.[15]

This Note argues, instead, that *Apprendi* need not invalidate the Guidelines because the decision does not require juries to make Guidelines determinations using a reasonable doubt standard.[16] *Apprendi* should be interpreted narrowly, to permit judges to continue to use a preponderance of the evidence standard to make Guidelines sentencing determinations. The validity of such a conclusion wholly depends on which of two divergent principles actually underlies the holding.[17] A conclusion that *Apprendi* impacts the determinations that a judge makes under the Guidelines stems from the assumption that the *Apprendi* decision aimed to provide defendants with heightened protections from judicial fact finding at sentencing.[18] Under this assumption, the Court's holding would be arbitrary and inequitable unless judicial discretion to make Guidelines determinations were eliminated entirely.[19] The decision could not be applied consistently because judicial discretion continues to be permitted in a multitude of analogous circumstances and thus mere wording of statutes would dictate whether a defendant receives the protections that the *Apprendi* rule provides.[20] Conversely, *Apprendi* would not affect the Guidelines if the *Apprendi* Court simply meant to hold that due process requires juries to decide whether the defendant's acts satisfy the legislatively set definition of a crime.[21] When the legislature sets a "maximum penalty," it is arguably defining a new and separate crime and thus the point at which due process protections should be triggered.[22] The holding in *Apprendi* could therefore apply to determinations that increase the maximum statutory penalty without affecting determinations made under the Guidelines. After examining the language of the decision and the goals advanced by a closely related line of cases, it is more probable that this second possibility was the *Apprendi* Court's motivation and

14. Because *Apprendi* clearly applies to the determination of the statutory penalty in federal narcotics cases, these problems will inevitably plague such determinations. *See infra* note 281 and accompanying text. Problems involving the Guidelines will be similar because the new procedure that *Apprendi* commands is simply not suited to the particular type of determinations that all narcotics statutes require.

15. *See infra* notes 294-302 and accompanying text.

16. *See infra* Part III.

17. *See infra* notes 232-47 and accompanying text.

18. *See infra* notes 232-47 and accompanying text.

19. *See infra* notes 232-47 and accompanying text.

20. *See infra* notes 232-47 and accompanying text.

21. *See infra* Part III.B.

22. *See infra* notes 255-60 and accompanying text.

therefore, courts should limit the scope of *Apprendi* and decline to invalidate the Guidelines.

Part I of this Note examines the evolution of the common law requirement that the prosecution must prove certain facts to a jury beyond a reasonable doubt and describes the case law addressing legislative restrictions associated with defining the integral parts of a crime. Part I further examines the varying amount of discretion granted to sentencing judges over the course of time and the structure of the Federal Sentencing Guidelines. Part II analyzes the decision in *Apprendi* and the differing views as to the impact of *Apprendi* on the operation of the Guidelines. Part III describes two possible interpretations of the decision, and argues that courts should adopt the narrower interpretation that would not require extension of the *Apprendi* holding to eliminate judicial discretion in determining Guidelines ranges. Additionally, Part III also demonstrates how eliminating judicial discretion would create a multitude of problems, as exemplified by the procedural difficulties that result from applying *Apprendi* to § 841 cases. This Note concludes that *Apprendi* can be applied consistently both to determinations that increase the maximum statutory penalty, and to the Guidelines, without requiring the invalidation of the Guidelines.

I. ELEMENTS AND SENTENCING FACTORS

This part first explains the distinction that American courts have historically drawn between sentencing factors and elements, and then examines recent cases that have attempted to define that distinction more precisely. This part further discusses the varied amount of discretion that judges have possessed over time and then explains the structure and operation of the Federal Sentencing Guidelines.

A. *Sentencing Factors, Elements and Legislative Discretion*

The jury's role in determining guilt or innocence in criminal prosecutions has always been thought to be the most fundamental aspect of the American judicial system.[23] Juries have historically provided critical protections to defendants, which led to the incorporation of the right to a jury trial into the Constitution.[24] The Fifth Amendment provides, *inter alia*, "[n]o person shall be...

23. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994). The right to a trial by jury originally developed in England as a check against the crown and was expressly provided for in the English Bill of Rights. *See* Andrew James McFarland, Note, Lewis v. United States: *A Requiem for Aggregation*, 46 Cath. U. L. Rev. 1057, 1063 (1997).

24. *See* U.S. Const. amend. V; U.S. Const. amend. VI; Alschuler, *supra* note 23, at 870.

deprived of life, liberty, or property, without due process of law,"[25] while the Sixth Amendment states "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation."[26]

A criminal jury must use the "beyond a reasonable doubt" standard in its deliberations, which means that the fact finder must have an extremely high level of certainty to return a guilty verdict.[27] The reasonable doubt standard is so demanding because it reduces the risk of convictions resting on factual error and ensures that a defendant is not deprived of his liberty unless the factfinder is certain that the defendant committed the crime.[28] A defendant's right to a jury trial, however, attaches only to "serious" crimes and does not extend to "petty" offenses.[29] According to the Supreme Court, any crime that carries a maximum penalty of greater than six months imprisonment is sufficiently "serious" to trigger this right.[30]

Although a defendant is undeniably entitled to have a jury deliberate using a reasonable doubt standard,[31] only some components of a trial are subject to those heightened protections.[32] The jury only makes determinations about elements of a crime and therefore, the protection that a jury verdict and the reasonable doubt standard

25. U.S. Const. amend. V.

26. U.S. Const. amend. VI.

27. *In re* Winship, 397 U.S. 358, 362-64 (1970). This common law tradition was constitutionalized in *In re Winship*. *Id.* This standard of proof instructs "the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.* at 370. The rule "symbolize[s] for society the great significance of a criminal conviction." Underwood, *supra* note 7, at 1306. It also reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

28. *See* Coffin v. United States, 156 U.S. 432, 453 (1895); Underwood, *supra* note 7, at 1306 (noting that the standard directs the fact finder not to render a guilty verdict if the case is too close to call and the evidence of guilt is not overwhelming).

29. Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

30. Blanton v. City of Las Vegas, 489 U.S. 538, 542 (1989). Furthermore, a defendant is not entitled to a jury trial even if crimes that each carry a penalty below six months imprisonment aggregate to a cumulative potential penalty greater than six months imprisonment. *See* Lewis v. United States, 518 U.S. 322, 329 (1996). "[T]he deprivation of liberty imposed by imprisonment makes that penalty the best indicator of whether the legislature considered an offense to be 'petty' or 'serious.'" *Id.* at 326 (quoting *Blanton*, 489 U.S. at 542).

31. *Duncan*, 391 U.S. at 145 (holding that the trial by jury in criminal cases is fundamental to the American system of justice and thus the Fourteenth Amendment guarantees the Sixth Amendment's right to a jury trial in state criminal prosecutions, as well as in federal); 9 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2497 (3d ed. 1940).

32. *See e.g.*, Joshua S. Bratspies, *Beyond a Reasonable Doubt: Limiting the Ability of States to Define Elements of an Offense in the Context of Hate Crime Legislation*, 30 Seton Hall L. Rev. 893, 900-01 (2000) (discussing the requirement that all facts "necessary to constitute the crime" be proved beyond a reasonable doubt).

provide depends on how the state defines an element.[33] From the earliest days of the republic no jurisdiction ever considered every issue of fact in a criminal case to be an element[34] and no uniform rule ever existed across jurisdictional lines regarding which components of a charged crime were defined as elements.[35] At early common law, many jurisdictions defined an element as any factual determination that would result in an increase of the statutory penalty.[36] Other jurisdictions identified certain findings, such as a finding of recidivism,[37] that were solely for the judge to decide.[38]

The earliest Supreme Court case addressing the distinction between sentencing factors and elements merely held that all elements needed to be proven to the jury beyond a reasonable doubt.[39] In *In re Winship*, the Supreme Court first discussed the standard of proof required in criminal proceedings.[40] Although common law tradition required the use of the reasonable doubt standard in criminal proceedings, the Supreme Court had never before held that it was constitutionality mandated.[41] In *Winship*, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[42] Therefore, although this landmark decision did not squarely involve sentencing, it effectively approved a diminished standard of proof at sentencing proceedings. Because *Winship* required a heightened standard of proof only for determinations that were charged as part of the crime,

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33. *See id.* at 902; McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (noting that "the applicability of the reasonable doubt standard . . . has always been dependent on how a state defines the offense that is charged in any given case"); Winship *on Rough Waters*, *supra* note 5, at 1095-99; *see also supra* notes 4-11 and accompanying text.

34. Underwood, *supra* note 7, at 1303.

35. *See* Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 St. Louis U. L.J. 299, 310 (2000) (noting the absence of a consistent role of the judge between different jurisdictions and periods of history).

36. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2369 (Thomas, J., concurring); Commonwealth v. Smith, 1 Mass. 186, 1 Will. 244 (1804).

37. Punishment for recidivism is punishment for being a repeat offender. *See* Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998); Black's Law Dictionary 1269 (6th ed. 1990) (defining a "recidivist" as a "habitual criminal").

38. *See* Archbold, Pleading, Evidence and Practice in Criminal Cases 225 (Stephen Mitchell ed., 40th ed. 1979); Lester B. Orfield, Criminal Procedure from Arrest to Appeal 556-65 (1947); Joel Samaha, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 Wm Mitchell L. Rev. 217, 230 (1989) (discussing the power of judges at very early common law to exceed the maximum of the crime when they felt in good faith that it was deserved).

39. *In re* Winship, 397 U.S. 358, 362 (1970); Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements And Sentencing Factors*, 112 Harv. L. Rev. 1349, 1351 n.19 (1999) [hereinafter *Awaiting The Mikado*].

40. *Winship*, 397 U.S. at 362.

41. *See id.* at 369.

42. *Id.*

any other determinations not structured as part of the crime were not subjected to this heightened standard of proof.[43]

The Supreme Court held that it is unconstitutional to use only a preponderance of the evidence standard in determining a defendant's guilt.[44] The Court reasoned that the Due Process Clause requires that proof must be established using the reasonable doubt standard[45] and further stressed that the use of the reasonable doubt standard was necessary to insure that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[46]

Although the *Winship* Court held that every part of a crime must be proven beyond a reasonable doubt, it provided no guidance as to what constitutes a part of a crime.[47] As a result, legislatures remained relatively flexible in selecting the specific elements that comprise a crime and choosing which determinants could instead be characterized as sentencing factors.[48] If a legislature desired to restrict a jury's ability to make certain determinations, the legislature could readily circumvent the *Winship* holding by simply classifying that component of a crime as a sentencing factor, rather than as an element.[49] Therefore, the force of *Winship* depended on whether a fact was considered to be an "element" of that crime or merely a sentencing factor or defense.[50]

In *Mullaney v. Wilbur*,[51] the Court restricted the power of legislatures to freely legislate around *Winship*'s requirements.[52] The Court applied *Winship* to a statute that allocated the burden of proof for a component of the crime to the defendant and held that determinations that are genuinely part of the crime charged must be proven beyond a reasonable doubt and cannot be shifted to the defendant.[53] Indeed, the Court noted that "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law."[54] Under *Mullaney*, therefore, legislatures were prohibited from shifting the

43. *See* Priester, *supra* note 7, at 250; *Awaiting the Mikado*, *supra* note 39, at 1353.
44. *See Winship*, 397 U.S. at 364; Priester, *supra* note 7, at 250.
45. *See Winship*, 397 U.S. at 364.
46. *Id.*
47. *See id.*
48. *See* Patterson v. New York, 432 U.S. 197, 210 (1977).
49. *See id.* (noting that legislatures could circumvent the burden of proof by redefining elements as affirmative defenses).
50. *See id.*
51. 421 U.S. 684 (1975).
52. *Id.*
53. *Id.*
54. *Id.* at 698. See *infra* notes 206-08 and accompanying text for a discussion of how such statutory construction could enable legislatures to evade the requirements of *Apprendi*.

burden of proof to the defendant for a fact that is an integral part of a crime.

Only two years later, the Supreme Court decided *Patterson v. New York*,[55] and clarified the extent to which *Mullaney* restricted the legislature's authority to designate certain parts of a crime as defenses rather than as elements.[56] In *Patterson*, the Court upheld a New York State murder statute that allocated to the defendant the burden of proving the affirmative defense of extreme emotional distress.[57]

The *Patterson* Court retreated from *Mullaney* and rejected the defendant's contention that the statute's construction violated Due Process protections.[58] *Patterson* distinguished *Mullaney* because, in *Patterson*, the affirmative defense was not a fact essential to the offense charged and the prosecution continued to bear the full burden of proving all statutory elements of the crime.[59] The *Patterson* Court stated that "[t]he Due Process Clause, as we see it, does not put [the State] to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime."[60] Once the State has proven the statutory elements of the crime, any mitigating factors may be proven in whatever manner the State desires, including requiring the defendant to bear the burden of proving an affirmative defense.[61] Therefore, *Patterson* effectively redefined the holding in *Mullaney* by limiting the prohibition against shifting burdens of proof to only those facts adjudged to be part of the crime, rather than any fact affecting culpability.[62] By limiting the protections of the reasonable doubt rule to only those facts that are encompassed in the formal definition of the crime, the *Patterson* Court abandoned the rationale in *Mullaney* that the fact's substantive nature governs whether the rule applies.[63] Essentially, *Mullaney* resolved the issue

55. 432 U.S. 197 (1977).

56. *Id.* at 215-16.

57. *See id.* at 216; *see also* N.Y. Penal Law § 125.25 (McKinney 1975). The jury in *Patterson* was instructed that they were only required to determine the existence of the affirmative defense by a preponderance of the evidence, although they had to determine guilt of the substantive crime beyond a reasonable doubt. *Patterson*, 432 U.S. at 200. The lower standard of proof for the affirmative defense was not at issue because the defendant had a lesser burden in proving it, which did not infringe on his constitutional rights. *See id.* at 201. The only disputed point was the shift in burden of proof for the affirmative defense to the defendant. *See id.* at 201.

58. *Patterson*, 432 U.S. at 201.

59. *See id.* at 202.

60. *Id.* at 207-08.

61. *See id.*

62. *See* Marina Angel, *Substantive Due Process and the Criminal Law*, 9 Loy. U. Chi. L.J. 61, 102-11 (1977) (criticizing the inconsistencies between *Patterson* and *Mullaney*); Todd Meadow, Note, Almendarez-Torres v. United States: *Constitutional Limitations on Government's Power to Define Crimes*, 31 Conn. L. Rev. 1583, 1587-88 (1999).

63. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457, 470 (1989).

with a "substance over form" approach, while *Patterson* reverted to a form over substance approach.[64]

Although *Patterson* recognized that legislatures enjoy broad power in constructing statutes, the Court explicitly refrained from disturbing the previously established principle that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."[65] The Court addressed the possibility that legislatures could reallocate burdens of proof by labeling some elements of a crime affirmative defenses, and it qualified its expansive grant of authority by cautioning that a legislature cannot "'declare an individual guilty or presumptively guilty of a crime.'"[66] Therefore, the *Patterson* Court's primary concern was to ensure that legislatures do not create a presumption of guilt for a fact, which would shift the burden of rebutting that presumption to the defendant.[67] Otherwise, the legislature retained broad discretion to designate parts of a crime as elements.[68]

In *McMillan v. Pennsylvania*,[69] the Court reinforced *Patterson*, holding that the legislative definition of elements of an offense are usually dispositive of which facts the prosecution must prove beyond a reasonable doubt.[70] Additionally, while previous decisions had indirectly addressed the required burden of proof at sentencing,[71] in *McMillan*, the Court explicitly mandated that a preponderance of the evidence standard adequately protected the defendant's rights at sentencing.[72]

McMillan involved a challenge to Pennsylvania's Mandatory Minimum Sentencing Act, which required that a mandatory minimum

64. *Awaiting the Mikado*, *supra* note 39, at 1352-53.

65. *Patterson*, 432 U.S. at 210.

66. *Id.* (quoting McFarland v. Am. Sugar Ref., 241 U.S. 79, 86 (1916) (holding that a state cannot, consistent with the Fourteenth Amendment's equal protection clause, create a statutory presumption of participation in an illegal monopoly)). In *McFarland*, Justice Holmes noted that where the legislature creates a statutory presumption, "[i]t is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'" *McFarland*, 241 U.S. at 86 (quoting Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910)).

67. *Patterson*, 432 U.S. at 210.

68. *See id.*

69. 477 U.S. 79 (1986).

70. *Id.* at 85.

71. *See generally Patterson*, 432 U.S. at 198, 201 (holding that legislatures were relatively unconstrained in characterizing facts as either elements or sentencing factors); Mullaney v. Wilbur, 421 U.S. 684 (1975) (acknowledging that there are some constitutional limitations to legislative authority to designate a fact as an element); *In re* Winship, 397 U.S. 358, 362 (1970) (holding merely that all elements of a crime must be proven to the jury beyond a reasonable doubt).

72. *McMillan*, 477 U.S. at 91.

sentence of five years imprisonment be imposed on anyone convicted of certain enumerated felonies if the judge found by a preponderance of the evidence that the defendant "'visibly possessed a firearm'" during the commission of the offense.[73] In upholding this provision's constitutionality, the Court concluded that the language of the statute evinced the legislature's clear intent for "visible possession" to be a sentencing factor rather than an element.[74] The Court's holding recognized that the constitutionality of such a provision rests on legislative intent, and courts should not invalidate a legislature's decision to pursue "its chosen course in the area of defining crimes and prescribing penalties."[75]

Speaking for the majority, Chief Justice Rehnquist approved the construction of the statute, noting that the statute "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[76] This analogy reflects the Court's readiness to permit legislative flexibility in determining which facts should be sentencing factors, provided that the defendant is not primarily being punished for a part of a crime that is guised as a sentencing factor.[77]

In analyzing the legislature's intent, Chief Justice Rehnquist examined five factors, which subsequently became the basis for a multifactor test that courts used to evaluate whether a legislature overstepped its bounds in designating a particular factor to be a sentencing factor.[78] The Court considered whether: (1) the statute presumed the defendant guilty of any part of the offense;[79] (2) the sentencing factor subjected the defendant to a significant increase in his sentence;[80] (3) the law altered the maximum penalty for the crime or whether it simply divested the judge of his discretion in applying that maximum;[81] (4) the statute created a separate offense;[82] and whether (5) the legislature intentionally constructed the statute in this

73. *Id.* at 81 (quoting 42 Pa. Cons. Stat. § 9712 (1982)).
74. *Id.* at 91 (coining the term "sentencing factor").
75. *Id.* at 86.
76. *Id.* at 88.
77. *Id.*
78. *See id.* at 86-90; *see also* Bratspies, *supra* note 32, at 905. Courts used these criteria to evaluate statutes until the *Apprendi* decision created the new rule. *See infra* note 119 and accompanying text.
79. *See McMillan*, 477 U.S. at 85-86; *see also* Bratspies, *supra* note 32, at 905.
80. *See McMillan*, 477 U.S. at 87-88. In *McMillan*, the Court found that there was not a great disparity in sentences under the Pennsylvania Mandatory Minimum Sentencing Act because the statute only "ups the ante" by five years. *Id.*; *see also* Bratspies, *supra* note 32, at 905. Additionally, this case differed from *Mullaney* because in *McMillan* there was no great "'differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *McMillan*, 477 U.S. at 87 (quoting Mullaney v. Wilbur, 421 U.S. 684, 700 (1977)).
81. *See McMillan*, 477 U.S. at 87-88; *see also* Bratspies, *supra* note 32, at 905.
82. *See McMillan*, 477 U.S. at 87-88; *see also* Bratspies, *supra* note 32, at 905.

manner to attempt to evade the *Winship* requirements.[83] In addition, the Court suggested that factors that have historically been treated as sentencing factors should remain within the discretion of the judge.[84]

Although the standard the *McMillan* Court adopted was greatly deferential to legislatures, the decision reiterated that legislative power to define the elements of a crime is not entirely unfettered.[85] The Court, however, recognized that it has never attempted to define precisely the constitutional limits that legislatures face.[86] The Court rejected the claim that the legislature's removal of sentencing discretion through imposition of mandatory minimum sentences violates due process rights because of the "difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."[87] It reasoned that mandatory minimum sentences are constitutional because the defendant does not have a liberty interest in any sentence imposed below the maximum penalty for the crime.[88]

In dissent, however, Justice Stevens stated that "[i]t would demean the importance of the reasonable-doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an 'element' of a crime."[89] He did not believe a constitutional test should turn on legislative intent and stressed the reasonable doubt standard of proof is required to avoid "the loss of liberty and the stigma that results from a criminal conviction."[90] Justice Stevens' dissent in *McMillan* is noteworthy because he eventually wrote the majority opinion in *Apprendi*, although fifteen years would elapse before he could muster enough support to turn his dissent into a majority opinion.[91]

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83. *See McMillan*, 477 U.S. at 88-89; *see also* Bratspies, *supra* note 32, at 905.

84. *McMillan*, 477 U.S. at 90; Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998) (holding that recidivism has historically been a sentencing factor); *see also* Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 Fed. Sentencing Rep. 197 (2000).

85. *See McMillan*, 477 U.S. at 86-87.

86. *Id.* at 86.

87. *Id.* at 92.

88. *See* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 Cornell L. Rev. 299, 320-21 (1994) (arguing that guidelines sentencing in general should require more stringent fact-finding procedures). *McMillan*'s validation of mandatory minimums established the constitutional boundaries in which determinate sentencing guideline schemes could operate. *See id.*; *see also* United States v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1991). See *infra* notes 152-66 and accompanying text for a discussion of determinate sentencing schemes.

89. *McMillan*, 477 U.S. at 102 (Stevens, J., dissenting).

90. *Id.* at 103 (Stevens, J., dissenting).

91. Apprendi v. New Jersey, 120 S. Ct. 2348, 2351 (2000).

B. *Recent Case Law Defining Elements and Sentencing Factors*

In a recent series of cases, the Court has sought to define the extent of constitutionally permissible legislative action in designating a determinant as a sentencing factor.[92] These cases effectively constrain the legislature's discretion to define which acts constitute a crime and ultimately, which decisions are for a judge to decide and which are reserved for a jury.[93]

In 1998, the Supreme Court, in *Almendarez-Torres v. United States*,[94] upheld a statute empowering the judge, rather than the jury, to decide whether the defendant was a recidivist, even though it resulted in an increase of the defendant's sentence above the maximum allowable under the jury's verdict.[95] The Court used very narrow language to hold that recidivism was a sentencing factor.[96] The defendant was charged with violating 8 U.S.C. § 1326(a), which makes it illegal to be "found in the United States... after being deported."[97] After the defendant pled guilty to that charge, the government filed notice alleging that the defendant had previously been deported due to felony convictions.[98] This fact increased the statutory maximum sentence because he therefore fell within the purview of 8 U.S.C. § 1326(b).[99] Under § 1326(b), the defendant was exposed to incarceration of up to twenty years, while under § 1326(a) he would have been subject to a maximum term of only two years imprisonment.[100] The defendant challenged this procedure, and the Court, relying on the *McMillan* standard, looked to "the statute's language, structure, subject matter, context, and history" to determine that the legislature intended recidivism to be a sentencing factor rather than an element.[101]

Justice Scalia's dissent,[102] however, adopted the principle that would later emerge in the majority opinion *Jones v. United States*, and then

92. *See id.*, at 2362-63 (holding that an element *is* defined as "any fact [other than prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum"); Jones v. United States, 526 U.S. 227, 243 n.6, 244-52 (1999) (holding that an element *may* have to be defined as "any fact (other than prior conviction) that increases the maximum penalty for a crime"). See *supra* note 112 for an explanation of the constitutional doubt theory the *Jones* court used to reach its decision.

93. *See Apprendi*, 120 S. Ct. at 2362-63; *Jones*, 526 U.S. at 243 n.6, 244-252.

94. 523 U.S. 224 (1998).

95. *Id.*

96. *See id.* at 230.

97. *Id.* at 227 (quoting 8 U.S.C. § 1326 (1994)).

98. *Id.* at 227.

99. *Id.* § 1326(b) punishes the act described in § 1326(a) where the defendant was deported subsequent to an aggravated felony conviction. § 1326(b).

100. *Almendarez-Torres*, 523 U.S. at 227.

101. *Id.* at 228.

102. *Id.* at 248-60 (Scalia, J., dissenting).

in *Apprendi*.[103] He wrote for the four dissenting Justices[104] that it was "genuinely doubtful whether the Constitution permits a judge . . . to determine by a mere preponderance of the evidence . . . a fact that increases the maximum penalty to which a criminal defendant is subject."[105]

In *Jones*, the Court held that it was unconstitutional for a provision of the federal carjacking statute to permit the judge to impose a sentence of twenty-five years if he found that the crime involved "serious bodily injury."[106] The jury convicted the defendant of a crime carrying a maximum sentence of only fifteen years, yet the judge's own findings, using a preponderance of the evidence standard, increased the sentence beyond that statutory maximum.[107] After thoroughly parsing the statute, the Court concluded that Congress intended "serious bodily injury" to be an element of the offense and not merely a sentencing factor.[108] The Court expressed disbelief that the legislature would not have intended the dramatic increase in penalty to carry "the process safeguards that elements of an offense bring with them for a defendant's benefit."[109] Thus, Jones could not be sentenced to a term of imprisonment greater than fifteen years because the government did not prove the serious bodily injury allegation to the jury beyond a reasonable doubt.[110]

After reaching its decision through statutory interpretation and application of the *McMillan* standard,[111] the Court further stated that "constitutional doubt" would arise if the existence of serious bodily injury were treated only as a sentencing factor.[112] The Court suggested that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[113] The Court did not adopt this standard, but rather, left it as a theory of

103. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-63 (2000); Jones v. United States, 526 U.S. 227, 229 (1999).

104. The four justices were Justice Scalia, Justice Stevens, Justice Ginsburg and Justice Souter. *Almendarez-Torres*, 523 U.S. at 228.

105. *Id.* at 251 (Scalia, J., dissenting).

106. *Jones*, 526 U.S. at 230-31, 248.

107. *See id.* at 230-31.

108. *Id.* at 237-38.

109. *Id.* at 233.

110. *See id.* at 251-52.

111. See *supra* notes 78-84 and accompanying text for a discussion of the *McMillan* standard.

112. *Jones*, 526 U.S. at 243 n.6. "Constitutional doubt" is a statutory interpretation technique used to avoid interpreting a statute in such a way that grave constitutional questions would arise. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 945 (1999); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909). Where a statute is susceptible to two statutory constructions, one of which raises a question repugnant to the Constitution, the other interpretation should be adopted. *See Del. & Hudson Co.*, 213 U.S. at 408.

113. *Jones*, 526 U.S. at 243 n.6 (using the theory of constitutional doubt).

constitutional doubt because "prior cases [only] suggest rather than establish this principle."[114]

The Court noted a lack of historical evidence supporting any tradition of unlimited judicial discretion, while some evidence existed marking a tension between judicial and jury powers.[115] The Court therefore concluded that, at the time of the drafting of the Constitution, the Framers were more likely concerned about the latter, which made it more likely that the Sixth Amendment intended to protect against exclusive judicial fact finding.[116] The Court distinguished its earlier decision in *Almendarez-Torres* merely by reasoning that recidivism is a traditional sentencing factor.[117]

In July 2000, the Supreme Court decided *Apprendi v. New Jersey*,[118] holding that the Constitution requires that "[o]ther than . . . prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[119] The five to four decision[120] was made in the context of New Jersey's Bias Crimes statute, which required a sentencing judge to impose a greater sentence if he determined that the crime was motivated by bias.[121] This principle is virtually identical to the theory of constitutional doubt expressed in *Jones*, except that the Court in *Apprendi* held that this principle is constitutionally mandated because it was required by the Sixth Amendment right to a trial by jury and the Fifth Amendment due process clause.[122] The Court noted that the *Jones* holding

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114. *Id.* The Court stressed that this debate in no way "'call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature.'" *Id.* (quoting *Jones*, 526 U.S. at 270 (Kennedy, J., dissenting)).

115. *See id.* at 244-45.

116. *Id.* at 244.

117. *See id.* at 249-50 & n.10. This attempt to distinguish *Almendarez-Torres* without overruling it has been unpersuasive even to the staunchest supporters of the principle expressed in *Jones*. *See* 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, 1116 (1999) (commenting that it would have been much more satisfying if the *Jones* court had admitted that it "had taken a wrong turn at *Almendarez-Torres*") [hereinafter Knoll, *Searching for the "Tail of the Dog"*]. The article points out that Justice Stevens had earlier stated that "the wrong turn was taken at *McMillan*." *Id.* (citing Monge v. California, 524 U.S. 721 (1998) (Stevens, J., dissenting)).

118. 120 S. Ct. 2348 (2000).

119. *Id.* at 2362-63.

120. Justice Scalia, Justice Thomas, Justice Stevens, Justice Souter and Justice Ginsburg were in the majority. *Id.* at 2351. Chief Justice Rehnquist and Justice O'Connor, Justice Breyer and Justice Kennedy were in the minority. *Id.*

121. *See id.* at 2351-52. The constitutionality of a State's right to prescribe a greater penalty for a crime that involves "hate" or "bias" was not in question. *See id.* at 2354; *see also* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (rejecting a constitutional challenge to an enhanced sentence based on the jury's finding that the defendant had selected his victim based on race). The issue in *Apprendi* was the adequacy of the procedure in providing for this greater penalty. *See Apprendi*, 120 S. Ct. at 2354.

122. *Compare Jones*, 526 U.S. at 243 n.6, *with Apprendi*, 120 S. Ct. at 2362-63. *See*

foreshadowed the *Apprendi* decision, and concluded "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'"[123] The Court reasoned that "it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened" and "it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached."[124] The Court, thus, eliminated any need for lower courts to engage in statutory interpretation in deciding the intent of legislatures, as it created an easily administrable, bright line rule.[125]

C. *Judicial Discretion at Sentencing*

Apprendi has conclusively resolved the ambiguity that existed regarding the distinction between sentencing factors and elements. The Court's resolution, however, leaves many situations in which judges continue to utilize judicial discretion.[126] Such judicial discretion has existed since the establishment of the American criminal law system, and has often thwarted attempts to provide defendants with the Due Process protections that elements provide.

In some jurisdictions at early common law, a defendant could not be sentenced to a term in a higher statutory range unless the jury had returned a verdict on that fact.[127] The defendant, however, was subjected to unfettered judicial discretion within a wide statutory range for the facts that the jury had determined.[128] Within this wide range, the judge could impose a sentence based on any criteria he considered relevant without any checks or accountability on his discretion.[129] To sentence a defendant at the high end of the statutory

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also supra note 112 for a discussion of the theory of constitutional doubt that the *Jones* Court utilized to reach its decision.

123. *Apprendi*, 120 S. Ct. at 2363 (quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring)).

124. *Id.* at 2359.

125. See *supra* notes 69-86 and accompanying text for examples of the Court's prior use of the statutory interpretation of legislative intent.

126. *See infra* notes 244, 248 and accompanying text.

127. *See Apprendi*, 120 S. Ct. at 2368-78 (Thomas, J., concurring). *But see* Samaha, *supra* note 38, at 229, 237.

128. *See* 4 William Blackstone, Commentaries, *371-72 (1769) (discussing judges' broad discretion in fixing the amount of the fine and the degree of punishment); Orfield, *supra* note 38, at 558.

129. Bowman, *supra* note 35, at 303 (noting that federal judges could consider evidence about "the defendant's troubled childhood, arrest record, acquitted conduct, uncharged conduct, rumored conduct, education, family circumstances, substance abuse problems—or virtually any other factor that the judge felt to be important"); *see also Apprendi*, 120 S. Ct. at 2357 n.7 (noting the breadth of judicial discretion over fines and corporal punishment in misdemeanor cases and specifically mentioning that it was not uncommon for a sentencing range to be from one year to life

range, the judge could give weight to a factor that, if statutorily defined, would carry the protections of an element.[130] Legislatures gave the judge almost plenary power to impose sentences in a wide statutory range based on undisclosed factors even where juries determined the existence of the elements of a crime.[131] Thus, by the late nineteenth century, a defendant's rights were at most only partially protected in jurisdictions that strictly defined an element.

Traditionally, judges made many determinations in a sentencing phase subsequent to the trial phase because the sentence "fixes the amount of the penalty" for the offense.[132] That division reflected belief in a "basic distinction between facts bearing on guilt and facts bearing on the disposition and treatment of the convicted defendant."[133] In the sentencing phase, judges generally had the aid of a pre-sentence report, which takes into account the "individual and social history of the offender, his personality, his mental and moral characteristics."[134] A court's discretion was thought better exercised if it accepted "affidavits from prosecution and defense in aggravation or mitigation of the offense."[135] The Court in *Williams v. New York*[136] found that "the fullest information possible concerning the defendant's life and characteristics" is highly relevant.[137] Justice was not considered done unless the judge considered "'more than the particular acts by which the crime was committed and . . . [took] into account the circumstances of the offense together with the character

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imprisonment) (citing J. Baker, Introduction to English Legal History 584 (3d ed. 1990)); Tr. of Oral Argument at *4-5, *37 Apprendi, 120 S. Ct. 2348 (No. 99-478) *available at* 2000 WL 349724; 4 Blackstone, *supra* note 128, at *371-72 (noting judges' broad discretion within a wide sentencing range); Orfield, *supra* note 38, at 558; Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am J. Legal Hist. 326, 350 (1982). Even at oral argument in *Apprendi*, the Court noted that "it was not uncommon for judges to consider such things as the motive of the crime, or the lack of remorse." Tr. of Oral Argument at *41, Apprendi, 120 S. Ct. 2348 (No. 99-478) *available at* 2000 WL 349724. *But see Apprendi*, 120 S. Ct. at 2357 (citing Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in The Trial Jury in England, France, Germany 1700-1900, 36-37 (A. Schioppa ed. 1987) (claiming that "the English Trial judge of the later eighteenth century had very little explicit discretion in sentencing . . . [t]he Judge was meant simply to impose that sentence")).

130. *See* Orfield, *supra* note 38, at 558; 1 Joel Prentiss Bishop, Bishop on Criminal Law § 948 (9th ed. 1923) (discussing the wide sentencing discretion that judges possessed); 4 Blackstone, *supra* note 128, at *371-72; Bowman, *supra* note 35, at 303. *But cf.*, *Apprendi*, 120 S. Ct. at 2378 (Thomas, J., concurring) (explaining that judicial discretion within the bounds of the law is distinct from a judge having the discretion to actually create a penalty).

131. *See* Bowman, *supra* note 35, at 303.

132. Orfield, *supra* note 38, at 536.

133. *Id.* at 543-44.

134. *Id.* at 544.

135. *Id.* at 550 (citing United States v. Standard Oil Co., 155 Fed. 305 (N.D. Ill. 1907); State v. Reeder, 60 S.E. 434 (S.C. 1907)).

136. 337 U.S. 241 (1949).

137. *Id.* at 247.

and propensities of the offender.'"[138] Judges were granted this discretion at sentencing because of their extensive experience with criminal cases, which enabled them to deal more fairly and scientifically with the defendant than the ordinary jury could.[139]

Additionally, no uniformity existed between sentences that different judges imposed.[140] Some judges tended to impose the maximum sentence, while others imposed sentences near the minimum for similar offenses, some penalized certain types of crimes more severely than others, and some penalized certain races and nationalities more than others.[141] Legislatures delegated almost unfettered discretion to the sentencing judge to determine the precise sentence within the wide range.[142] A trial judge was not limited as to which facts he could consider at sentencing or even in the standard of evidence he was required to use in evaluating this evidence.[143]

During the sentencing phase, judges employed less stringent forms of the rules of evidence than were guaranteed to a defendant at trial.[144] The sentencing judge's job was "not confined to the narrow issue of guilt," instead, his task was "to determine the type and extent of punishment after the issue of guilt has been determined" without regard to evidence rules.[145] Furthermore, a judge was not required to conduct any hearings during the sentencing phase of a trial, provide the defendant with an opportunity to participate in those hearings, or divulge the criteria upon which he based his decision.[146] Therefore,

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138. *Id.* at 248 n.10 (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937)); *see also* 1 Bishop, *supra* note 130 at § 934; Orfield, *supra* note 38 at 550.

139. *See* Orfield, *supra* note 38, at 537. The late nineteenth century Illinois and Indiana Criminal Codes provide good examples of the wide discretion that judges had at sentencing. In Illinois, an individual could receive a sentence of anywhere from fourteen years to life imprisonment, or even death, if found guilty of murder. In Indiana, an individual could receive anywhere from one to ten years for larceny involving objects valued greater than $25; or anywhere from one day to five years for larceny for objects valued less than $25. *Id.*

140. *Id.*

141. *Id.*

142. *See id.*; Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (discussing the wide discretion that federal judges have had from "the beginning of the Republic").

143. *See* Orfield, *supra* note 38, at 557; McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986). "A judge could impose the greatest sentence available because of mere suspicion about the defendant, or could impose the maximum in every case no matter how sympathetic the defendant might be." Priester, *supra* note 7, at 251-52 (footnotes omitted).

144. Williams v. New York, 337 U.S. 241 (1949).

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and [the] extent of punishment to be imposed within limits fixed by law.

Id. at 246.

145. *Id.* at 247.

146. Specht v. Patterson, 386 U.S. 605, 606 (1967); *Williams*, 337 U.S. at 241, 246

although a jury may have been required to decide every factor that would increase the maximum penalty of the crime, the judge's exercise of unlimited discretion created great uncertainty for defendants at sentencing and denied citizen participation in making many of the decisions about the existence of facts that could expose the defendant to serious punishment.

The sentencing inequities at early common law led to the development of indeterminate and determinate sentencing schemes.[147] An indeterminate sentencing system provides an extremely broad sentencing range, but the judgment of parole boards, departments of correction, or other administrative agencies supplants wide judicial discretion.[148] Allowing these bodies to determine the actual length of imprisonment enabled prisoners' rehabilitation to be studied more carefully.[149] Indeterminate sentencing schemes simply replaced the broad discretion of judges with broad discretion of particular agencies.[150] Although indeterminate sentencing schemes were intended as a major sentencing reform, their own problems prompted even further sentencing reform, in the shape of determinate sentencing schemes.[151]

(1949); *see also* Bowman, *supra* note 35, at 303.

147. Sentencing Reform in Overcrowded Times: A Comparative Perspective 6 (Michael Tonry & Kathleen Hatlestad, eds. 1997) [hereinafter Sentencing Reform].

148. *See* Orfield, *supra* note 38, at 558. *See also* Sentencing Reform, *supra* note 147, at 6 (recognizing that the indeterminate sentencing scheme received its name because the actual term of imprisonment could not be ascertained at sentencing and parole boards' officials could not be second-guessed); Bowman, *supra* note 35, at 301; Recent Cases, *Constitutional Law—Separation of Powers—Constitutionality of Indeterminate Sentence Acts*, 24 Harv. L. Rev. 236 (1911) (discussing cases affirming constitutionality of indeterminate sentencing schemes).

149. Orfield, *supra* note 38, at 558; Sentencing Reform, *supra* note 147, at 6. This worked on the premise that parole boards would be able to recognize "when treatment had worked." *Id.* Dean Roscoe Pound of Harvard Law School criticized indeterminate sentencing schemes because they reduce all sentencing to mere form, because judges do not actually decide the length of sentence. Roscoe Pound, *The Future of the Criminal Law*, 21 Colum. L. Rev. 1, 16 (1921) (suggesting that in indeterminate sentencing schemes, the judge has a very reduced role). In some states, the benefits of this process were diminished because a judge could set a minimum term slightly below the legislature's prescribed maximum. Orfield, *supra* note 38, at 560.

150. *See* Mistretta v. United States, 488 U.S. 361, 363, 365 (1989); Zerbst v. Kidwell, 304 U.S. 359, 362-63 (1938).

151. Sentencing Reform, *supra* note 147, at 6 (noting, that in 1975, every jurisdiction had an indeterminate sentencing scheme but at present, such systems have fallen into disrepute). Critics argued that indeterminate sentencing schemes were ineffective because officials almost invariably shortened defendants' sentences by roughly one third for "good behavior," the incarceration period of prisoners were sometimes truncated by management and budget concerns and racially biased officials were able to discriminate against minority offenders with no review permitted. *See id.* at 6, 217.

D. *The Federal Sentencing Guidelines*

Indeterminate sentencing systems still led to serious sentencing disparities between similarly situated defendants because parole boards and other agencies had unlimited discretion.[152] As a result, Congress enacted the Sentencing Reform Act of 1984, which created the United States Sentencing Commission ("the Commission").[153] The Commission developed the Federal Sentencing Guidelines, which were intended to create greater uniformity in sentencing by removing the unlimited discretion that trial courts previously possessed.[154] The Guidelines were hailed as a major sentencing reform because, in addition to eliminating sentencing disparities, they give enough predictability to sentencing to allow "realistic projections of [the] need[] for new prisons and other corrections programs."[155]

The Guidelines achieve this increased uniformity, and thus sentencing reform, by generating an appropriate sentence for the judge to impose based on the defendant's offense level and his criminal history.[156] The Criminal History Category of the Guidelines

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152. *See Mistretta*, 488 U.S. at 365; Sentencing Reform, *supra* note 147, at 7; Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 Fordham L. Rev. 1245, 1250 n.52 (2000). Other criticisms of indeterminate sentencing included doubts about rehabilitative effectiveness of correctional programs and the unreviewability of parole boards' decisions. *See id.*

153. *See* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 87 (1993) (noting that the Commission's primary mission was to reduce "unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants"); Galin, *supra* note 152, at 1250. In the early 1980s, Minnesota and Pennsylvania were the first states to introduce sentencing guidelines. Sentencing Reform, *supra* note 147, at 8.

154. Sentencing Reform, *supra* note 147 at 6, 7-8, 12 (noting that at least seventeen states have adopted sentencing guidelines systems); Galin, *supra* note 152, at 1250; Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239, 254 (1999) (explaining that the Guidelines aimed to reduce unwarranted disparity by replacing discretion with the centralized decision making of the U.S. Sentencing Commission). Most critics of the Federal Sentencing Guidelines actually favor guided sentencing but are opposed to the shortcomings of these particular guidelines, particularly because judges do not have much discretion within the Guidelines. *See, e.g.*, Sentencing Reform, *supra* note 147, at 73 (noting that state sentencing commissions repeatedly rejected the Federal Sentencing Guidelines model when adopting a sentencing guidelines system); José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?*, 44 St. Louis U. L. J. 271-72, 275-77 (2000); Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 Judicature 189, 189-92 (1995) (noting that when the ABA drafted model sentencing guidelines it used the Federal Sentencing Guidelines as an example of how not to construct them).

155. Sentencing Reform, *supra* note 147, at 8.

156. Most federal circuit courts have held that the judge must make these determinations using a preponderance of the evidence standard, although in the Third Circuit a clear and convincing standard governs. United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990). See *supra* note 7 and accompanying text for discussion about the preponderance of the evidence standard.

measures the defendant's prior convictions of felonies and misdemeanors, while the Offense Level measures the seriousness of the instant crime through the (1) base offense level; (2) specific offense characteristics; and (3) additional adjustments.[157] A judge applies the Guidelines by finding the intersection on the Sentencing Table Grid of the appropriate Criminal History Category on the horizontal axis and the Offense Level on the vertical axis.[158] The intersection designates the number of months in the defendant's sentencing range within the statutory penalty range for the crime.[159] The judge retains only minimal discretion because he is limited to imposing a sentence within that narrow sentencing range.[160]

This Guidelines sentencing range is assigned after the defendant's statutory range has been determined. For example, 21 U.S.C. § 841 punishes the possession of narcotics with the intent to manufacture or distribute.[161] The statute provides three sentencing ranges that reflect different quantities of every type of drug.[162] The statute prescribes a range of zero to twenty years for low quantities of each type of narcotics;[163] intermediate quantity levels of narcotics carry a minimum penalty of five years and a maximum penalty of forty years imprisonment;[164] and the highest quantity levels carry a minimum penalty of ten years and a maximum penalty of life.[165] The judge, after determining the appropriate statutory range, determines the applicable Guidelines range, which requires a more detailed calculation of the quantity of drugs involved in the transaction.[166]

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157. *See* U.S. Sentencing Guidelines Manual ch. 4 (2000); Bowman, *supra* note 35, at 306-07. Additional adjustments are made pursuant to Chapter 3 of the Sentencing Guidelines and include factors such as the defendant's role in the offense; the presence of obstruction of justice; the vulnerability of the victim; the existence of multiple counts of conviction; or the defendant's acceptance of responsibility. *See* U.S. Sentencing Guidelines Manual, ch. 3 (2000); Bowman, *supra* note 35, at 306-07.

158. *See* Bowman, *supra* note 35, at 305-06.

159. *See id.* at 306.

160. A judge may make an upward or downward "departure" from the Guidelines under extraordinary circumstances. U.S. Sentencing Guidelines Manual, § 5k2.0 (2000); Bowman, *supra* note 35, at 308.

161. 21 U.S.C. § 841(a)(1) (1994).

162. *Id.* § 841(b).

163. *Id.* § 841(b)(1)(C).

164. *Id.* § 841(b)(1)(B).

165. *Id.* § 841(b)(1)(A).

166. A second, more incremental, calculation of the amount of narcotics involved is required to ascertain the appropriate Guidelines range. For example, to determine the statutory range for possession of heroin, a judge must merely determine if the defendant possessed less than 100 grams, between 100 grams and 1000 grams, or 1 kilogram or more. *See* 21 U.S.C. §§ 841 (b)(1)(A)(i), 841 (b)(1)(B)(i), 841 (b)(1)(C). To determine the Guidelines range, the judge must determine if the defendant possessed less than 5 grams, between 5 to 10 grams, 10 to 20, 20 to 40, 40 to 60, 60 to 80, 80 to 100, 100 to 400, 400 to 700, 700 grams to 1 kilogram, 1 to 3 kilograms, 3 to 10 kilograms, 10 to 30, or 30 kilograms or more. U.S. Sentencing Guidelines Manual § 2D1.1.

The *Apprendi* rule may eradicate the benefits from these advances in sentencing. The *Apprendi* Court's bright line rule, that precisely defined the once amorphous concept of an element,[167] may have a monumental impact on the Guidelines, eliminating significant attempts at sentencing reform.[168] The next part analyzes the controversial *Apprendi* decision and explains why many legal commentators believe that this decision will necessarily affect the Guidelines.

II. APPRENDI V. NEW JERSEY

American criminal law has always recognized the existence of both elements and sentencing factors, but until *Apprendi*, the distinction between the two was not uniformly defined.[169] This part discusses the *Apprendi* Court's derivation of its principle from its previous decisions and then examines the dissenting opinions' disagreement with that derivation. This part also discusses the opinions of the dissenters, and other legal commentators, who believe that the majority opinion will necessarily affect the Guidelines.

In *Apprendi*, the Court established that an element is defined as any fact that increases the maximum statutory penalty for the crime.[170] To reach its conclusion, the *Apprendi* majority relied on extensive historical evidence indicating that trial judges have never been delegated the power to sentence defendants above the maximum penalty associated with the crime for which the jury convicted the defendant.[171] Moreover, the Court reasoned that "the maximum" is important because punishment exceeding the maximum subjects a defendant to a heightened stigma.[172] The Court explained that the "relevant inquiry is one not of form, but of effect"[173] and thus the new test does not turn on whether the factor subjectively has the characteristics of an element, but rather, whether it objectively corresponds to a sentence that surpasses the maximum statutory sentence.[174]

Notably, the Court also distinguished past decisions.[175] Justice Stevens responded to the dissent's accusations that the *Apprendi*

167. *See supra* note 119 and accompanying text.
168. *See supra* notes 152-55 and accompanying text.
169. *See supra* note 35 and accompanying text.
170. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-63 (2000).
171. *Id.* at 2359 (explaining that the stigma attached to an offense increases as the punishment for that offense increases).
172. *See id.* at 2359. The Court reasoned that its decision should only be concerned with the statutory maximum because neither a defendant's stigma, nor deprivation of liberty is increased in any sentence imposed beneath that. *See id.* at 2363.
173. *Id.* at 2365.
174. *See id.*
175. The Court rationalized that *Mullaney* and *McMillan* were consistent with this opinion. *See id.* at 2360.

decision overrules *McMillan* by stating that *McMillan* was simply limited to cases where the sentence imposed does not exceed the maximum.[176] The decision in *Almarendez-Torres* was explained as "at best an exceptional departure from the historic practice,"[177] which was justified because the additional sentence was based on a prior commission of a crime which (1) "'does not relate to the commission of the offense;'"[178] and because (2) recidivism is the most traditional sentencing factor, one that has always been acceptable for a judge to decide.[179] The Court admitted that it is possible that "*Almendarez-Torres* was incorrectly decided"[180] and that if the recidivist issue were contested, "a logical application of [*Apprendi*] should apply."[181]

In a concurring opinion, Justice Thomas reasoned that the Constitution requires the even more stringent rule that the jury must decide "[e]ach fact necessary" to increase the defendant's sentence past the statutory maximum.[182] Such a rule would be even broader than the one that the Court actually adopted because there would be no special exception for recidivism. While discussing the history of punishment in America,[183] Justice Thomas advocated that recidivism should not receive a special exemption from the rule promulgated in the case.[184] He described the majority's creation of an exception for

176. *See id.* at 2361 n.13; *see also supra* notes 69-88 and accompanying text.

177. *Apprendi*, 120 S. Ct. at 2361; *see also supra* notes 94-101 and accompanying text.

178. *Apprendi*, 120 S. Ct. at 2362 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)).

179. *Id.* at 2361-62.

180. *Id.* at 2362.

181. *Id.*

182. *Id.* at 2369 (Thomas, J., concurring).

183. *Id.* at 2369-78 (Thomas, J., concurring). Justice Thomas began his historical overview with post-Civil War cases standing for the proposition that "the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element." *Id.* at 2369-70 (Thomas, J., concurring) (citing Commonwealth v. Smith, 1 Mass. *245, 1804 WL 709 (1804) (holding that the indictment must allege the value of all of the goods that the defendant was accused of stealing); Hope v. Commonwealth, 50 Mass. 134 (1845) (holding that the value of the property alleged to be stolen must be charged in the indictment); Larned v. Commonwealth, 53 Mass. 240, 1847 WL 3926 (1847) (holding that the legislature has created two separate crimes if certain acts are made punishable with greater severity than others)).

184. *See Apprendi*, 120 S. Ct at 2371-73 (Thomas, J., concurring). Justice Thomas contended that the common law tradition of the United States has been to treat recidivism no differently than any other factor that must be proven at trial. *See id.* at 2372 (Thomas, J., concurring) (citing Plumbly v. Commonwealth, 43 Mass. 413, 1841 WL 3384 (1841) (holding that an increased penalty imposed for a prior conviction cannot stand unless alleged in the indictment and conviction of the defendant on that count); Tuttle v. Commonwealth, 68 Mass. 505, 1854 WL 5131 (1854) (holding that increased punishment for having a prior conviction is a separate crime that must be averred in the indictment and proved to a jury)). Justice Thomas also contended that *McMillan* began "a revolution in the law" where legislatures actually began to depart from the common law practice that he described. *Apprendi*, 120 S. Ct. at 2377 (Thomas, J., concurring); *see also* Knoll, *Searching for the "Tail of the Dog"*, *supra*

recidivism based on its traditional role as "an error to which [he] succumbed" to in *Almendarez-Torres*.[185]

In her dissent, Justice O'Connor vigorously criticized the majority's establishment of a bright line rule.[186] She strenuously disagreed with the majority's statement that the rule emerged from prior history and case law,[187] pointing out that the Supreme Court had traditionally avoided establishing a bright line rule for this issue because it was more prudent to examine each case individually.[188] She also dismissed the historical evidence purportedly demonstrating that some judges possessed no sentencing discretion,[189] by instead presenting evidence establishing that judges in some jurisdictions had discretion at common law.[190] Justice O'Connor also rejected Justice Thomas' supposition that the government has traditionally always proven each element of a crime that had a separate penalty attached to it.[191] She pointed out that the support for this proposition actually refers to circumstances where there was a separate statutory offense with a separate penalty attached.[192]

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note 117, at 1060 (arguing that it was only after *McMillan* was decided that courts began to treat quantity determinations as sentencing factors in the context of the federal narcotics laws).

185. *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring).

186. *See id.* at 2380-81 (O'Connor, J., dissenting). Chief Justice Rehnquist, Justice Breyer and Justice Kennedy joined in her opinion. *See id.* at 2380.

187. *Id.* at 2381 (O'Connor, J., dissenting).

188. *Id.* (O'Connor, J., dissenting) (citing Monge v. California, 524 U.S. 721, 728-29 (1998); McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)).

189. *Id.* (O'Connor, J., dissenting).

190. *See id.* Justice O'Connor points out that the majority itself acknowledged that there is conflicting evidence on this point and that Supreme Court decisions have long legitimized such discretion. *See id.*; *see also supra* notes 127-43 and accompanying text.

191. *See Apprendi*, 120 S. Ct. at 2382-83 (O'Connor, J., dissenting).

192. *Id.* at 2381-82 (O'Connor, J., dissenting). The majority's support for this proposition consists of two quotations excerpted from J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862). *See id.* at 2357-58. The first quote reads,

> "[w]here a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision."

Id. (citing J. Archbold, Pleading and Evidence in Criminal Cases 51 (quoting 2 M. Hale, Pleas of the Crown *170)). The second supporting quotation reads, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." *Id.* (citing J. Archbold, Pleading and Evidence in Criminal Cases 188). Justice O'Connor contended that the text merely supports the notion that every statutory determination needs to be charged in the indictment and proven to the jury, which is distinct from the notion that any fact that would increase the defendant's sentence needs to be charged in the indictment and proven by a prosecutor. *See id.* at 2382 (O'Connor, J., dissenting). Furthermore, Justice O'Connor attacked the evidence

Furthermore, Justice O'Connor disputed the majority decision's reliance on *Mullaney*, because she contended that the concepts the majority extracted from it are inconsistent with the *Patterson* decision issued two years later.[193] According to Justice O'Connor, the majority contended that *Mullaney* held that any factual determinations affecting the degree of punishment entitle the defendant to due process protection of proof beyond a reasonable doubt.[194] Justice O'Connor dismissed this "expansive reading" as having been rejected by the *Patterson* Court. The *Patterson* Court had stated that "[w]e thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."[195] She explained that *Patterson* and all subsequent cases understood that *Mullaney* only held that "'a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.'"[196]

Justice O'Connor expressed further puzzlement that the majority purported to derive its rule from *McMillan* because it appeared evident to her that the *Apprendi* decision overrules *McMillan*.[197] Moreover, she used *Walton v. Arizona*,[198] in support of her argument against the majority's decision.[199] *Walton* involved a challenge to Arizona's death penalty procedure.[200] Under the Arizona statute, the trial judge conducted a hearing to determine the existence of certain statutory aggravating factors as a prerequisite to imposing capital punishment.[201] The Court rejected the defendant's contention that the Constitution requires a jury to make this determination because "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'"[202] Justice O'Connor reasoned that *Walton* clearly rejects the

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that Justice Thomas used to support his contention that the Fifth and Sixth Amendments codified pre-existing law on this issue. *See id.* at 2382-83 (O'Connor, J., dissenting). She dismissed this argument because of "its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights." *Id.* at 2383 (O'Connor, J., dissenting).

193. *Id.* at 2383-84 (O'Connor, J., dissenting); *supra* notes 55-68 and accompanying text.

194. *Apprendi*, 120 S. Ct. at 2384 (O'Connor, J., dissenting).

195. Patterson v. New York, 432 U.S. 197, 210 (1977).

196. *Apprendi*, 120 S. Ct. at 2384-85 (O'Connor, J., dissenting) (quoting *Patterson*, 432 U.S. at 215); *see also supra* notes 51-54 and accompanying text.

197. *Apprendi*, 120 S. Ct. at 2385-86 (O'Connor, J., dissenting); *supra* notes 69-88 and accompanying text.

198. 497 U.S. 639 (1990).

199. *Apprendi*, 120 S. Ct. at 2388 (O'Connor, J., dissenting).

200. *Walton*, 497 U.S. at 639.

201. *See id.* at 643-45.

202. *Id.* at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per

"increase in the maximum penalty" rule "[i]f a state can remove from the jury a factual determination that makes the difference between life and death."[203] Justice Thomas claimed that the facts that expose a convicted defendant to a capital sentence are different from other facts, but Justice O'Connor found this distinction "difficult to comprehend."[204] As a result, she concluded that prior case law does not support the majority's constitutionally mandated "increase in the maximum penalty" rule.[205]

Additionally, Justice O'Connor noted that the *Apprendi* rule promotes meaningless formalism because legislatures can easily legislate around the rule.[206] She explained that a state could alter its sentencing system to satisfy the majority's rule without changing it substantively,[207] because a state could set the penalty for a crime at zero to life in prison and then prescribe that all other factors are mitigating factors, which would not subject it to the *Apprendi* holding.[208]

Aside from her disagreement with the *Apprendi* Court's reasoning, Justice O'Connor was also concerned that the decision will have extremely far reaching effects.[209] Specifically, she believed that this opinion threatens the Federal Sentencing Guidelines and all determinate sentencing schemes.[210] Additionally, she concluded that it is implausible that the Constitution requires such a "meaningless and formalistic" principle, where mere semantics control violations.[211] She suspected that the constitutional principle underlying the majority opinion will require the jury to make every factual determination affecting a defendant's sentence,[212] which will have very broad implications for determinate sentencing schemes. According to Justice O'Connor, the Court's opinion "halt[s] the current debate on sentencing reform in its tracks and . . . invalidate[s] with the stroke of

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curiam) (rejecting a constitutional challenge to Florida's capital sentencing scheme)).

203. *Apprendi*, 120 S. Ct. at 2388 (O'Connor, J., dissenting).

204. *Id.*

205. *Id.* at 2386 (O'Connor, J., dissenting).

206. *Id.* at 2389 (O'Connor, J., dissenting).

207. *See id.*

208. *Id.* Justice O'Connor illustrated her point using the statute in question in *Apprendi* as an example. *Id.* She explained that New Jersey could prescribe a range of five to twenty years in prison for an offense and then provide that only those defendants whom a judge finds to have acted with a bias motive can receive over ten years. *Id.; see also* Ross, *supra* note 84, at 201-02 (describing a sentencing scheme to evade the rule that eventually emerged in *Apprendi* where all other factors are mitigating factors). *But see* McMillan v. Pennsylvania, 477 U.S. 79, 87-89 (1986) (warning that a legislature cannot intentionally evade the *Winship* requirements).

209. *See Apprendi*, 120 S. Ct. at 2391 (O'Connor, J., dissenting).

210. *Id.* See also *supra* notes 159-60 and accompanying text for a discussion of the Guidelines and determinate sentencing schemes.

211. *Id.* at 2390 (O'Connor, J., dissenting).

212. *See id.* at 2391 (O'Connor, J., dissenting).

a pen three decades' worth of nationwide reform."[213] Specifically, Justice O'Connor believed that Justice Thomas' concurring opinion concedes that the rule he sets out would invalidate the Guidelines because juries would have to decide the existence of every minute fact that the Guidelines require.[214] Indeed, she points to Justice Thomas' concurrence in which he states that the possibility of the invalidation of the Guidelines is "a question for another day."[215]

She also noted that the majority does not explicitly state whether the Federal Sentencing Guidelines remain constitutional, but the majority's "reasoning strongly suggests that they are not."[216] The Court's failure in that regard leaves federal judges "in a state of limbo," and subsequent sentences handed down under the Guidelines rest on shaky ground because courts are unsure of whether determinate schemes are still constitutional.[217]

Justice Breyer's dissent expressed many of the same concerns that Justice O'Connor discussed.[218] His dissent emphasized that "the rationale that underlies the Court's rule suggests a principle—jury determination of all sentencing-related facts—that, unless restricted, threatens the workability of every criminal justice system."[219] Justice Breyer postulated that legislative decisions to create certain statutory penalties are no different than ones the Sentencing Commission makes to create Guidelines penalties.[220] He therefore suggested that the majority's reasoning creates serious uncertainty about the constitutionality of determinate sentencing,[221] and indicated that the Guidelines would have to be invalidated because it would be unworkable for the jury to determine all facts under the Guidelines.[222]

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213. *Id.* at 2394 (O'Connor, J., dissenting). See *also supra* notes 151-155 and accompanying text for a discussion of how the introduction of determinate sentencing schemes was a major sentencing reform.

214. *See id.* at 2393-94 (O'Connor, J., dissenting).

215. *Id.* at 2394 (O'Connor, J., dissenting). Justice Thomas noted that the Guidelines may very well be affected because they "'have the force and effect of laws,'" despite the fact that they were promulgated by an independent body in the judicial branch and thus the special status that they were granted under *Mistretta* would not shield them from the *Apprendi* rule. *See id.* 2381 n.11 (Thomas, J., concurring) (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)); *Mistretta*, 488 U.S. at 369, 380 (rejecting challenges to the constitutionality of the Guidelines on the grounds of separation of powers and excessive delegation of legislative powers to the Commission).

216. *Apprendi*, 120 S. Ct. at 2394 (O'Connor, J., dissenting).

217. *Id.* at 2394-95 (O'Connor, J., dissenting).

218. *See id.* at 2396 (Breyer, J., dissenting). Chief Justice Rehnquist joined this opinion.

219. *Id.* at 2402 (Breyer, J., dissenting).

220. *See id.* at 2401 (Breyer, J., dissenting).

221. *See id.* at 2402 (Breyer, J., dissenting). Although Justice Breyer acknowledged that the "present sentencing system is [not] one of 'perfect equity,'" he reasoned that the majority's rule would provide increased protection at "too high a price." *Id.* at 2401 (quoting *id.* at 2367 (Scalia, J., concurring)).

222. *See id.* at 2402.

Thus far, challenges to the constitutionality of the practice of judges making Guidelines determinations have been unsuccessful.[223] Courts have held that *Apprendi* only applies to those determinations that increase the defendants' sentence above the statutory maximum.[224] Some courts and commentators, however, continue to question this point. In *Sustache-Rivera v. United States*,[225] the court noted that the meaning and scope of the *Apprendi* rule is unclear, and it pointed to Justice O'Connor's reading of the decision.[226] Legal commentators have argued that *Apprendi* invites challenges to the Guidelines because the majority's reasoning "seem[s] to support the argument that any factual determination subjecting a defendant to greater punishment or stigma should be found beyond a reasonable doubt."[227] Others have noted that the decision could "jeopardize [the] federal sentencing guidelines"[228] and Professor Robert Batey has noted that there "is considerable dispute over how much of sentencing guidelines *Apprendi* has rendered unconstitutional."[229]

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223. *See* United States v. Lewis, No. 99-3097SI, 2001 U.S. App. LEXIS 288 (8th Cir. Jan. 10, 2001) (deciding that an enhanced Guidelines offense range based on firearms prosecution does not violate *Apprendi* because *Apprendi* only applies to statutory maximums); United States v. Marin, No. 00-8030, 2001 U.S. App. LEXIS 197 at *5-6 (10th Cir. Jan. 8, 2001) (implying that *Apprendi* is only applicable to enhancements that increase the penalty above the statutory maximums); United States v. Angle, 230 F.3d 113, 121-22 (4th Cir. 2000) (indicating that *Apprendi* does not invalidate the Guidelines after holding that a defendant may not receive a sentencing range above the statutory maximum); Harris v. United States, 119 F. Supp. 2d 458, 463 (D.N.J. 2000) (holding that *Apprendi* does not render the Guidelines unconstitutional).

224. *See supra* note 223. Courts have consistently held that the jury must decide any fact that increases the statutory maximum. *See* United States v. Nordby, 225 F.3d 1053, 1059, 1062 (9th Cir. 2000) (vacating defendant's sentence in a § 841 case because the judge made the findings to determine the applicable statutory range); United States v. Pavelcik, No. 99-50316, 2000 U.S. App. LEXIS 20983, at *1-2 (9th Cir. Aug. 11, 2000) (applying *Apprendi* to statutory determinations made under the mail fraud through telemarketing statute); United States v. Sheppard, 219 F.3d 766, 768 (8th Cir. 2000) (noting that the jury must determine the amount of narcotics involved in a § 841 case in determining the statutory penalty); United States v. Henderson, 105 F. Supp. 2d 523, 535 (S.D. W. Va. 2000) (requiring that drug quantity determinations to impose the statutory penalty should be treated as elements of the offense).

225. 221 F.3d 8, 15 (1st Cir. 2000) (holding that *Apprendi* should not be applied retroactively).

226. *See id.* at 15 n.10.

227. Elkan Abramowitz & Barry A. Bohrer, *Supreme Court Addresses Procedural Issues, Indictment Dismissal*, N.Y. L.J., Sept. 5, 2000, at 3; *see also* Lewis J. Liman, *Initial Thoughts On Apprendi v. New Jersey*, N.Y. L.J., July 5, 2000, at 3 (recognizing the broad implications that the decision has for the federal sentencing guidelines); Wystan M. Ackerman, Note, *Precluding Defendants from Relitigating Sentencing Findings In Subsequent Civil Suits*, 101 Colum. L. Rev. 128, 153 n.163 (2001) (noting that a broad reading of *Apprendi* would implicate sentencing guidelines systems).

228. Brooke A. Masters, *High Court Ruling May Rewrite Sentencing*, Wash. Post, July 23, 2000, at A1.

229. Batey, *supra* note 8, at 57.

The *Apprendi* rule may eliminate many of the recent improvements in sentencing that the Guidelines provide.[230] In fact, the problems that *Apprendi*'s application to the Guidelines will create may require that the Guidelines be wholly invalidated, because they may be reduced to an ineffective sentencing tool. The next part examines how *Apprendi* may affect the Guidelines, presents two different interpretations of the *Apprendi* decision and argues that the narrower interpretation is more plausible and desirable. The next part also discusses the consequences to the Guidelines if courts do indeed apply *Apprendi* to the Guidelines.

III. THE INTERPRETATIONS AND EFFECTS OF *APPRENDI*

This part considers the conceivable tenets underlying the *Apprendi* decision, which is critical to ascertaining the proper scope and future effects of the decision. Although strict application of the language of *Apprendi* does not necessitate invalidation of the Guidelines, courts may take such a step if they perceive the reasoning of the holding to logically require it. If the *Apprendi* Court sought to provide defendants with heightened protections from judicial fact-finding at sentencing, then the holding would be arbitrary if it did not also eliminate judicial discretion to make Guidelines determinations.[231] Because the *Apprendi* decision failed to address the full range of circumstances in which judicial discretion operates, the only resolution for this deficiency would be to eliminate all judicial discretion. If, however, the *Apprendi* rule simply meant to constitutionalize the requirement that the jury render a verdict for every fact that the legislature determines defines a new and separate crime, i.e., the maximum penalty for the crime, then the current procedure for determining the applicable Guidelines range would remain valid. This Note argues that the latter possibility is a more plausible, as well as more desirable, interpretation, which leads to the conclusion that *Apprendi* should not invalidate the Federal Sentencing Guidelines.

Furthermore, if courts determine that *Apprendi* applies to the operation of the Guidelines, they will encounter substantial procedural difficulties. This section uses the Guidelines range in a § 841 case as an example of the impracticalities of the procedure that would result from *Apprendi*'s application and why it is important that the present Guidelines procedure remain valid.

230. See *supra* notes 152-55 and accompanying text for discussion of the reforms that the Guidelines brought to sentencing.

231. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2394 (2000) (O'Connor, J., dissenting); *id.* at 2397 (Breyer, J., dissenting).

A. *The First Interpretation of* Apprendi

Some might read the *Apprendi* decision to hold that the Constitution entitles defendants to heightened protections from judicial fact finding at sentencing.[232] Under this interpretation, the Court's limitation on judicial fact finding only for determinations that could increase the prescribed maximum penalty would be artificial because judicial discretion is still permitted in a multitude of analogous circumstances. For example, judges maintain discretion to impose a sentence within the Guidelines and in indeterminate and discretionary sentencing schemes.[233] If the Constitution entitles defendants to heightened protections at sentencing, then such protections should extend to every determination that a judge makes and not just be triggered by "the maximum."[234] As a practical matter, after *Apprendi*, defendants' sentences can still be substantially increased as a result of findings made by judges, rather than juries, using merely a preponderance of the evidence standard.[235] This interpretation yields the absurd result of continuing to allow judges to make findings of fact that increase the length of the defendant's sentence within the prescribed statutory maximum penalty, while they cannot make decisions that would raise the penalty above the statutory maximum.

According to the majority in *Apprendi*, only a sentence imposed above the maximum increases the stigma associated with the crime.[236] Therefore, the *Apprendi* holding permits the judge to continue to make factual determinations that increase the defendant's sentence in a range below the maximum sentence allowable under the jury's verdict because the defendant ostensibly has no liberty interest in a sentence below the statutory maximum.[237] If the defendant's rights are prejudiced solely because the judge, rather than the jury, determines the existence of certain facts, however, then his rights would also be infringed if that determination were made concerning a fact which increases the sentence, and consequently the stigma, even when the sentence remains below the statutory maximum. Thus, the *Apprendi* principle should logically extend to sentences imposed

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232. The dissenters in *Apprendi* take this position. *See Apprendi*, 120 S. Ct. at 2391 (O'Connor, J., dissenting). Justice O'Connor suspected that the decision was intended to reach "determinate sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations" and she acknowledged the possibility that this will invalidate the Federal Sentencing Guidelines. *Id.*; *see supra* notes 209-17, 225-29 and accompanying text.

233. See *supra* notes 127-43, 147-60 and accompanying text for a discussion of these sentencing schemes.

234. *See Apprendi*, 120 S. Ct. at 2391 (O'Connor, J., dissenting).

235. *See id.* at 2362-63.

236. *Id.* at 2359; *supra* text accompanying notes 123-24.

237. *See Apprendi*, 120 S. Ct at 2359.

below the maximum because the defendant has a liberty interest in any term of sentence, whether it is imposed above or below the statutory maximum.

Under this interpretation, the *Apprendi* holding would also be captious because of the historical and current prevalence of indeterminate and discretionary sentencing schemes.[238] In indeterminate and discretionary sentencing schemes, which have long been held constitutional—and *Apprendi* does not declare unconstitutional—the judge, or even a parole board, makes the same type of determinations that *Apprendi* holds unconstitutional.[239] Using an armed robbery statute as an example, three possible scenarios could arise:[240]

1. Discretionary sentencing:[241] The jury convicts the defendant on the armed robbery charge. The statutory penalty range for this crime is zero to twenty years. The judge then takes into account that a firearm was used in the commission of the crime and imposes a sentence of fifteen years.

2. Indeterminate sentencing:[242] The jury convicts the defendant on the armed robbery charge. The statutory penalty range for this crime is zero to twenty years. The parole board has the power to determine the actual length of the sentence based on, *inter alia*, such factors as remorse, rehabilitation etc. during the defendant's imprisonment. It decides on a sentence of fifteen years.

3. Determinate Guidelines Sentencing:[243] The jury convicts the defendant on the armed robbery charge. The statutory penalty range for this crime is zero to ten years or ten to twenty years if a firearm was involved. The judge finds that the defendant used a firearm in the commission of the crime and imposes a sentence of fifteen years within the range of ten to twenty years.

In all three of these scenarios, the defendant receives identical sentences through the operation of judicial or administrative discretion, yet *Apprendi* now makes it unconstitutional for sentences to be enhanced above the maximum in only the determinate

238. See *supra* notes 127-43, 147-60 and accompanying text for a discussion of these sentencing schemes.

239. *See* Orfield, *supra* note 38, at 558.

240. This argument is distinct from positing that the *Apprendi* rule can be legislated around easily through creative drafting, if for example, the legislature fixed the penalty for every crime at zero to life and made all determinations mitigating factors to evade the *Apprendi* principle. *See* Ross, *supra* note 84, at 202; *supra* note 208 and accompanying text.

241. See *supra* notes 129-47 and accompanying text for further discussion about discretionary sentencing.

242. See *supra* notes 147-60 and accompanying text for further discussion about indeterminate sentencing schemes.

243. See *supra* notes 147, 152-60 and accompanying text for further discussion about determinate sentencing and specifically, the Federal Sentencing Guidelines.

scheme.[244] In the third scenario, the determinate scheme, the defendant cannot be sentenced to fifteen years unless the jury makes that determination, because the defendant's sentence would be raised above the statutory maximum of ten years. The only distinction between these scenarios, however, is that under the determinate scheme, the legislature has provided guidance as to what facts bear more on punishment, or are more or less central to a conviction of the underlying offense.[245] There is an intellectual perplexity in "fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."[246] To confine protections against judicial fact finding solely to those facts increasing the penalty above the maximum is inexplicably capricious. The defendant has no more of a liberty interest in the determinate scheme than in the other two systems and the distinction between the three sentencing systems, based on mere semantics, "demean[s] the Constitution" by forging a constitutional principle on a difference without a distinction.[247]

Additionally, the *Apprendi* Court explicitly continued to allow judicial fact finding in capital sentencing schemes.[248] Following a jury verdict, some capital sentencing schemes require the judge, rather than the jury, to determine the existence of specific aggravating factors to impose a sentence of death.[249] In some of those jurisdictions, judges may impose a sentence of death despite a jury's recommendation of life imprisonment.[250] The Court reasoned that these procedures comport with the *Apprendi* holding because "'a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death.'"[251] A judicial

244. *See* Apprendi, 120 S. Ct. at 2362-63.

245. *See* Tr. of Oral Argument at *42-46, Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) (No. 99-478), *available at* 2000 WL 349724. *But see* Frank R. Hermann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 Buff. L. Rev. 175 (1998) (urging courts, prior to the *Apprendi* decision, to adopt "the maximum penalty" approach).

246. McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

247. This phrase was used in *id.* at 102 (Stevens, J., dissenting).

248. *Apprendi*, 120 S. Ct. at 2366.

249. *Id.* The only actual constitutional limitations on the sentencer are that, to impose a sentence of death (1) a state must narrow the class of persons that a sentencer impose the death penalty upon to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" and (2) the state must allow sentencers to consider any relevant evidence that might mitigate the severity of the crime. Charmaine G. Yu & L. Wade Weems, *Capital Punishment*, 88 Geo. L.J. 1560, 1565 (2000) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The Sixth Amendment does not require that a jury make the findings that are necessary to impose a sentence of death. *See* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam).

250. *See* Spaziano v. Florida, 468 U.S. 447, 465 (1984) (discussing Florida's capital sentencing procedure).

251. *Apprendi*, 120 S. Ct. at 2366 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (Scalia, J., dissenting)).

decision to impose a death sentence would therefore not violate *Apprendi* because death falls within the maximum penalty that the legislature fixed.[252] This reasoning is fallacious, however, because the effect on the defendant would be no different from a scenario in which the statutory penalty is life and the judge then increases the defendant's sentence past that maximum and imposes a sentence of death after making certain findings. The distinction between these procedures is truly formalistic because essentially, the jury has simply found the defendant guilty of the crime and has left the option of imposing the death penalty to the judge. Mere wording of the statute would dictate the availability of the protections that the defendant is entitled to receive, and in capital punishment jurisprudence, formalism should arguably be most carefully scrutinized.

To avert arbitrariness, then, the Court's reasoning in *Apprendi* would necessarily have to be carried to its extreme and would require the elimination of all judicial discretion. Legislatures would have to adopt strict determinate sentencing schemes in which the jury essentially levies every sentence, which would invalidate the Guidelines. The Guidelines require judges to determine the existence of certain facts that place the defendant in a Guidelines range within the statutory sentencing range, and in many instances, the judge imposes significant sentencing enhancements that are predicated upon judicial findings.[253] This judicial discretion would be impermissible if *Apprendi* were interpreted as an effort to protect defendants from judicial fact finding.[254]

B. *The Second Interpretation of* Apprendi

Alternatively, the future impact of *Apprendi* will be far more limited if the decision is read merely to reflect the constitutional requirement that the jury render a verdict for every fact that the legislature determines defines a new and separate crime, rather than for every determination affecting a defendant's sentence. In other words, the *Apprendi* Court may have been solely concerned with diminishing the jury's role in fact finding that affects the maximum statutory penalty because the maximum penalty indicates that the legislature defined a new and separate crime.[255] Under this interpretation, a fact that would increase the maximum statutory penalty defines the point at which a "new crime" begins, and is not

252. *See id.* at 2366 (dictum).

253. *See supra* text accompanying notes 152-60.

254. *See* Michael R. Schechter, Note, *Sentencing Enhancements Under the Federal Sentencing Guidelines: Punishment Without Proof*, 19 N.Y.U. Rev. L. & Soc. Change 653, 659 (1992) (advocating, prior to the *Apprendi* decision, that the Guidelines are unconstitutional because it violates due process for a judge to punish defendants for facts of which the fact-finder has not determined the existence).

255. *See supra* text accompanying notes 173-74.

merely a sentencing factor. Therefore, it is only at this point that *Apprendi* would require that constitutional protections be triggered. This interpretation preserves legislative capacity to define offenses because it simply requires that juries determine whether a defendant's acts fit within the legislature's definition of a crime. The Court is not concerned with the length of imprisonment or the maximum penalty attached to a crime, as long as the jury renders the verdict for any fact that results in increasing that maximum penalty.[256]

This interpretation can be reconciled with the continued constitutionality of judicial discretion in determining facts that affect the length of a sentence in indeterminate and discretionary sentencing schemes and that fall within the statutory maximum in a determinate scheme.[257] The *Apprendi* principle would only require a jury to make determinations beyond a reasonable doubt for facts that the legislature has indicated create a "new crime," so the application of the rule would not result in inconsistency between indeterminate and discretionary sentencing schemes and a determinate scheme. Although the maximum penalty rule would still be formalistic, it would be meaningfully formalistic because the maximum penalty would indicate that the legislature intended to create a new and separate crime. Additionally, the Court's recognition of the continued validity of certain capital sentencing schemes would not be inconsistent with the principle enunciated in *Apprendi* because the "maximum" penalty would not be simply an arbitrary line because it signifies the legislature's definition of the crime that carries a sentence of death.[258]

Under this interpretation, the *Apprendi* principle can be consistently applied to sentences imposed above the maximum without requiring the invalidation of the present procedure of determining Guidelines penalties. The *Apprendi* rule, by definition, applies only to those determinations that would subject the defendant to an increase in the prescribed statutory maximum penalty attached to the crime for which the jury convicted the defendant.[259] Thus, *Apprendi* should not affect judicial determinations regarding the applicable Guidelines range because Guidelines ranges are within the statutory penalty range.[260]

Substantial evidence suggests that the *Apprendi* Court did not intend to protect defendants against all judicial fact finding, but it instead only intended to constitutionally require the jury to decide facts that constitute a separate crime, as defined by the legislature.

256. *See supra* text accompanying notes 173-74.

257. *See supra* notes 127-43, 147-60 and accompanying text for a discussion of these sentencing schemes.

258. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2366 (2000).

259. *See id.* at 2362-63.

260. *See supra* notes 157-66 and accompanying text.

Indeed, Justice Stevens noted in *Apprendi* that "nothing in [our country's] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute."[261] Additionally, as the *Jones* Court stated, "[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution."[262] Eliminating all judicial discretion would be contrary to traditional American and English jurisprudence and the Court's resistance toward eliminating this discretion demonstrates its intentions.[263] These statements are markedly inconsistent with the view that the *Apprendi* decision meant to protect defendants from judicial fact finding at sentencing.[264]

The line of cases establishing that the right to a jury trial applies only to "serious" crimes also supports the proposition that the *Apprendi* principle should not be extended to Guidelines determinations.[265] *Duncan v. Louisiana*[266] and *Lewis v. United States*[267] established that a defendant is not entitled to a jury trial if the maximum penalty for the alleged crime is less than six months imprisonment.[268] *Duncan* reasoned that the length of the sentence is the best indicator of its seriousness.[269] *Lewis* held that a defendant who is charged with multiple crimes is not entitled to a jury trial even if the penalties for the crimes that he is charged with aggregate to greater than six months imprisonment.[270] Under *Lewis*, the only relevant constitutional inquiry is the maximum penalty in each individual case because that maximum indicates the legislature's judgment of the character of the offense.[271] The rule that emerges from these decisions therefore focuses on the maximum penalty for the crime without taking into account the actual length of the sentence.[272] Although the maximum statutory penalty in *Lewis* may

261. *Apprendi*, 120 S. Ct. at 2358 (emphasis omitted).
262. Jones v. United States, 526 U.S. 227, 248 (1999). The Court stated that it was concerned only with the diminishment of the role of the jury in determining a fact's existence. *See id.*
263. *See supra* notes 127-43 and accompanying text.
264. *See Apprendi*, 120 S. Ct. at 2358.
265. *See* Lewis v. United States, 518 U.S. 322, 330 (1996).
266. 391 U.S. 145 (1968).
267. 518 U.S. 322.
268. *Id.* at 330; Duncan, 391 U.S. at 159-61; *see also supra* notes 29, 31 and accompanying text.
269. *Duncan*, 391 U.S. at 159-61.
270. *Lewis*, 518 U.S. at 330.
271. *Id.* at 329-30.
272. *See id.* at 326; *Duncan*, 391 U.S. at 160.

seem to be a meaningless formalistic line, it is actually a significant indicator of the legislature's judgment of the crime's severity.[273]

Similarly, the *Apprendi* holding appears illogical at first glance because its bright line rule focuses only on the maximum penalty of the crime without extending to all judicial discretion. That formal line, however, actually is highly relevant to assessing the character and severity of the offense. As evident from the *Lewis* opinion, a formal line that signifies the judgement of the legislature should not be extended to circumstances that otherwise would logically be required.[274] The *Apprendi* rule's focus on legislatively set maximums should not be dismissed as meaningless formalism or as arbitrary, because it is actually a conscious reconciliation between the jury's constitutional role and the legislature's constitutional power to define crimes.[275] The *Apprendi* rule relies on the statutory maximum to show where the legislature believed a "new crime" began. Thus, in *Apprendi*, the defendant's right to a jury verdict beyond a reasonable doubt should not extend to Guidelines determinations because the statutory maximum establishes a meaningful line.

C. *The Difficulties in Applying* Apprendi *to the Guidelines*

If courts do determine, under the first interpretation of the decision, that *Apprendi* renders unconstitutional the current procedure for determining the Guidelines range, they will have two options.[276] First, courts could declare that the Guidelines are unconstitutional because of the Guidelines' heavy dependence on judge-made findings, even for minute details.[277] It would be very impractical, however, and would drain judicial resources tremendously, for juries to make decisions about each diminutive detail that the Guidelines require.[278] Second, instead of wholly invalidating the Guidelines, courts could simply declare that juries must make every determination under the Guidelines, using a beyond a reasonable doubt standard of proof. This will, however, cause procedural difficulties with many different Guidelines determinations. In particular, various procedural difficulties will result from the application of *Apprendi* to the determination of the Guidelines range in § 841 cases where juries, rather than judges, must determine the quantity of narcotics that defendants possessed.[279] This will diminish a defendant's ability to

273. *Lewis*, 518 U.S at 326.

274. *See id.*

275. See *supra* notes 23-38, 55-68 and accompanying text for discussion of legislative power to define crimes balanced against the jury's role in trials.

276. See *supra* Part III.A. for a discussion of the first interpretation.

277. *See supra* note 157 and accompanying text.

278. *See supra* note 157 and accompanying text.

279. Focusing on *Apprendi*'s effects on narcotics cases is especially important because such cases represent a large percentage of both state and federal dockets. *See Developments in the Law—Alternatives to Incarceration*, 111 Harv. L. Rev. 1863, 1888

present a credible defense against a prosecutor's allegation that the defendant possessed a certain quantity of narcotics.[280] The problems that a defendant would face in the determination of the Guidelines range in a § 841 offense are identical to the post-*Apprendi* problems that will arise in the determination of the statutory penalty in a § 841 case.[281]

Defendants would generally be reluctant to permit a jury to determine the amount of narcotics possessed because that issue is difficult to litigate in the same part of the trial as the possession charge.[282] The defendant would have to simultaneously argue that he is not guilty of narcotics possession, yet at the same time argue that he had only possessed a certain minimal amount of narcotics.[283] It is difficult to claim, "I didn't do it, but if I had, I only possessed this much." The gravest effect of these conflicting positions is manifest when introducing evidence to support each of those claims because the evidence supporting the second claim would necessarily establish the defendant's guilt on the former claim. Even in instances where defendants may legitimately contest the quantity of narcotics alleged, defendants may be forced to forgo their defenses in favor of contesting the possession charge.[284]

Defendants may be faced with a choice that violates their constitutional rights because they are essentially forced to choose between which constitutionally guaranteed rights to abandon.[285] In

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(1998) (stating that in 1995, drug offenders comprised over 60% of the inmates in federal prisons and accounted for 74% of the growth in federal prison populations since 1985); *see also* Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. Cal. L. Rev. 1717, 1724-25 (1997) (discussing the disproportionately severe sentences imposed upon crack cocaine offenders). There are over 20,000 federal narcotics convictions annually. Bowman, *supra* note 35, at 337.

280. *See* Ross, *supra* note 84, at 198-99. For a discussion of other sentencing determinations that would present similar procedural problems under *Apprendi*, see *id.* at 199.

281. *See id.* at 198-99. Courts have already determined that *Apprendi* applies to the determination of the statutory penalty in a § 841 case and thus it is inevitable that these problems will arise in that context. *See supra* note 224. The flaws in both procedures are similar because § 841 may simply not be suited to the jury determinations that are required under *Apprendi*.

282. *See* Monge v. California, 524 U.S. 721, 729 (1998); Ross, *supra* note 84, at 199. Ross discusses other determinations where this simultaneous proof is impossible. She provides the example of a defendant denying membership in a criminal organization at trial while mitigating that membership at sentencing. *See id.*

283. *See id.*; Tr. of Oral Argument at *21-22, Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) (No. 99-478), *available at* 2000 WL 349724 (The Court asked defendant petitioner's counsel if he had ever encountered a situation in his legal career in which he was tempted to argue these inconsistent defenses.).

284. This problem is more severe than simply requiring the introduction of evidence that is highly prejudicial to the defendant. *See* Ross, *supra* note 84, at 198. *Apprendi*'s application to hate crime laws will require the introduction of such inflammatory evidence. *See id.*

285. *See id.* at 201.

Mullaney, the Supreme Court held that it was impermissible to allocate the burden of proving integral components of a crime to the defendant because the government maintains the burden of proving all elements of a crime.[286] The procedure resulting from *Apprendi*'s application to § 841 creates a shift in the burden of proof of exactly the sort that *Mullaney* held unconstitutional. To avoid introducing inconsistent defenses, a defendant is forced to present a defense against the possession charge and ignore the opportunity to dispute the quantity of narcotics involved. This choice effectively shifts the burden of proving the quantity involved from the prosecutor to the defendant because the defendant would be compelled to introduce evidence on his behalf or else forfeit his right to dispute the prosecutor's allegation of quantity.[287] Although under *Apprendi* narcotics quantity is treated as an element of a crime, a defendant cannot practically secure those protections. The defendant is unable to reap the benefits of the *Apprendi* protections without relinquishing his right under *Mullaney* to have the government prove all elements of the crime against him. It would not be so strange for a later decision to conflict with an earlier decision, except that the *Apprendi* Court purportedly relied on *Mullaney* to reach its decision.[288]

This burden shifting amounts to more than a "tough choice" that a defendant sometimes must make at trial. For example, a defendant who goes to trial must perhaps choose whether he has a better chance of convincing the jury that he was the victim of entrapment or of mistaken identity. That situation, however, differs considerably from the choice that a defendant faces under a § 841 offense, because in a § 841 case, the defendant must effectively choose between which charges of a crime he desires to present a defense against, rather than which of several defenses to introduce. Also, as a result of his trial strategy, he must accept radically unreliable sentencing findings on this separate charge.

The flaws inherent in these various procedures may prompt courts to adopt a bifurcated trial procedure.[289] In the initial phase, a jury would determine the guilt of the defendant on the possession count,

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286. Mullaney v. Wilbur, 421 U.S. 684, 701-04 (1975); David A. Nicolaisen, *Proof Issues*, 88 Geo. L.J. 1471, 1473 (2000) (noting that "any shifting of the burden of persuasion must withstand constitutional scrutiny"). Although *Patterson* limited *Mullaney*'s holding, *Patterson* reaffirmed this aspect of *Mullaney*. *See supra* text accompanying notes 51-68.

287. *See* Ross, *supra* note 84, at 198.

288. Apprendi v. New Jersey, 120 S. Ct 2348, 2360 & n.12 (2000).

289. *See* Ross, *supra* note 84, at 200. *See generally* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505, 518-24 (1995) (arguing that motions to bifurcate a trial should rarely be granted because they force the jury to make decisions based on incomplete evidence); Verla Seetin Neslund, Comment, *The Bifurcated Trial: Is It Used More Than It Is Useful?*, 31 Emory L.J. 441, 444-75 (1982) (discussing the origins and differing approaches to bifurcated trials).

and in the second phase, the jury would determine the quantity of narcotics that the defendant possessed.[290] This second phase could be used to jointly determine the applicable Guidelines and statutory penalty.[291] Even in a second phase, however, the defendant would still be disadvantaged because he would lack credibility with the jury.[292] The defendant would face the same jury that had just convicted him on the possession charge at the initial trial, which evidently did not give credence to his defense. In a second phase, he would have even less credibility because his argument would contradict the defense he had originally presented. Thus, the jury would likely check whichever box on a quantity verdict sheet that the prosecution advocated.

To avert such a predicament and insure that juries are aware of the ramifications of their decisions, courts would have to provide juries with detailed sentencing information. The jury's decision regarding quantity would then place the defendant within a very narrow sentencing range and be very near to actually deciding the defendant's precise sentence. This might inspire jurors to engage in jury nullification, where they ignore the law as instructed to them by the court and decide a case based on their own sense of justice.[293]

Trial bifurcation will thus undoubtedly increase uncertainties for defendants because greater compromise will be made during jury deliberations. Sympathy for defendants will likely cause jurors to be lenient in arriving at verdicts that would result in harsh sentences, which could lead them to return a verdict in the quantity phase of the trial for a lesser quantity than the defendant may have really possessed.[294] In English penal history, the specter of severe sentences often led to "flat-out acquittals in the face of guilt" and verdicts on

290. *See generally* People v. Saunders, 853 F.2d 1093, 1095-98 (9th Cir. 1993) (detailing the California approach to bifurcation).

291. The determination of the quantity possessed for calculation of the Guidelines penalty would have to be performed in any event for the statutory penalty. More problems, however, would arise with determining the more incremental Guidelines penalty. *See supra* note 166 and accompanying text.

292. *See* Ross, *supra* note 84, at 200 (noting also, that there may be no constitutional basis for dividing the fact finding in this manner if the specific factual determination is indeed an element of the crime).

293. *See* Alexander, *supra* note 279, at 1725 (discussing jury nullification in response to harsh determinate sentencing); Robert M. Grass, Note, *Bifurcated Jury Deliberations in Criminal Rico Trials*, 57 Fordham L. Rev. 745, 757 (1989); *Racism, Harsh Sentences Lead to More Jury Nullification, Suggests Law Prof*, West's Legal News, Jan. 26, 1996, *available at* 1996 WL 258186; *see also* Jones v. United States, 526 U.S. 227, 245 (1999) (describing common law origins of jury nullification).

294. "56.7% of all federal drug offenders sentenced in 1998 were first time offenders while 87.9% of drug cases did not involve weapons." Bowman, *supra* note 35, at 337. In 1998, the average crack cocaine sentence was over ten years; the average methamphetamine sentence was over eight years; and the average powder cocaine sentence was over six and one half years. The length of these sentences was longer than the average sentence for robbery, which was approximately nine and one half years; sex abuse, which was six years; assault, which was three and one half years; and burglary, which was slightly over two years. *Id.*

lesser included offenses.[295] Once the harsh penalties that are associated with federal narcotics crimes become evident to jurors, sympathy may become a major factor during deliberations. An example of harsh penalties that may become visible to juries, and thus may affect a jury's deliberations, are the disparate penalties between crack cocaine and powder cocaine.[296] In some cases, crack cocaine penalties are over 100 times more severe than those for powder cocaine.[297] A jury could become conscious of this disparity if it was privy to sentencing information in a case involving defendants charged with possessing both powder and crack cocaine. After being informed of the penalties associated with the crime, jurors may hesitate to reach a verdict that would relegate the defendants to such disparate periods of incarceration.

On the other hand, in close cases, juries may convict rather than acquit defendants, because they would have indirect control over the sentencing and "[w]hen the jury can assess the penalty, they may be more likely to convict... since they need have no fear of a higher penalty fixable by the court."[298] The jury could convict and then impose a very low sentence, in effect "splitting the baby." Moreover, the jury would be determining the defendant's sentence even more exactly when determining the Guidelines range than when it simply decides the statutory penalty. Therefore, these problems would be even more acute in the context of determining a defendant's Guidelines range.[299]

Capricious verdicts, resulting from the interjection of jurors' sympathies into deliberations, would lead to unwarranted sentencing disparities between similarly situated defendants that would undermine any parity that the Guidelines have provided.[300] From the inception of the criminal justice system, jurors have not been entrusted with making actual sentencing decisions precisely because

295. *See Jones*, 526 U.S. at 245. Blackstone labeled this phenomenon "pious perjury." *Id.* (quoting 4 Blackstone *supra* note 128 at *238-39).

296. *See* Alexander, *supra* note 279, at 1724-26 (arguing that a multitude of problems with indeterminate sentencing schemes have led judges, prosecutors and juries to attempt to avoid subjecting defendants to harsh penalties). Congress created stiffer penalties for crack cocaine offenses than for powder cocaine offenses because crack cocaine is more often associated with violence. *See id.* at 1737-38 (reasoning that the media's portrayal of crack cocaine as associated with gang violence legitimized Congress' disparate punishment schemes and made lawmakers fear that if they dissented they would be labeled "soft on crime").

297. *See id.* at 1737. The real world effect of this disparity is that African Americans receive lengthier sentences than non minorities, for the most part, because the respective drug users differ in race. *See id.* at 1730-31 & n.72; Michael Tonry, *Drug Policies Increasing Racial Disparities in U.S. Prisons, reprinted in* Sentencing Reform, *supra* note 147, at 230, 236-38.

298. Orfield, *supra* note 38, at 537.

299. *See supra* note 166 and accompanying text.

300. *See supra* notes 147-54 and accompanying text for discussion of the parity that the Guidelines were intended to provide.

of the possibility of these disparities.[301] Additionally, the judge has much more experience with sentencing similarly situated defendants.[302] Any benefits that the Sentencing Guidelines provide in eliminating disparities between sentences would disappear because indirectly the jury would be imposing the Guidelines. Thus, the effect of *Apprendi*, if interpreted broadly, would be to prevent further advances in sentencing and unnecessarily create greater uncertainty for defendants.

CONCLUSION

Although the plain language of the *Apprendi* decision does not require that the Guidelines be invalidated, a broad interpretation of the decision's underlying principle would require such drastic action. The narrower interpretation, however, that the Court did not intend to invalidate the Guidelines, because it meant only to constitutionalize the idea that the jury should determine every fact that the legislature intended to be a separate crime, would make the invalidation of the Guidelines imprudent. If courts do, however, adopt the broader approach, and apply *Apprendi* to the Guidelines, they will encounter tremendous difficulties in implementing the revised procedure that *Apprendi* would require.

301. *See* Orfield, *supra* note 38, at 537; *supra* text accompanying note 139.
302. *See supra* text accompanying note 139.