FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

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

BENJAMIN J. PRIESTER*

> *[W]e [have] rejected the claim that whenever a State* links the severity of punishment to *the presence or absence of* an identified fact *the State must prove that fact beyond a reasonable doubt.*[1]
>
> *[T]he 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*.[2]

I

INTRODUCTION

The tension between the two principles set out above is an unresolved dilemma for the United States Supreme Court. On the one hand, not every fact relevant to sentencing a criminal defendant warrants the Constitution's full criminal procedure protections. On the other hand, if those protections apply only to the facts selected by the legislature to determine guilt or innocence, the sentencing proceeding may overwhelm the trial in importance because the sentencing facts will determine the defendant's fate to a far greater extent. Justice Scalia described this tension bluntly:

> Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances.

This note is also available at http://www.law.duke.edu/journals/61LCPPriester.

* J.D., December 1998, Duke University School of Law.

I would like to thank Sara Beale, Theresa Newman, Tom Rowe, and Paul Rozelle for their comments and suggestions, and Walter Dellinger for the opportunity to attend the oral argument in *Jones*.

1. McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986) (internal quotations omitted) (emphasis added).

2. *In re* Winship, 397 U.S. 358, 364 (1970) (emphasis added).

> Could the state then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly caused injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he had used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted?[3]

How does the Constitution resolve this tension? The decisions of the Court have yet to provide an answer. The cases have, however, set out the basic framework for analyzing the constitutional question. The Court has called certain facts the "elements" of a criminal offense. Elements require all of the Constitution's procedural protections, particularly the government's beyond a reasonable doubt burden of proof and trial by jury.[4] The Court considers other facts to be "sentencing factors." Sentencing factors are factual determinations that do not affect the defendant's guilt or innocence, but only the severity of the sentence imposed. The presence of a sentencing factor could increase or decrease the sentence, or affect it in another way, such as by triggering a mandatory minimum sentence. The Constitution's strict procedures for elements of the offense do not apply, by definition, to sentencing factors, which may be determined, for example, by a preponderance of the evidence or by the judge alone.

We would expect the Court normally to defer to the legislature on whether a given factual determination is an element of the offense or a sentencing factor for the offense. The question that the tension illustrated by Justice Scalia's hypothetical raises, however, is whether the Constitution *ever* places a limit on the legislature's power to define a factual determination as an element or as a sentencing factor. Can a fact have such importance that it constitutionally must be considered "necessary" to the crime, rather than merely relating to the "severity" of the punishment? The Court's dilemma is that the constitutional answer is unclear, and the possibility of abuse by the legislature is real. In *Jones v. United States*,[5] a case argued in the 1998 Term, the Court had the opportunity to confront and resolve the elements/sentencing factors constitutional question.

With this recent constitutional issue, this note supplements a long history of articles on criminal law, procedure, and sentencing in *Law and Contemporary*

---

3. Monge v. California, 118 S. Ct. 2246, 2255 (1998) (Scalia, J., dissenting); *cf. McMillan*, 477 U.S. at 100-01 (Marshall, J., dissenting) (describing the risk that bank robbery or assault could be redefined into affirmative defenses); Patterson v. New York, 432 U.S. 197, 223 (1977) (Powell, J., dissenting) (arguing that majority's holding will allow legislatures to redefine elements into affirmative defenses); Mullaney v. Wilbur, 421 U.S. 684, 699 & n.24 (1975) (discussing the risk that the defendant could be required to disprove aggravating facts in murder or assault).

4. For purposes of this note, I will assume that all crimes discussed are nonpetty offenses, for which the right to jury trial is guaranteed by the Constitution in both state and federal criminal trials. *See* Baldwin v. New York, 399 U.S. 66 (1970) (providing the Sixth Amendment right to jury trial for crimes for which a sentence of more than six months in prison is possible); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating under the 14th Amendment full federal constitutional jury trial rights as requirements for state criminal trials).

5. 119 S. Ct. 1215 (1999).

Problems.[6] The note argues that the Constitution does restrict the power of the legislature by requiring that certain facts be proved as elements of the offense. Part II reviews the historical evolution of the elements/sentencing factors constitutional question. Part III describes seven proposed tests the Court might adopt as solutions to the constitutional dilemma. Part IV turns to the text of the Constitution itself, particularly the provisions relating to trials for "crimes." Part V evaluates the proposed constitutional tests to determine which provides the best definition of a "crime" in the text as a matter of constitutional interpretation. Part VI describes the Court's missed opportunity in *Jones* to adopt the test proposed by Justice Scalia, which defines a "crime" for this constitutional purpose as the factual findings used to determine the defendant's maximum possible sentence. The note concludes that this test is the rule the Court should adopt for resolving the elements/sentencing factors constitutional question.

II

BACKGROUND: THE CONSTITUTIONAL QUESTION EMERGES

The constitutional tension posed by the elements/sentencing factors issue has emerged gradually over the last thirty years. A combination of Supreme Court elaboration of constitutional criminal procedure doctrines and legislative developments in sentencing law and procedure generated challenges of unconstitutionality based on grounds that previously had been unused or unavailable. The Court now faces the constitutional question, with little doctrine and few cases directly reaching the issue. Reviewing the evolution of the constitutional question, therefore, is crucial for understanding where the Court now stands and what constitutional rule it should adopt for future cases.

For most of our history, the federal criminal code allowed judges great leeway in sentencing convicted defendants. "Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range."[7] In particular, there were no limitations on what facts the judge could consider at sentencing, nor was any standard of evidence required: "Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[8] A judge could impose the greatest sentence available because of mere suspicion about the de-

6. *See* Symposium, *Sentencing*, 23 LAW & CONTEMP. PROBS. 399 (Summer 1958); *see also, e.g.*, Symposium, *Toward a More Effective Right to Assistance of Counsel*, 58 LAW & CONTEMP. PROBS. 1 (Winter 1995); Symposium, *Discretion in Law Enforcement*, 47 LAW & CONTEMP. PROBS. 1 (Autumn 1984); Symposium, *Police Practices*, 36 LAW & CONTEMP. PROBS. 445 (Autumn 1971); Symposium, *Sex Offenses*, 25 LAW & CONTEMP. PROBS. 215 (Spring 1960); Symposium, *Crime and Correction*, 23 LAW & CONTEMP. PROBS. 583 (Autumn 1958); Symposium, *Extending Federal Powers over Crime*, 1 LAW & CONTEMP. PROBS. 399 (Autumn 1934).

7. Mistretta v. United States, 488 U.S. 361, 364 (1989).

8. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

fendant,[9] or could impose the maximum in every case no matter how sympathetic the defendant might be.[10] "Serious disparities in sentences . . . were common."[11]

In addition, the Court historically never applied the full constitutional criminal procedure protections to all findings of fact related to a defendant or his crime. In *Leland v. Oregon*,[12] for example, the Court held that because Oregon had fully proven its case to the jury (including the *mens rea* the statute required), the state could shift the onus to the defendant to prove the insanity defense; "there was no constitutional requirement that the State shoulder the burden of proving the sanity of the defendant."[13] At least to some extent, the Court concluded, the Constitution does not command that every fact relevant to the crime or the sentence always must be proved as an element of the offense.

In 1970, however, the Court took a dramatic step: *In re Winship*[14] constitutionalized the government's burden of proof in criminal trials. New York law provided that juvenile delinquency proceedings required only the preponderance of the evidence standard to convict the accused.[15] The Court held that such proceedings were criminal in nature, however, even though they involved juveniles.[16] Therefore, the Constitution required that the government's burden of proof for each element of the offense must be "beyond a reasonable doubt."[17] Even though this strict standard appears nowhere in the Constitution, the *Winship* Court held that "the traditional importance of that standard at least from our early years as a Nation justifie[s] our conclusion" that due process requires the beyond a reasonable doubt standard at every criminal trial.[18]

The *Winship* burden of proof holding for criminal trials solidified a great disparity between the procedures used in guilt-finding and those used in sentencing. The Court declared that when the government proves the elements of

---

9. *See* Transcript of Oral Argument at 38-39, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203), *available at* 1998 WL 713483. Justice Stevens argued:

> You see, my point is that when you use these indeterminate sentencing examples where the judge had total discretion, the judge then could act on *ex parte* submissions that were purely suspicion, and you're saying that because that was permissible in indeterminate sentencing, when you have a regular system with statutorily required increases, you can still follow the same basic principle. . . . It seems to me it doesn't follow at all.

Id.

10. *See id.* at 13 (Justice Scalia: "Have you ever heard of a hanging judge? . . . Which was a judge which would give the maximum. If you came up before him, you would get the max, period, and that happened sometimes, didn't it?").

11. *Mistretta*, 488 U.S. at 365.

12. 343 U.S. 790 (1952).

13. Mullaney v. Wilbur, 421 U.S. 684, 705 (1975) (Rehnquist, J., concurring) (distinguishing *Leland*).

14. 397 U.S. 358 (1970).

15. *See id*. at 359.

16. *See id*.

17. *Id*. at 364.

18. Monge v. California, 118 S. Ct. 2246, 2254 n.6 (1998) (Stevens, J., dissenting) (internal quotations omitted).

the offense to the jury at the criminal trial, the Constitution requires a very high level of proof. This rule stood in stark contrast to the historical deference of the Court on sentencing issues; the Court's precedents permitted sentencing schemes such as *Leland*-style burden-shifting or the unregulated discretion of federal judges to sentence defendants on whatever factors and proof satisfied them.[19]

Given this situation, the constitutional tension quickly emerged: whether the Constitution required certain—or any—facts to be elements of the offense (with full trial procedural protections including proof beyond a reasonable doubt) rather than sentencing factors (with less procedural protection at trial or in the separate sentencing proceeding). It did not take long for convicted defendants to assert on appeal that their convictions were unconstitutional because a fact "necessary to constitute the crime"[20] had been proven as a sentencing factor, and not as an element of the offense under *Winship*.

The Court first confronted such a constitutional challenge in *Mullaney v. Wilbur*.[21] The Maine homicide statute provided that a murder conviction required proof that the killing was both unlawful (that is, not justified or excused) and intentional (that is, either the defendant intended to kill, or he intended to do an act reasonably likely to cause great bodily harm and that death in fact resulted).[22] If these two elements were proved, a murder conviction would be entered because the third element, the *mens rea* of malice aforethought, would be presumed as a matter of law.[23] The defendant could have his conviction reduced to manslaughter, however, if he proved by a preponderance of the evidence that he acted in the heat of passion.[24] Thus, the Maine state courts's construction of the statute, by which the Court acknowledged it was bound, created

19. In 1984, Congress enacted the implementing legislation for the federal Sentencing Guidelines to regulate and harmonize federal sentencing. *See* Mistretta v. United States, 488 U.S. 361, 363-68 (1989) (discussing the history of federal sentencing and the reasons for the adoption of the Sentencing Reform Act of 1984). The Guidelines specify which factual determinations can be made in sentencing defendants for each federal offense. *See* U.S. SENTENCING GUIDELINES MANUAL (1998). While most lower courts have found that these determinations should be made by at least a preponderance of the evidence, *see, e.g.*, United States v. Wise, 976 F.2d 393, 400 (8th Cir. 1992), the Supreme Court has addressed neither whether the preponderance of the evidence sentencing standard is constitutionally necessary, nor whether it is always constitutionally sufficient. *See supra* note 9; Almendarez-Torres v. United States, 118 S. Ct. 1219, 1233 (1998) ("[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of the sentence."); *cf. also* United States v. Jackson, 161 F.3d 24, 26-27 (D.C. Cir. 1998) (stating that sentencing determinations under the Guidelines are generally made by a preponderance of the evidence, but noting that a higher standard has been required by Courts of Appeals if the determination will "significantly enhance" the sentence); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. ("The [Federal Sentencing] Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

20. *Winship*, 397 U.S. at 364.

21. 421 U.S. 684 (1975).

22. *See id*. at 685-86.

23. *See id*. at 686, 691-92.

24. *See id*. at 686.

a single offense with two available sentencing gradations;[25] the defendant bore the burden of reducing the higher grade to the lower.

A unanimous Court held that the Maine statute was inconsistent with *Winship*. The Court discussed the common law history of murder and manslaughter, which included allowing malice aforethought to be a policy presumption and not an element of the crime.[26] On the other hand, Maine conceded that malice aforethought and heat of passion were "inconsistent things,"[27] were the only distinction between murder and manslaughter,[28] and led to greatly disparate sentences.[29] The Court rejected Maine's argument that "the fact in question here does not come into play until the jury already has determined that the defendant is guilty";[30] that is, that the defendant's state of mind was only a sentencing factor. Instead, the Court reasoned, malice aforethought is a statutory element of the crime of murder that distinguished that crime from manslaughter, yet, under the Maine statute, its existence would be presumed by law unless the defendant could prove otherwise. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns," Maine violated *Winship*.[31] The state may not relieve the prosecution of the burden of proving every *statutory* element of the offense; if the legislature has made *mens rea* an element of the crime, the Constitution requires that it be proved, not presumed.[32]

Two years later, the burden-shifting statute challenged in *Patterson v. New York*[33] involved not a presumption, but rather an affirmative defense. New York defined murder as intentionally (that is, not accidentally) causing the death of another.[34] Even if the prosecution proved beyond a reasonable doubt that the killing was intentional, however, the defendant was allowed an affirmative defense—to prove by a preponderance of the evidence that the killing was motivated by an extreme emotional disturbance, not by an intent to kill.[35] The New York courts held that this rule was consistent with *Mullaney* because the prosecution bore the full burden of proving all statutory elements of the crime; the mitigating fact of extreme emotional disturbance was not an element, and thus the state could place the burden of proving it on the defendant.[36]

---

25. *See id*. at 691-92.
26. *See id*. at 692-96.
27. *Id*. at 687.
28. *See id*.
29. *See id*. at 700.
30. *Id*. at 697. The concurring opinion of Justice Rehnquist, joined by Chief Justice Burger, emphasized that the holding of *Mullaney* did not disturb the holding of *Leland*. *See* 421 U.S. at 705-06.
31. *Id*. at 698.
32. *See* Patterson v. New York, 432 U.S. 197, 215 (1977) (interpreting *Mullaney* as limited to this holding).
33. 432 U.S. 197 (1977).
34. *See id*. at 199 & n.4.
35. *See id*. at 200.
36. *See id*. at 201.

In a 5-3 decision,[37] the Court agreed that mitigating factors available after guilt has been proven fully need not be elements of the offense: "The Due Process clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime . . . ."[38] According to the Court, once the state has proven the elements of the crime required by statute, any additional facts that the state may wish to recognize as mitigating factors may be proved in whatever manner the state desires, including putting the burden on the defendant to prove an affirmative defense.[39] In other words, *Patterson* is like *Leland*, not like *Winship* or *Mullaney*: Affirmative defenses and other mitigating factual determinations need not be elements of the offense.[40] The dissenters sharply disagreed, insisting that *Patterson*—as a matter of substantive, not formalistic, statutory interpretation—was indistinguishable from *Mullaney* because the defendant bore the burden of proving a fact that reduced his sentence.[41]

The elements/sentencing factors constitutional challenge raised in *McMillan v. Pennsylvania*[42] concerned a mandatory minimum sentence provision. State law provided that for certain felonies a mandatory sentence of at least five years (but no more than the maximum sentence for the given offense) must be imposed if the offense was committed while the defendant visibly possessed a firearm.[43] The defendant argued that this fact must be an element of the offense, triggering *Winship*, before the mandatory minimum could be imposed.

The Court dismissed this argument in a 5-4 opinion.[44] The majority "rejected the claim that whenever a State links the severity of punishment to the presence or absence of an identified fact the State must prove that fact beyond a reasonable doubt."[45] Thus, the fact of visible possession of a firearm—which triggers the mandatory minimum—could be determined as a sentencing factor. Although it acknowledged that there might be some constitutional outer limits on the state's power to define certain facts as sentencing factors rather than as elements, the *McMillan* Court did not find any constitutional violation in the case.[46] The dissenters, on the other hand, argued that *Winship* was not limited to statutory elements; if the state seeks to treat certain facts as prohibited conduct that increase or restrict the sentence, it must prove those facts as elements of the crime, whether they affect guilt or the sentence.[47]

---

37. Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Stevens. Justices Powell, Brennan, and Marshall dissented. Justice Rehnquist did not participate in the case.

38. 432 U.S. at 207-08.

39. *See id*. at 207.

40. *See id*. at 205-06.

41. *See id*. at 221-22 (Powell, J., dissenting).

42. 477 U.S. 79 (1986).

43. *See id*. at 81-82.

44. Justice Rehnquist wrote for the majority, joined by Chief Justice Burger and Justices White, Powell, and O'Connor. Justices Marshall, Brennan, Blackmun, and Stevens dissented.

45. 477 U.S. at 84 (internal quotations omitted) (quoting *Patterson*, 432 U.S. at 214).

46. *See id*. at 87-90.

47. *See id*. at 95, 98 (Stevens, J., dissenting).

The constitutionality of sentence enhancement provisions was posed in *Almendarez-Torres v. United States*.[48] The federal alien reentry statute at issue in the case makes it a felony for a deported alien to reenter the United States without permission; the punishment is up to two years in prison.[49] If the alien had been convicted of an aggravated felony before deportation, however, the illegal reentry may be punished by up to twenty years.[50] Although it sought to have Almendarez-Torres sentenced under the latter provision, the United States had neither alleged his prior felony in the indictment nor proven at it trial. Instead, the government produced proof of the prior felony only at sentencing; Almendarez-Torres received a prison sentence of just over seven years.[51] On appeal, Almendarez-Torres argued that any sentence longer than two years was invalid because the recidivism enhancement was an element of the twenty-years-sentence offense.[52]

In a 5-4 decision,[53] the Court held that the recidivism enhancement was only a sentencing factor and that the sentence imposed was valid. As in *Patterson* and *McMillan*, the Court upheld the statute's constitutionality without defining a precise test: Whatever constitutional limitations might exist on making a fact a sentencing factor rather than an element, proving recidivism as a sentencing factor under this statute was constitutional.[54] The Court particularly emphasized that recidivism long has been a sentencing factor not proven to the jury.[55] The dissenters, in contrast, insisted that the recidivism sentence enhancement must be an element of the offense as a matter of statutory interpretation because of the doctrine of "constitutional doubt."[56] The dissent argued that the maximum sentence for illegal reentry *simpliciter*—the only facts proved to the jury—is two years, yet Almendarez-Torres was sentenced to seven; this raised grave doubts about whether the prior felony conviction also must be proved as an element before the maximum sentence may be increased beyond two years.[57] The dissent declined to reach the constitutional question, however, because statutory interpretation could avoid it.[58]

---

48. 118 S. Ct. 1219 (1998).

49. *See id*. at 1222.

50. *See id*.

51. *See id*. at 1223.

52. *See id*.

53. Justice Breyer wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justices Scalia, Stevens, Souter, and Ginsburg dissented.

54. *See* 118 S. Ct. at 1230-32.

55. *See id*. at 1224, 1230-31.

56. *See id*. at 1234 (Scalia, J., dissenting). The doctrine of constitutional doubt is a principle of statutory construction under which the Court will decline to adopt an interpretation of a law that raises serious doubts about whether the law, as so interpreted, is constitutional. *See id*. at 1227-28. When the Court must interpret a statute "susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id*. at 1234 (Scalia, J., dissenting) (quoting United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

57. *See id*. at 1237 (Scalia, J., dissenting).

58. *See id*. at 1244 (Scalia, J., dissenting).

The *Almendarez-Torres* dissenters were forced to reach this constitutional question in *Monge v. California*.[59] California's "three-strikes" law provided increased sentences for repeat offenders and required the state to prove those prior convictions as elements of the offense.[60] After Monge's conviction, the appellate court reversed the application of the recidivism law because the state had produced legally insufficient evidence on the prior conviction allegation.[61] The state then made a second attempt to prove the applicability of the recidivism provision at resentencing, but the state supreme court held that the federal Double Jeopardy Clause precluded a retrial on the sentencing allegation.[62]

The United States Supreme Court held in *Monge* by an 8-1 margin that double jeopardy does not apply to noncapital sentencing proceedings.[63] However, the Court agreed only by a 5-4 margin that Monge's case involved sentencing.[64] As in prior cases, the majority declined to state a rule, but held that in this case no constitutional principle was violated by treating the recidivism allegation as a sentencing factor rather than as an element.[65] The *Almendarez-Torres* dissenters, however, saw the same problem here as in that case: Monge was convicted of using a minor to sell marijuana, a crime with a maximum sentence of seven years, but he was sentenced to eleven years because of his prior felonies.[66] Unlike *Almendarez-Torres*, moreover, in *Monge* the Court could not construe the state law to avoid a constitutional difficulty. Therefore, the dissent argued that because Monge was sentenced for a greater term than was available for the facts of the crime proved to the jury, his sentence should not stand unless the facts used to enhance his sentence beyond that maximum are proved as elements of a separate, longer-sentence-for-recidivism crime.[67]

In the 1998 Term, the Court again faced the elements/sentencing factors constitutional question in *Jones v. United States*.[68] The federal carjacking statute at issue in *Jones* provides for a basic sentence of up to fifteen years, but for up to twenty-five years "if serious bodily injury . . . results" from the carjacking.[69] The petitioner, Nathaniel Jones, was sentenced to twenty-five years imprisonment after his carjacking conviction.[70] The United States had not proven

---

59. 118 S. Ct. 2246 (1998).

60. *See id*. at 2248.

61. *See id*. at 2249.

62. *See id*.

63. *See id*. at 2248 (O'Connor, J., so holding for five-member majority); *id*. at 2255 (Scalia, J., for three dissenters, agreeing that noncapital sentencing does not implicate double jeopardy); *id*. at 2254 (Stevens, J., dissenting, arguing that the state has only one chance to meet its burden of proof, at trial or at sentencing). The Court expressly limited the holding of *Bullington v. Missouri*, 451 U.S. 430 (1981), to its facts: Double jeopardy applies to sentencing only in capital cases. *See* 118 S. Ct. at 2251-53.

64. Justice O'Connor wrote for the majority, joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Breyer. Justices Stevens, Scalia, Souter, and Ginsburg dissented.

65. *See* 118 S. Ct. at 2250-51.

66. *See id*. at 2256 (Scalia, J., dissenting).

67. *See id*. at 2257 (Scalia, J., dissenting).

68. 119 S. Ct. 1215 (1999).

69. The relevant provision in *Jones* was 18 U.S.C. § 2119 (Supp. IV 1992).

70. *See* Brief for Petitioner at 6, *Jones* (No. 97-6203).

the victim's serious bodily injury at trial, however, but only at the sentencing hearing.[71] Jones's appeal argued that this fact had to be proven not as a sentencing factor, but as an element of the offense, before a sentence greater than fifteen years could be imposed on him. A substantial portion of the petitioner's and the United States's briefs were devoted to the first question presented, the statutory construction issue: whether Congress intended the serious-bodily-injury fact to be an element of an aggravated carjacking offense, or merely a sentencing factor for a single carjacking offense.[72] At oral argument, however, the Court's questions immediately focused on the second question presented—whether, if serious bodily injury is a sentencing factor and not an element, such an arrangement is constitutional; the Court showed no interest in the statutory interpretation issue.[73] Ultimately, however, the Court did not decide *Jones* on constitutional grounds.[74] The elements/sentencing factors constitutional question, therefore, is still unresolved.

The historical progression from *Winship* to *Jones* has provided the foundational facts and analysis for answering the elements/sentencing factors constitutional question that a majority of the Court has declined to confront directly. Some of these cases involved the legislature treating a fact as important to guilt or sentencing, yet shifting the burden of proof to the defendant. Others allowed sentences to be imposed that were greater than what otherwise appeared to be the maximum for the "base offense," even when the government relied on facts not proved to the jury beyond a reasonable doubt. In the end, however, each case addressed the same core question: Must this fact be proved as an element of the offense, or may it be a sentencing factor?

III

PROPOSED CONSTITUTIONAL TESTS

The elements/sentencing factors line of cases suggests a variety of tests for determining whether treating a fact as other than an element of the offense is constitutionally permissible. None of these tests, however, has garnered consistent support within the Court.

The seven proposed tests fall into three categories. In the first category, no direct constitutional limitation on the legislature's power to define elements or sentencing factors is imposed. In the second category, the constitutional limitation is based on the consequences of the factual determination. In the third category, the type of factual determination involved determines whether the fact must be an element.

---

71. *See id*. at 5-6.

72. *See id*. at 10-30; Brief for the United States at 12-36, *Jones* (No. 97-6203); *see also* Brief for the National Ass'n of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 6-16, *Jones* (No. 97-6203).

73. *See* Transcript of Oral Argument, *Jones* (No. 97-6203), *available at* 1998 WL 713483.

74. *See infra* Part VI.

A. No Direct Limitation Tests

The first category of tests includes those that assert that the Constitution places no direct limitation on a legislature's power to define or redefine the elements of criminal offenses. Although some constitutional principles (such as the Ex Post Facto Clause or the requirement of fair notice of prohibited conduct under the Due Process Clause) do restrict this power indirectly,[75] these tests assert that nothing in the Constitution compels any rigorous judicial review of the criminal offenses enacted by the legislature. The tests accept the *McMillan* Court's analysis: "[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive."[76] If the statute makes the fact an element, it is an element; if the statute makes the fact a sentencing factor, it is a sentencing factor. If the statute is unclear, the matter is merely one of statutory interpretation and legislative intent: There can be no application of the doctrine of constitutional doubt or the rule of lenity because the legislature's choice is perfectly constitutional either way—that is, there need not be any presumption in favor of elements in unclear cases.

1. The Pro-Government Position. The United States argued in *Jones* that there is no independent constitutional principle that limits whether facts may be sentencing factors or must be elements. To establish guilt, the government must prove to a jury beyond a reasonable doubt those facts required by the statutory offense.[77] Once guilt has been established, the sentence imposed may be based on any additional facts deemed relevant—by a judge within his discretion, under a Sentencing Guidelines structure, or as listed in the specific offense itself. Thus, upon proof of the elements of the carjacking statute (possessing a firearm, taking a motor vehicle, the vehicle's interstate commerce nexus, taking the vehicle from another by force and violence or intimidation),[78] the defendant is guilty. The severity of the injury suffered by the victim is only a sentencing factor: That the defendant can receive no more than fifteen years absent proof of serious bodily injury does not make serious bodily injury an element of the crime. Instead, the statute "defin[es] one offense with three possible authorized sentencing ranges."[79] That the proof of additional facts

---

75. *See infra* note 85 and accompanying text.

76. McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986).

77. *See* Transcript of Oral Argument at 41, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203), *available at* 1998 WL 713483. The United States argued the following:

> You have a statute that says, [“]whoever.[”] [Following that,] [i]t lists certain actions . . . and usually a state of mind, then it says [“]shall,[”] and gives you a set of punishments. I think that's a very good indication that *what comes in between the whoever and the shall is an element* that has to be proved to the jury in order to establish guilt of the crime. Our submission on that fundamentally is . . . *the elements of a crime are what the legislature says they are* . . . .

Id. (emphasis added).

78. *See* Brief for the United States at 15, *Jones* (No. 97-6203) (interpreting these facts as the only elements of 18 U.S.C. § 2119 (Supp. IV 1992)).

79. *Id.* at 16.

required to move between ranges is made at sentencing rather than at trial is left to the legislature's discretion. Otherwise,

> [a]ny rule that Congress cannot prescribe subsidiary metes and bounds within an overall statutory sentencing range—as opposed to allowing judges to set any such intermediate limits in their own discretion—would render application of the mandatory federal Sentencing Guidelines unconstitutional, unless every factor taken into account in setting a defendant's Guidelines range [is] charged in the indictment and proved beyond a reasonable doubt at trial. . . . Yet under [the] Court's decisions, that is incorrect.[80]

The United States did acknowledge some constitutional limitations on its position. Most importantly, the United States conceded that in every case, the sentence imposed must be proportional to the offense of conviction under the Eighth Amendment.[81] During oral argument in *Jones*, petitioner's counsel suggested a particularly troublesome statute:

> But we have 18 U.S. Code section 247. It says that someone who intentionally defaces real property, or intentionally obstructs a person in the enjoyment of their religious freedom, . . . shall be punished as in subsection (d). Subsection (d) says that if death results, or if the acts include kidnapping or intent to kidnap, you can receive life or death. If bodily injury results, . . . it can be 40 years. If it's bodily injury under other circumstances it can be 20 years, and in any other case, it is 1 year or a fine. Now, the Solicitor General's position is . . . that the jury would only determine whether there was this intentional defacing [of] real property, or interference with religious rights, . . . which would only trigger a fine or a 1-year sentence, but the judge then would make all of these critical findings which would really determine this person's deprivation of liberty.[82]

The Court then challenged the government about whether this statute posed a constitutional difficulty:

> QUESTION: If nothing else happens, punished by 1 year. If there's physical injury, 30 years. If there's a death, life, and whether there's physical injury, or whether there's death, is taken away from the jury and your right to jury trial does not exist for those. Is that a problem?
>
> MR. DuMONT: Well, I think first of all that's in the civil rights sections of the statutes, the statutes intended to address defacement of religious property for the reasons of race or creed. It's a very serious offense. Congress was responding simply to some known problems.
>
> QUESTION: So serious you get 1 year for it.
>
> MR. DuMONT: So—
>
> QUESTION: Unless somebody dies, in which case you get life, and you don't get a jury trial as to whether anybody has died.
>
> QUESTION: Yes, and you can commit it by just throwing a bucket of paint on a wall. That would do it.
>
> MR. DuMONT: Well, that's right, . . . one can multiply the examples here. The assault statute, for instance, that is a simple assault, but if someone dies there could be

80. *Id*. at 46.

81. *See id.* at 41-42 (arguing, in section titled "The Range of Available Sentences Under Section 2119 Is Not Unconstitutional," that even the maximum possible sentence—life imprisonment, available if death results—is proportional to the very serious offense of violent carjacking with a firearm).

82. Transcript of Oral Argument at 12-13, *Jones* (No. 97-6203), *available at* 1998 WL 713483.

> life imprisonment. The examples are there. *I think what troubles us about those examples when we hear them is a notion of proportionality, that it would be disproportionate to send someone to jail for life, for instance, when the offense of conviction is merely a defacement of property or a simple assault.*[83]

Under the pro-government position, proportionality to the offense of conviction is the only principle that restricts how much importance a sentencing factor can have. Carjacking, of course, is a very serious offense, so the United States insisted that there was no proportionality problem in *Jones* by increasing the sentence from the fifteen-year to the twenty-five year gradation.[84]

The United States also agreed in passing that certain other established constitutional principles indirectly limit the legislature's power, such as the Ex Post Facto Clause, individual constitutional rights, and the due process requirement of fair notice of what conduct is prohibited.[85] So long as neither proportionality nor any of these collateral constitutional rules is violated, however, the legislature is free to make any given fact an element of the offense or a sentencing factor.

The pro-government position does not provide substantive or procedural limitations on the legislature's discretion to make factual findings into elements or sentencing factors. In essence, the position denies that a constitutional problem is raised by the elements/sentencing factors issue; although the possibility of abuse exists, that abuse, if it even exists at all, has not so undermined defendants' constitutional rights to jury trial and proof beyond a reasonable doubt that any additional constitutional safeguards are necessary. The pro-government position asserts that the political process has not become so distorted against criminal defendants that judicial activism is needed to restore the balance. If abuse is found in a particular case, moreover, that may be remedied by holding that the sentence imposed is disproportional to the offense of conviction. The position rejects the conclusion that a broad theory of constitutional elements is necessary.

2. The Procedural Due Process Position. No Justice has yet applied to the elements/sentencing factors issue a method of constitutional analysis that would impose no substantive limitations on the element/sentencing factor determination of the legislature, but that would safeguard defendants' interests: procedural due process. In essence, this position would acknowledge all of the fears and concerns (for example, the redefinition of traditional elements into sentencing factors, undermining the right to jury trial by moving important factual findings to the sentencing phase only, and so on) that have led Justices to urge the substantive constitutional tests discussed below. Rather than imposing substantive limits on the elements/sentencing factors side, however,

---

83. *Id.* at 30-31 (emphasis added).

84. *See id.* at 31.

85. *See* Brief for the United States at 48-49, *Jones* (No. 97-6203). The United States also conceded that fundamental principles of justice might preclude the legislature from eliminating elements of historically defined crimes. *See id.* at 48; *cf. infra* Part V.B.6 (describing such historically grounded principles).

the procedural due process position would increase the amount of process that is due at sentencing. The disparity between trial and sentencing procedures would be mitigated because the punishment imposed at sentencing would receive rigorous procedural protections; the significance of a sentencing factor rather than an element determination is greatly reduced. Although the Court historically has not held that much process was due at sentencing compared to the guilt/innocence phase, the procedural due process position argues that this result is no longer acceptable today: Because factual determinations at sentencing have taken on a much more significant role in depriving—or in their potential to deprive—the defendant of liberty, more process is due today than previously.

But how could such an increase in procedural due process at sentencing be justified constitutionally? One possible answer is traditional: the *Mathews v. Eldridge*[86] balancing test. In deciding whether the process provided is sufficient, the Court considers the private interest in jeopardy, the government's interest in the merits and in not providing excessive process, and the risk of error.[87] Given all the fears the Court has expressed in its opinions and the increased importance of the federal and state sentencing guidelines, the Court easily and properly could conclude that the defendant's interest at sentencing is of critical importance. The Court could acknowledge that it previously underestimated the importance of sentencing, or it could accept the argument that the Sentencing Guidelines and related developments have increased the significance of sentencing determinations. Of course, an adequate factual trial record might not be assembled by a defendant, but many willing scholars and institutes gladly would file briefs *amicus curiae* with the Court confirming the critical importance and procedural inadequacy of contemporary sentencing. On the other hand, any asserted governmental interest in proving facts as sentencing factors rather than as elements, such as avoiding jury trials or proof beyond a reasonable doubt or denying defendants some heightened sentencing procedural protections, are comparatively insignificant and are unlikely to carry much weight with the Court. Finally, the very concerns expressed by the Court are that shifting important factual determinations to sentencing rather than trial forces the defendant to bear too much of the risk of erroneous findings.

Weighing these three considerations easily could lead the Court to conclude that inadequate process is being provided at sentencing. Of course, the question of how much more process is constitutionally due is more difficult to answer. The Court is unlikely to apply the beyond a reasonable doubt standard of proof and the jury trial requirement to all sentencing determinations—the Court has not done that even in capital cases.[88] However, the Court could re-

86. 424 U.S. 319 (1976).

87. *See id.* at 335; *cf. also* United States v. Wise, 976 F.2d 393, 411 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part) (applying the *Mathews v. Eldridge* balancing test to justify the extension of Confrontation Clause rights to Guidelines sentencing proceedings).

88. *See* Almendarez-Torres v. United States, 118 S. Ct. 1219, 1232, 1237 n.2 (1998) (discussing cases—once a jury has convicted a defendant of a capital crime, the state constitutionally may provide

quire more adversariness (such as Confrontation Clause rights or prior notice of the state's sentencing allegations), a higher burden of proof for factual findings (such as clear and convincing evidence),[89] or other protections.[90] Yet none of these heightened procedural rules would alter the legislature's ability to define facts as elements or as sentencing factors. Increased procedural due process instead would moderate the dangers by reducing the disparity between trial and sentencing procedures, making the element/sentencing factor difference much less significant and far less of a risk to defendants' interests.

B. Consequences of Facts Tests

The second category of tests includes those that examine not only the statutory elements and sentencing factors defined by the legislature, but also the consequences that factual findings have for the defendant. Rejecting the argument that which facts are elements or sentencing factors depends only on the legislature's words and intent, the Justices applying these tests insist that when certain types of factual findings produce certain effects, those findings must be made beyond a reasonable doubt by a jury—that is, such findings must be elements of the offense. There is considerable disagreement, however, over what kinds of consequences would mandate that a factual determination be deemed an element of the offense rather than a sentencing factor.

1. The Factors Analysis Position. The factors analysis used in several cases in many ways is not a test at all. Rather, it is a way for the Court to acknowledge that, in some circumstances, a statute might be constitutionally objectionable for failing to treat a certain factual determination as an element of the offense without the Court having to specify precisely what those circumstances and facts might be. In essence, the Court has accomplished the classic legal diversion: "One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense"[91]—implicitly adding, "but that is not this case." The Court has enumerated many relevant factors that might require that a factual determination be proved as an element of the offense. It is clear, however, that these factors are part of a gestalt analysis; none is dispositive.

The *Patterson* Court, for example, used several factors to demonstrate that the New York affirmative defense rule did not violate due process. First, the

---

that the judge alone determines whether death will be imposed; that is, the decision to sentence to death need not be made by a jury or by the beyond a reasonable doubt standard).

89. *Cf. id.* at 1233 ("[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of the sentence.").

90. *See, e.g.*, Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147 (1993) (arguing that the federal Sentencing Guidelines do not adequately protect defendants' procedural rights at sentencing).

91. Monge v. California, 118 S. Ct. 2246, 2250 (1998).

statute did not proclaim the guilt of an individual.[92] Second, the law did not presume guilt; thus, it did not "unhinge the procedural presumption of innocence."[93] The law also did not provide that proof of indictment or identity would be sufficient to "create a presumption of the existence of all the facts essential to guilt";[94] that is, it did not violate *Mullaney* by presuming without proof a statutory element of the offense. Third, the statute did not undermine the privilege against self-incrimination.[95] Finally, there was no evidence that permitting New York to make extreme emotional distrurbance an affirmative defense would "lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required."[96] Thus, the Court concluded, affirmative defenses need not be elements of the offense just because a factual finding is allowed to mitigate a sentence.

The Court considered in *McMillan* a wider range of factors when analyzing the constitutionality of the visibly-possessing-a-firearm sentencing factor in Pennsylvania's mandatory minimum sentencing law. That law did not weaken the presumption of innocence or "relieve the prosecution of its burden of proving guilt."[97] It also did not create a dramatic sentencing differential (as had the Maine law in *Mullaney*) or alter the maximum sentence for the offense.[98] In addition, the statute did not define a separate offense with a different penalty, but only limited the sentencing judge's discretion within the offense's range.[99] Furthermore, the law did not establish a sentencing scheme without procedural due process.[100] The Court also noted that the state had not tried to "evade" *Winship* by redefining into a sentencing factor a fact traditionally proven as an element of an offense.[101] Finally, the Court concluded, "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."[102] After presenting and discussing these factors, the Court held that, despite the lack of a clear test, there was "no doubt" that the Pennsylvania law "falls on the permissible side of the constitutional line."[103]

---

92. *See* Patterson v. New York, 432 U.S. 197, 210 (1977) (quoting McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (1916)) ("[I]t is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime.").

93. *Id*. at 211 n.13 (quoting People v. Patterson, 347 N.E.2d 898, 909 (1976) (Breitel, C.J., concurring)).

94. *Id*. at 210 (quoting Tot v. United States, 319 U.S. 463, 469 (1943)).

95. *See id*. at 211 n.13 (quoting People v. Patterson, 347 N.E.2d 898, 909 (1976) (Breitel, C.J., concurring)).

96. *Id*. at 211.

97. McMillan v. Pennsylvania, 477 U.S. 79, 87 (1986).

98. *See id*. at 87-88.

99. *See id*. at 88.

100. *See id*. (citing Specht v. Patterson, 386 U.S. 605 (1967), as a case in which insufficient procedural due process at sentencing had been provided).

101. *See id*. at 89-90.

102. *Id*. at 88.

103. *Id*. at 91.

The *Almendarez-Torres* majority opinion applied the factors analysis based on the factors considered in *McMillan*. The Court conceded that, unlike the mandatory minimum provision in *McMillan*, the sentence enhancement for recidivism in the alien reentry statute did increase the maximum sentence to which the defendant was exposed.[104] In addition, the law had a greater range of sentences available than the statute at issue in *McMillan*, but the range was still well within constitutional bounds.[105] On the other hand, the majority emphasized that, far from being a traditional element of criminal offenses, recidivism traditionally has been proven as a sentencing factor to protect the defendant from prejudice.[106] Finally, the Court cursorily concluded that the other *McMillan* factors all weighed in the government's favor.[107] Thus, despite the fact that the maximum sentence was increased on the basis of a factual finding not made by a jury beyond a reasonable doubt, the *Almendarez-Torres* Court found that the other factors supported the constitutionality of proving recidivism as a sentencing factor.

After *Almendarez-Torres*, the Court might adopt a factors analysis "test" to determine whether a factual determination constitutionally must be proved as an element of the offense. The initial factors are based on established constitutional principles and the presence of any one factor would invalidate the law. The Court determines whether the disputed law (1) declares or presumes guilt on the law or the facts, (2) undermines the presumption of innocence, or (3) weakens the privilege against self-incrimination. If none of these is present, the Court then would examine whether the finding on the factual determination does the following: (4) provides sufficient procedural due process, (5) alters the maximum penalty to which the defendant is exposed, (6) creates a great differential in the range of sentences available, (7) appears to create a separate offense with a distinct penalty, (8) redefines a fact traditionally treated as an element of the offense into a sentencing factor, or (9) allows "the tail to wag the dog" because the sentencing factors substantially outweigh the elements of the offense in importance.

The last six factors (4–9) clearly are not precise. Because none is dispositive, however, they need not be; even if one or two factors are troublesome, so long as the Court is confident that on balance the six factors in the aggregate do not point to unconstitutionality, the fact may be a sentencing factor. The end result might be compared to a "shocks the conscience of the Court" standard of review. The six factors thus are more detailed proxies for the truly troublesome effect—allowing the sentencing tail to wag the substantive offense dog. That the Court has yet to find a factors analysis violation, however, is revealing, especially given the vigorous disagreements about some of the statutes it has already reviewed. Only an extreme case could convince a majority of the cur-

104. *See* Almendarez-Torres v. United States, 118 S. Ct. 1219, 1230-31 (1998).
105. *See id*. at 1230, 1231-32.
106. *See id*. at 1221, 1226, 1230-31.
107. *See id*. at 1232.

rent Court that the tail is actually wagging the dog. The factors analysis test, therefore, is not yet—if it ever could be—a strenuous form of constitutional judicial review.

2. The Maximum Sentences Position. Justice Scalia's recent dissents in *Almendarez-Torres* and *Monge* propose a rigorous consequences-based test. A criminal statute provides that upon proof of certain facts (the statutory elements of the offense), the defendant is guilty and then may be sentenced in accordance with the statute. If the statute provides only one maximum sentence, then any sentencing factors that limit discretion within that range—such as a *McMillan* mandatory minimum when certain facts are proved at sentencing—do not raise constitutional problems. If, however, the statute provides more than one maximum sentence, the differences between which depend on additional factual findings, then those gradations must be elements of the offense. Thus, when considering Monge's conviction for drug dealing and the recidivism enhancement, Justice Scalia concluded:

> Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a maximum possible sentence of seven years . . . . He was later sentenced to eleven years in prison, however, on the basis of several additional facts that California and the Court have chosen to label "sentence enhancement allegations." However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime.[108]

This analysis also compels the conclusion that the *Almendarez-Torres* recidivism enhancement is an element of the offense (because there could be no sentence in excess of two years without proving the additional fact of recidivism)[109] and that the *Jones* serious bodily injury enhancement is as well (because there can be no sentence longer than fifteen years without proof of that additional fact).

But is the maximum sentences position coherent? Cannot the test be evaded by carefully providing which term is the "maximum"? The *Jones* statute, for example, could be rewritten to provide that the maximum sentence is twenty-five years, but no sentence of more than fifteen years may be imposed without proof of serious bodily injury. So rewritten, the statute apparently meets Justice Scalia's test: Within the "maximum" (twenty-five years) for the offense, there are limits on discretion, but that "maximum" is not extended by proof of serious bodily injury. While it sounds convincing, this argument distorts the maximum sentences position. The maximum sentences position defines the maximum for the offense not by what the statute says it is, but by reference to the facts proved to the jury. The threshold is not what constitutes the maximum sentence for the offense *as a whole*, but what is the maximum sentence that the sentencing judge may impose for the offense *given the facts proved to the jury*. Think of *Jones*: The jury saw a set of facts sufficient to sup-

108. Monge v. California, 118 S. Ct. 2246, 2256 (1998) (Scalia, J., dissenting).

109. *See Almendarez-Torres*, 118 S. Ct. at 1244 (Scalia, J., dissenting) (reaching that conclusion on statutory interpretation grounds).

port the fifteen-year sentence. Any attempt to sentence longer than that is to sentence Jones to an aggravated offense for which the jury did not convict him; it did not pass on the fact of serious bodily injury. Thus, no matter how the statute in *Jones* is rewritten, the statute itself still imposes what could be called a "mandatory subsidiary maximum"—no sentence longer than fifteen years unless serious bodily injury is proved. The maximum sentences position demands that this proof be made to the jury.[110]

The result of the maximum sentences position is that the jury must hear all facts necessary to impose whatever binding maximum possible sentence the statute provides. A decision to impose anything less than a binding maximum, however, is different. The jury's findings of fact determine only the upper limit on the sentence that may be imposed—and if gradations within the statute require factual findings to increase from one (mandatory maximum) grade to another, those facts must go to the jury as well. In other words, a mandatory minimum (like *McMillan*) limits sentencing discretion without creating a new element of the offense, because the maximum is unchanged—the jury need not play a role in deciding what sentence is appropriate within the permissible range. Likewise, the federal Sentencing Guidelines never permit the sentence to be extended beyond the offense's maximum.[111] For Justice Scalia, nonjury-triable sentencing factors may play a role in deciding how close to or far below the available maximum the sentence is, but increasing a sentence above a mandatory maximum (whether for the offense as a whole or for binding gradations within it) requires the determinative facts to be proved as elements.

C. Types of Facts Tests

Tests in the third category assert that certain types of facts always must be elements of the crime. These tests make categorical determinations about the nature of criminal conduct and criminal procedure: Because some kinds of facts are central to criminal law, those facts must receive full constitutional procedural protections, including a jury trial and proof beyond a reasonable doubt. Other facts not at the core of criminal law need not receive these protections. Judicial review is authorized to ensure that the designated types of facts are always proved as elements of the offense, regardless of how the statute is written.

1. The Any-Nonmitigating-Fact Position. Justice Stevens, dissenting in *McMillan*, proposed a very strict standard for determining which facts must be elements of the offense. He argued that any fact that is used as a nonmitigating

---

110. Thus, in both *Almendarez-Torres* and *Monge*, Justice Scalia insisted that the sentence-enhancing prior convictions must be proved as elements—to a jury beyond a reasonable doubt. *Cf. infra* text accompanying note 204 (quoting Justice Scalia's argument that, if proving prior offenses as elements would be prejudicial to the defendant, the trial can be bifurcated for that proof, preserving defendant's right to jury trial and reasonable doubt proof on the mandatory subsidiary maximum).

111. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 (1998). For Justice Scalia, this principle is a constitutional requirement. *See infra* Part V.

factor in the defendant's sentence must be an element of the offense.[112] "Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt."[113] This is necessary to protect the principle adopted in *Winship*: The prosecution's use of nonmitigating facts about conduct requires proof beyond a reasonable doubt.[114] This test applies *Winship* not only to the state's *qualitative* burden of proving whether the defendant is guilty at all, but also to the *quantitative* outcome—that is, the significance of the stigma and the period of incarceration that the state wishes to impose on the defendant. Because the mandatory minimum law in *McMillan* imposed an additional stigma (using a firearm makes it a more dangerous transaction) and a special punishment (a minimum term is automatically imposed, whatever the circumstances of the particular offender), it violated the test. Justice Stevens conceded, however, that *Patterson* was correctly decided: *Winship* applies to "conduct which exposes a criminal defendant to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties."[115] In other words, aggravating or binding sentencing facts must always be elements, but mitigating facts may be sentencing factors.

Justice Stevens's test is viable, however, only if the distinction between mitigating and nonmitigating facts is valid. Justice Stevens argued that it is, while conceding that the distinction is "formalistic."[116] The legislature "may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty."[117] Justice Stevens insisted that only the former legislation is constitutionally permitted: There the defendant bears the burden of reducing his sentence from what the state has proven to the jury. In the latter situation, on the other hand, the defendant may be sentenced on the basis of facts the jury never decided upon. To society, moreover, the nature of the two approaches is very different because the political process serves as a check only on the first: "No democratically elected legislature," argued Justice Stevens, would ever enact a law "making presence in any public or private place a felony punishable by up to five years imprisonment and yet allowing an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a

112. Justice Stevens apparently continues to hold the any-nonmitigating-fact position, including for recidivism sentence enhancements. He joined Justice Scalia's dissent in *Almendarez-Torres*, which argued that there was serious constitutional doubt about whether the increased sentence imposed in that case was permissible. In *Monge*, Justice Stevens's separate dissent noted that "Justice Scalia accurately characterizes the potential consequences of today's decision as 'sinister.' It is not, however, California that has taken 'the first steps' down the road the Court follows today. It was the Court's decision in *McMillan v. Pennsylvania*." 118 S. Ct. 2246, 2255 n.8 (1998) (Stevens, J., dissenting) (internal citations omitted).

113. McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting).

114. *See id*. at 98 (Stevens, J., dissenting).

115. *Id*. at 99 (Stevens, J., dissenting).

116. *Id*. at 100 (Stevens, J., dissenting).

117. *Id*. (Stevens, J., dissenting).

bank."[118] By contrast, legislatures have no political process check against eroding the sentencing rights of convicted criminals: "As this case [*McMillan*] demonstrates, a State may seek to enhance the deterrent effect of its law forbidding the use of firearms in the course of felonies by mandating a minimum sentence of imprisonment upon proof by a preponderance against those already convicted of specified crimes."[119]

Thus, a fact that mitigates a crime already proved to a jury does not implicate *Winship* because the state has succeeded in fully proving all facts necessary to impose the full punishment available under the law; the decision to allow mitigation is at the state's pleasure. In contrast, a fact that imposes a stigma and punishment (like a mandatory minimum), or that has an aggravating effect on the sentence, violates the very purpose of *Winship*: Each fact upon which the nature of prohibited conduct or an increase in the imposed penalty is based must be proved beyond a reasonable doubt. In other words, any fact that plays *anything other than a mitigating role* at sentencing must be an element of the offense.

2. The Historical Elements Position. Justice Powell, the author of the *Mullaney* opinion, dissented in *Patterson* and proposed a categorical test for determining when a fact must be an element of the offense. The New York affirmative defense provision in *Patterson*, Justice Powell argued, was indistinguishable in its effect from the Maine burden-shifting law in *Mullaney*—the defendant bore the burden of persuasion in each case.[120] To limit the holding of *Mullaney* to a prohibition on the presumption of facts for statutory elements destroys *Winship*: The legislature may shift with impunity the elements of crimes into affirmative defenses (or sentencing factors) and constitutional criminal procedure protections may be evaded by creative legislative drafting.[121] Instead, Justice Powell suggested a constitutional test:

> The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. . . . [T]o permit a shift in the burden of persuasion when both branches of this test are satisfied would invite the undermining of the presumption of innocence.[122]

Thus, if the state distinguishes murder from manslaughter based on the defendant's state of mind, the burden of that distinction must lie with the state. But if the state repeals its state of mind distinction, in favor of a single offense and punishment for all homicides, Justice Powell's objection is inapplicable.[123]

---

118. *Id*. at 101 (Stevens, J., dissenting).
119. *Id*. at 102 (Stevens, J., dissenting).
120. *See* Patterson v. New York, 432 U.S. 197, 221-22 (1977) (Powell, J., dissenting).
121. *See id*. at 223-25 (Powell, J., dissenting).
122. *Id*. at 226-27 (Powell, J., dissenting).
123. *See id*. at 228-29 (Powell, J., dissenting).

The historical elements position requires that if a fact has substantial importance to the guilt or sentencing determination and it is a fact that historically has had such significance, then the fact must be an element of the offense if the statute makes that fact relevant.

3. The Facts-of-the-Offense Position. The defendant-petitioner in *Jones* argued that every fact related to the criminal transaction must be proved as an element of the offense. The test is whether the fact in question "is a fact associated with the commission of the crime, rather than the history of the offender."[124] A fact must be proved to the jury beyond a reasonable doubt if it is "closely related to and intertwined with the facts of the offense,"[125] such as the nature and quantity of drugs, the age of a minor drug distributor, or the value of stolen property[126]—or whether serious bodily injury resulted from a carjacking. On the other hand, offender characteristics—such as mental illness, insanity (*Leland*), the defendant's age, the possibility of rehabilitation, recidivism (*Almendarez-Torres*), or other aggravating or mitigating personal attributes—need not be proved to the jury.

At oral argument, Jones's counsel summarized the test:

> It appears that what the legislature does in enacting a criminal offense is, it tells the citizenry that if you engage in particular conduct, then you will be sentenced—you will potentially face a particular sentence, a certain loss of liberty . . . . [T]he Constitution [requires] that to establish that conduct which leads to that loss of liberty [the case] goes to a jury and is proved beyond a reasonable doubt. We think that what the Court should hold is, *if there's any fact that the legislature singles out from a transaction, from the citizen's conduct, whether it is an action, whether it is a mental state, or whether it's a result, that should be treated as an element of the offense, and it ought to go to a jury*.[127]

Under the facts-of-the-offense position, facts relating to the commission of the offense—acts, results, states of mind, and other nonoffender-related facts—always must be proved as elements of the offense if the state intends to use the occurrence of such facts to justify the sentencing determination. Facts concerning the nature of the offender personally, on the other hand, may be sentencing factors even if they affect the level of sentence to be imposed.

D. Considering the Proposed Constitutional Tests

The major cases and the proposed constitutional tests do not answer one important preliminary question about the elements/sentencing factors issue: Why do we need a constitutional test at all? The Court has yet to strike down a single law on the ground that it violated the Constitution by treating a fact as a sentencing factor rather than as an element of the offense. Similarly, a majority of the Court has never adopted a rigorous constitutional position; the only

---

124. Brief for Petitioner at 15, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203).

125. *Id*. at 17.

126. *See id*. at 17 n.12 (citing Courts of Appeals cases holding such facts to be elements of offenses).

127. Transcript of Oral Argument at 54, *Jones* (No. 97-6203), *available at* 1998 WL 713483 (emphasis added).

"test" used more than once is the highly deferential factors analysis of *McMillan* and *Almendarez-Torres*. Why not conclude that the fears of abuse and redefinition are not occurring, or are occurring so infrequently that the Chicken Little predictions of the destruction and evasion of constitutional criminal procedure simply have not come to fruition?[128] Why cannot we be satisfied with the Court's pragmatic outcomes: "Fundamental fairness has not been violated here, though we can't tell you exactly why. Rest assured, though: As with obscenity, we know it when we see it."

One answer, of course, is that we can be satisfied where we are, without a constitutional test. Another answer, however, is more compelling: A constitutional test—whichever one is selected—makes hundreds, if not thousands, of cases each year simpler to resolve. If we adopt the pro-government position, then all claims of constitutional violations for failing to prove a fact as an element rather than a sentencing factor can be dismissed out of hand; only case-by-case, proportionality-to-the-offense-of-conviction claims remain. The factors analysis test has the same result, because a court will not reverse a sentence unless its conscience is shocked by the procedure used. Under Justice Scalia's maximum sentences position, any fact causing an increase above a binding maximum requires element status; under Justice Stevens's any-nonmitigating-fact position, any factual finding used in sentencing for a purpose other than to mitigate the sentence is reversible error.

Although the Court will, and should, go to great lengths to avoid a constitutional issue if it is not forced to decide it, providing sensible and useful guidance to the lower federal and state courts is also an important function of the Court. Eventually, the Court will face a case that requires it to confront the constitutional question or it will realize that the issue is too administratively important to leave unresolved. The constitutional issue was squarely presented on the facts of *Jones* and was fully briefed and argued; the Court would not have been overreaching to decide the constitutional question in that case, yet it did not do so.[129] Furthermore, the issue has now been raised in three cases, *Almendarez-Torres*, *Monge*, and *Jones*, in less than two years. Elements/sentencing factors constitutionality challenges are likely to persist until the Court decides the issue. The question then becomes: Which constitutional test is the right one—which should be adopted by the Court? That is, which test is most consistent with the "letter and spirit"[130] of the Constitution?

IV

THE CONSTITUTIONAL TEXT: NARROWING THE QUESTION

There is no better place to begin thinking about which constitutional test is the right one to adopt for resolving the elements/sentencing factors issue than

128. *Cf. Chicken Little, in* WHAT YOUR 1ST GRADER NEEDS TO KNOW 28-29 (E.D. Hirsch ed., 1991) ("The sky is falling!").

129. *See infra* Part VI.

130. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

the Constitution itself. As is usually the case in constitutional law, the text does not resolve the elements/sentencing factors question, but it does guide the framing of the appropriate analysis of the issue. Several of the Constitution's provisions refer to crimes and to punishments as independent concepts. Similarly, the procedural provisions impose different requirements for trials of crimes and determinations of punishment. What is a "crime," and what is not, becomes the critical constitutional determination. The Constitution, although it does not indicate which test is the best one, does help to narrow the question.

First, several provisions of the Constitution governing the legislative branch discuss powers related to "crimes." In Article I, Congress is given the power to "provide for the Punishment of counterfeiting" securities and money,[131] and to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[132] Congress also possesses "all legislative Powers" of the United States,[133] including the power to "make all Laws which shall be necessary and proper" for the United States to function—for example, interstate commercial crimes, postal crimes, and so on.[134] The Constitution also makes clear that states, too, have the power to define criminal offenses.[135] A legislature's power to define crimes is expressly limited only twice: Neither Congress nor a state may enact a bill of attainder or ex post facto law,[136] and Article III uniquely and specifically defines the federal crime of treason.[137]

Other provisions of the Constitution also refer to "crimes." The President may "grant Reprieves and Pardons for Offences against the United States."[138] Article III requires a jury trial for "all Crimes,"[139] while the Sixth Amendment protects the defendant's rights "[i]n all criminal prosecutions," including the right "to be informed of the nature and cause of the accusation." Finally, the Fifth Amendment preserves grand jury indictment for "a capital, or otherwise infamous crime" and prohibits double jeopardy for "the same offence."

Second, the Constitution includes provisions relating to the legislature's power to determine the appropriate punishments for crimes. Congress has the power to set the punishments for counterfeiting and piracy,[140] and "to declare the Punishment of Treason."[141] When the Senate convicts a person at an im-

131. U.S. CONST. art. I, § 8, cl. 6.

132. *Id*. art. I, § 8, cl. 10.

133. *Id*. art. I, § 1.

134. *Id*. art. I, § 8, cl. 18.

135. *See id*. art. IV, § 2, cl. 2 (providing for interstate extradition for "A Person charged in any State with Treason, Felony, or other Crime"); *id*. amend. XIV, § 2 (acknowledging state power to deny the vote "for participation in rebellion, or other crime").

136. *See id*. art. I, § 9, cl. 3 (federal); *id*. art. I, § 10, cl. 1 (states).

137. *See id*. art III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort.").

138. *Id*. art. II, § 2, cl. 1. An exception is provided for impeachment: A pardon does not prevent impeachment and removal from office. *See id*.

139. *Id*. art. III, § 2, cl. 3. The impeachment exception is also present here because in impeachment the Senate sits as the jury. *See id*.

140. *See id*. art. I, § 8, cl. 6 (counterfeiting); *id*. cl. 10 (piracy).

141. *Id*. art. III, § 3, cl. 2.

peachment trial, the punishment imposed may "not extend further than to removal from Office, and disqualification" from future office.[142] In addition, the Thirteenth Amendment permits "involuntary servitude . . . as a punishment for crime whereof the party shall have been duly convicted."[143] On the other hand, the power to define appropriate punishments is also restricted: The "Judgment in Cases of Impeachment shall not extend further than" removal from office and disqualification,[144] and "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."[145] Under the Eighth Amendment, the legislature may not have "excessive fines imposed, nor cruel and unusual punishments inflicted."

But do the powers and provisions relating to "crimes" and those involving "punishments" really address different topics, or just two sides of the same constitutional coin? The text demonstrates that the Constitution treats crimes differently from punishments. Most significantly, while the consequences of an impeachment conviction in the Senate are limited to removal and disqualification, "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[146] Punishment, therefore, is something that follows the trial for a crime and the judgment of conviction; it is not part of the trial, but subsequent to it. A similar dichotomy appears in the Treason Clause. In separate sentences, the Constitution states that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,"[147] and then provides the power of Congress to "declare the Punishment of Treason."[148] Thus, the text of the Constitution reveals that determining the proper punishment for a convicted person is an independent determination from whether to convict the person.

The distinction between the trial for a crime and the punishment imposed after the conviction at that trial is confirmed by the procedural provisions of the Constitution. The procedural restrictions on the government when it puts a defendant on trial for a "crime" are significant. Article III provides that "[t]he Trial of all Crimes . . . shall be by Jury . . . in the State where the said Crimes shall have been committed."[149] The Fifth Amendment requires the government to seek the "presentment or indictment of a Grand Jury" for charges of any "capital, or otherwise infamous crime," precludes double jeopardy for the "same offence," and forbids compelled self-incrimination "in any criminal case." Similarly, the Sixth Amendment guarantees "[i]n all criminal prosecutions" the right to a speedy, public, and impartial jury trial in the state and dis-

142. *Id*. art. I, § 3, cl. 7.
143. *Id*. amend XIII, § 1.
144. *Id*. art. I, § 3, cl. 7.
145. *Id*. art. III, § 3, cl. 2.
146. *Id*. art. I, § 3, cl. 7.
147. *Id*. art. III, § 3, cl. 1.
148. *Id*. cl. 2.
149. *Id*. art. III, § 2, cl. 3.

trict where the crime was committed, as well as the rights to be told of the "accusation," to confront witnesses, to obtain compulsory process for favorable witnesses, and to the assistance of counsel. Each of these procedural protections limits the power of the government—jurisdiction and venue, ineligibility for trial (that is, grand jury and double jeopardy), or courtroom proceedings—when it tries a person for a crime.

By comparison, the provisions relating to punishment procedures confirm the distinction created in the Impeachment Clause: Punishment is a phase of the judicial proceeding that occurs *after* the trial is over and a judgment of conviction is entered,[150] and which therefore need not proceed under the rigorous trial procedures. In particular, the Constitution permits determinate sentences—that is, every person convicted of a given crime receives the same punishment, regardless of the facts of the case. Congress has the power to "provide" for the punishment for counterfeiting, to "punish" for piracy, and to "declare" the punishment for treason.[151] The verbs chosen indicate that Congress could insist that every convicted pirate receive twenty years, or that every convicted traitor receive life imprisonment. It also is apparent, however, that the Constitution does not empower Congress to pick and choose the punishment in individual cases: Article III vests the power to decide "Cases" and "Controversies" in the judiciary,[152] and Congress is forbidden from passing bills of attainder.[153] In other words, determining the *range of available sentence* (determinate or not) for a crime is a legislative task;[154] *imposing the particular sentence* (with or without the exercise of discretion) on the convicted defendant is a judicial task performed after the judgment of conviction is rendered.[155]

---

150. This analysis—that it is only subsequent to the entering of the judgment of conviction that the determination of the proper punishment for the offender is made—was followed by the Framers in the federal crimes enacted by the First Congress. Each crime's text follows the same pattern: It lists the elements of the crime, and then states that a person "being thereof convicted, shall be" punished as the statute provides. An Act for the Punishment of certain Crimes against the United States § 18, 1 Stat. 112, 116 (1790) (perjury: "every person so offending, and being convicted thereof, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars; and shall stand in the pillory for one hour"). Some crimes had determinate sentences. *See, e.g.*, *id*. § 1, 1 Stat. at 112 (treason: "if any person . . . shall be convicted thereof . . . shall suffer death"); *id*. § 14, 1 Stat. at 115 (forgery: "and shall be thereof convicted, *every such person* shall suffer death") (emphasis added). Other offenses allowed judicial discretion in imposing punishment on persons convicted. *See, e.g.*, *id*. § 7, 1 Stat. at 113 (manslaughter on federal property: "if any person shall . . . commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars"). Although it is true that this statute preceded the adoption of the Bill of Rights in 1791, the First Congress understood that those limitations would likely soon come into force; it had proposed the Amendments to the states the previous year. *See* 1 Stat. 97, 97-98 (1789). Thus, the divergence in procedure between criminal trials and subsequent impositions of punishment was understood by the Framers, and adopted by them in the early federal criminal statutes.

151. U.S. CONST. art. I, § 8, cl. 6 (counterfeiting); *id*. cl. 10 (piracy); *id*. art. III, § 3, cl. 2 (treason).

152. *Id*. art. III, § 2, cl. 1.

153. *See id*. art. I, § 9, cl. 3.

154. "Congress, of course, has the power to fix the sentence for a federal crime. . . . Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment." Mistretta v. United States, 488 U.S. 361, 364 (1988) (citations omitted).

155. *Cf. id*. at 364-65 ("[U]nder the indeterminate-sentence system [used in the federal courts prior to the adoption of the Sentencing Guidelines], Congress defined the maximum, the judge imposed a

If the Constitution's great procedural protections apply only to the "trial" of the defendant for a "crime," does the Constitution mandate the procedure used when punishment is imposed in a later sentencing proceeding? If sentencing were entirely determinate, with no judicial discretion, then perhaps no procedure would be required. When discretion is introduced, however, some procedure becomes necessary.

The Fifth and Fourteenth Amendments require that a person may not be "deprived of life, liberty, or property, without due process of law." As an initial matter, a significant amount of process is constitutionally due before a person may be declared *eligible*—that is, by conviction of a crime at trial—for any deprivation at all of liberty (imprisonment) or property (criminal fines) by the government, as discussed above. Likewise, when the government uses a judicial proceeding—rather than a determinate sentence compelled by the legislature—to calculate the *quantity* of the deprivation of liberty (term of imprisonment, or even a deprivation of life if the death penalty may be imposed) or property (value of fine), at least some process is constitutionally due in that proceeding. Exactly how much process is due at sentencing has not been resolved conclusively, although it is clear that the Constitution requires *some* procedural protections.[156]

Because the Constitution treats the trial for a crime and the imposition of punishment as separate, distinct matters, the procedural protections necessary in a criminal trial are not required in full at sentencing—otherwise, the Constitution would not treat them differently. Thus, for example, the Court has concluded that the "Sixth Amendment never has been thought to guarantee a right to a jury determination" of "the appropriate punishment to be imposed on an individual."[157] Sentencing procedure and practice for most of our history, as the Court has recognized, confirms this conclusion.[158]

The Constitution itself provides the tools to distill the elements/sentencing factors dilemma down to the core constitutional question: What constitutes a "crime" for constitutional purposes? Anything that falls in the constitutional category of a "crime" must be proved as an element; anything outside this category could be proved as a sentencing factor. Unfortunately, the constitutional text does not provide the definition.[159] The next step in the analysis, then, is to determine which of the proposed constitutional tests is best suited to filling this textual gap.

---

sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment [by exercising] discretion to release the prisoner before the expiration of the sentence imposed by the judge.").

156. *See supra* notes 19, 100, and accompanying text.

157. Spaziano v. Florida, 468 U.S. 447, 459 (1984).

158. *See supra* notes 7-11 and accompanying text (reviewing *Mistretta*).

159. Similarly, original intent or understanding is not helpful—no Justice, not even Justice Scalia, has relied upon such sources to provide a definition for use in this area.

V

CHOOSING A CONSTITUTIONAL TEST: DEFINING A "CRIME" IN THE CONSTITUTION

Each of the seven proposed constitutional tests detailed above provides a different answer to the core question: When is a factual determination "necessary to constitute the crime"[160] for constitutional purposes (and thus must be adjudicated as a element of the offense) and when is it merely a fact relating to the "severity of punishment"[161] (and thus satisfactorily may be proved as a sentencing factor)? Because the choice among the alternatives is not immediately obvious, the Court should adopt the test that supplies the most persuasive definition of "crime" for constitutional criminal procedure purposes.

A. Important Preliminary Issues of Constitutional Interpretation

Three issues of constitutional interpretation are important for defining "crime" for constitutional purposes in resolving the elements/sentencing factor question. The Court must determine which proposed test most successfully reconciles and explains these issues.

1. "Crime" and Mitigation. The Court's recent cases make clear that mitigating facts are always permissible as sentencing factors. That is, the *Patterson* holding has been universally accepted: If the legislature chooses to allow mitigating factual determinations to influence sentencing outcomes, those determinations need not be elements of the offense. For example, affirmative defenses[162] or cooperation with the government[163] may be sentencing factors proved by the government by a preponderance of the evidence standard, or even proved by the defendant. The proposed tests disagree, however, about which nonmitigating determinations, if any, must be elements.

The text of the Constitution explains why mitigating facts need never be elements: Mitigation is not part of the concept of a "crime." No matter how one defines what "crime" means[164] in the Constitution, the baseline is something akin to specified facts and conditions, the joint occurrence of which the government has forbidden. When other specified facts are permitted to exculpate entirely or reduce partially the punishment of the defendant, however, it is not logical to categorize those facts as part of the prohibited transaction (that

160. *In re* Winship, 397 U.S. 358, 364 (1970).

161. McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986).

162. *See* Leland v. Oregon, 343 U.S. 790 (1952); *see supra* text accompanying notes 115-118 (discussing Justice Stevens' acceptance of this conclusion).

163. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (allowing a downward departure in sentence for "substantial assistance" to the government).

164. A "crime" can be defined generally as "any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public," BLACK'S LAW DICTIONARY 370 (6th ed. 1990), or as "an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to punishment by that law," WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 307 (1991).

is, as part of the "crime"). A mitigating factual determination does not fit the Constitution's model of features of a "crime": It does not "deprive" a person of liberty or property (to the contrary, it reduces the deprivation otherwise imposed), nor does it place a person in "jeopardy" of life or limb or constitute an "accusation." Rather, a mitigating fact *reduces* the defendant's exposure to state sanctions and therefore need not be proved as an element of the offense. Nonmitigating facts, however, whether they increase the punishment (for example, sentence enhancements) or alter the nature of the sentence (for example, mandatory minimums), do implicate the model features of a "crime." Therefore, the proper scope of debate is about which nonmitigating facts must be elements; it is satisfactory to conclude that mitigating factual determinations may be sentencing factors.

2. Deference to Statutory "Crimes." There is little agreement among the tests about how much deference the Court should afford to the legislature's labeling of nonmitigating factual determinations as elements or sentencing factors. Is the elements/sentencing factors decision made entirely by the letter of the statute and reserved to the legislature with the political process as a check against abuses,[165] or can the courts look to the substance of the statute and apply a constitutional elements requirement?[166]

Normally, the Court is highly deferential to Congress and the states; a mere so-called "rational basis" is sufficient to sustain almost all laws against a constitutional attack. In some cases, however, the Court performs a more rigorous constitutional review to protect individual rights (both in the Bill of Rights and in the Constitution's structural protections of liberty by separation of powers and federalism) by serving as the ultimate interpreter of the Constitution. When legislative power clashes with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[167] Into which category of analysis does the elements/sentencing factors situation fall?

Defendants argue that the Constitution's significant procedural protections for criminal defendants on trial for a "crime," particularly the Fifth and Sixth Amendments, will be undermined or abrogated *de facto* by permitting legislatures too much leeway in determining which factual determinations are merely

---

165. *See* Patterson v. New York, 432 U.S. 197, 209-10 (1977) (use the law's elements only; the Court may not add elements to the statutory offense); *McMillan*, 477 U.S. at 85-86 (elements are what the legislature says they are); Almendarez-Torres v. United States, 118 S. Ct. 1219, 1223 (1998) (whether a fact is an element or a sentencing factor is for Congress to decide).

166. *See* Mullaney v. Wilbur, 421 U.S. 684, 699 (1975) (the Court is not limited to the formalism of the statutory text, but may look at the law's substance and effect); *Patterson*, 432 U.S. at 221-22 (Powell, J., dissenting) (*Winship* is not limited to the law's elements, but its application is also determined by the effect of the provision); *McMillan*, 477 U.S. at 93 (Marshall, J., dissenting) (same); Monge v. California, 118 S. Ct. 2246, 2255 (1998) (Scalia, J., dissenting) (same).

167. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). For example, in the recent case of *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court refused to accept Congress's determination that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), was sufficiently justified in fact to warrant federal statutory protection against state interference for the free exercise of religion greater than that required by the Court's interpretation of the Free Exercise Clause. *See id.* at 2162-72.

sentencing factors and thus need not be given these significant constitutional protections. In other areas of constitutional criminal procedure, however, the Court has preserved deference to the legislature. In particular, the Court constructed a highly deferential test for determining what constitutes the "same offense" for multiple prosecution purposes under the Double Jeopardy Clause. When a defendant alleges that he may not be tried for the charged offense because he previously has been placed in jeopardy for that offense, the *Blockburger*[168] "same elements" test is applied:[169] So long as each statutory offense requires an element not required by the other, the two offenses are not the "same" for constitutional purposes.[170] For example, a defendant tried and acquitted (or even convicted) of reckless driving can be tried subsequently for driving while intoxicated. *Blockburger* is satisfied because the DWI charge does not require proof of recklessness and the reckless driving charge does not require proof of intoxication. This is true even though the two trials may look and sound very much alike. The determinative issue is what the statutory offenses *require*, not the facts actually or potentially proved to the jury.

Hence, the proper degree of judicial deference to the legislature's statutes in the elements/sentencing factors controversy is not obvious. It is a decision the Court must make by considering the nature of the constitutional question and the arguments for and against deference. When defining what constitutes a "crime" for constitutional purposes, each test must determine and explain the amount of deference chosen.

3. Statutory "Crimes" and the Sentencing Guidelines. The final issue of constitutional interpretation important to choosing a constitutional test is determining how the selected definition of a constitutional "crime" will be applied not only to criminal statutes defining crimes, but also to statutes establishing broad sentencing schemes to limit judicial discretion in the sentencing process. This problem is a significant concern for Justice Breyer:

> [For] a couple of hundred years, we have statutes that define crimes, and we have judges that assert punishment under the statute.
>
> And when they assert punishment, sometimes it's a little punishment and sometimes a bigger punishment, and you can look into it scientifically with the aid of [computer] search[es] and find out what in general bigger or littler turns on, and when we find that out we find certain factors, like how much drug there was, like whether a person was hurt, like whether there was a recidivist, and that turns out to be true regardless of what the judge says.
>
> Now, suddenly, if you decide to write some of that into law, either in the form of . . . guidelines or statutes, does that suddenly become unconstitutional, the effort to

168. Blockburger v. United States, 284 U.S. 299 (1932).

169. *See* United States v. Dixon, 509 U.S. 688, 696 (1993).

170. *See id.* at 696-97. Thus, the Court has rejected the "same conduct" approach to double jeopardy, under which the government would have only one chance to prove to a jury the facts of the allegedly criminal conduct. Instead, the government can prosecute repeatedly the same defendant, so long as each trial proceeds under a statutory offense that is not the "same" as the prior charges—and the "same offense" determination relies solely on the elements of the offenses required by the text of the statutes. *See id.* at 704 (overruling Grady v. Corbin, 495 U.S. 508 (1990)).

> regularize what happened in the past by saying explicitly that those factors that did, in fact, govern punishment in the past now will be presumptively, or sometimes in statutes more than presumptively, grounds for increasing or diminishing a sentence?
>
> *What is it about that effort to regularize that should suddenly constitutionalize procedural requirements* that were not there when this very same thing went on under the cloak of darkness because the judge didn't say what was going on?
>
> . . . .
>
> That's what in my mind is lying at the heart of this and, of course, my answer in *Almendarez-Torres* is, except in extreme cases the Constitution does permit Congress and the [federal Sentencing] Commission to regularize what previously happened silently, or without understanding . . . .
>
> That, to be honest, was what my thought was.[171]

Is it possible to distinguish statutes creating new "crimes" from statutes that regularize sentencing within and across crimes, even where the latter may use factual determinations to determine the sentence imposed?

An apt analogy may be the relationship between Congress and the Executive Branch in the modern administrative state.[172] Despite the protests of some critics, the Court consistently has upheld the validity of administrative rulemaking by executive branch agencies. The reason is that the Court has declined to interpret Article I's vesting clause, giving Congress "all legislative Powers"[173] of the federal government, as requiring that every rule with the force of law must emanate from Congress. Executive branch agency rulemaking may have the force of law, even to the extent of imposing criminal penalties for violations of regulations. The important distinction the Court has drawn is that Congress must enact all generative statutes, those that create agencies and give them their broad powers; so long as the agency is given an "intelligible principle"[174] to guide its execution of the generative statute, the delegation of rulemaking power is not unconstitutional. If Congress creates an agency, gives it the power to issue regulations, authorizes criminal sanctions for violations of those regulations, and constrains the agency's discretion with some principled guidance, then Article I is satisfied.[175]

The concept of the generative statute may be combined with the Constitution's distinction between crimes and punishments. "Crimes" always must be defined by Congress in a generative statute; sentencing factors need not be. Congress must define precisely the facts and conditions that must be proved to

---

171. Transcript of Oral Argument at 11-12, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203), *available at* 1998 WL 713483 (emphasis added).

172. The same theory would also justify state agencies under state constitutional separation of powers principles.

173. U.S. CONST. art. I, § 1.

174. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

175. *Cf.* Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47 (Winter 1998) (arguing that the authority to interpret the federal criminal statutes should be centralized in the Department of Justice, not dispersed among the United States Attorneys, and that the subsequent uniform interpretations of the statutes issued by Main Justice should be accorded the same *Chevron* deference given to other administrative agencies by the federal courts).

constitute the statutory offense. In addition, Congress must state the maximum and minimum possible sentences for violations of the offense. This constitutes the generative statute for a "crime." On the other hand, Congress also may desire to regularize sentencing among judges, both for particular offenses and across crimes of similar severity. Such regularization and limitation of the discretion of sentencing judges is analogous to nongenerative administrative rulemaking.[176] The point is a formalistic one: The Sentencing Guidelines do not create new "crimes" *because they are not generative statutes* that create new offenses.[177] Instead, even when factfinding is required, all the Guidelines do is limit discretion when calculating the appropriate sentence for the defendant under independently ascertainable offenses created by generative criminal statutes.

Each constitutional "crimes" test (and corollary elements/sentencing factors rule) either draws the line between generative statutes defining specific crimes and regulatory statutes harmonizing sentencing generally, or it rejects the distinction outright. That choice will determine, for example, whether the test will be applied to hold that the Sentencing Guidelines create new "crimes" and elements, or, instead, that the Guidelines do not establish new crimes but only sentencing factors.[178]

---

176. This is particularly true where the sentencing regularization is undertaken by an agency outside the legislative branch, as is the case with the federal Sentencing Commission. Even codified guidelines enacted by the legislature, however, would be logically equivalent so long as they were broad systems of sentencing regulation.

177. The analogy to the Double Jeopardy Clause is also applicable here. Under the *Blockburger* "same elements" test, two offenses may be found not to be the "same offense" even though the crimes involve the same transaction and identical proof of facts to the jury. *See supra* Part V.A.2. This is precisely because, under the *Blockburger* constitutional test, the offenses are considered *separate* generative statutes and are therefore not the "same." The converse argument could be applied to the Sentencing Guidelines. The sentence enhancements available under the Guidelines could involve the same transaction and identical facts proved to the jury as a separate generative aggravating offense—for example, a simple assault sentence enhanced for brandishing a firearm might overlap with the available sentence range for assault with a deadly weapon. Precisely because the Sentencing Guidelines are *not* separate generative statutes, however, the sentence enhancements included in the Guidelines do not create new "crimes." The double jeopardy analogy demonstrates that the formalistic distinction between generative statutes and nongenerative statutes would not be anamolous to constitutional criminal procedure.

178. For example, a question of considerable dispute is the required method of proof under the federal drug offenses. Under the *generative statutes*, *see* 21 U.S.C. §§ 841-848 (1994), crimes involving different amounts of each drug have different sentences; that is, 10 pounds of marijuana, 10 grams of crack cocaine, and 10 ounces of LSD will be sentenced disparately. (The companion guidelines, *see, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1998), simply carry over these statutory standards, with additional internal elaboration.) Sometimes these sentencing requirements are separately denoted "penalties" subsections, *see* 21 U.S.C. § 841(b), while in other statutes the text relating to offense and punishment is intermingled, making the statute highly ambiguous, *see id*. § 844. Thus, courts considering some of these statutes have held that the type and amount of drugs may be determined as sentencing factors. *See, e.g.*, Edwards v. United States, 118 S. Ct. 1475, 1477 (1998) ("We agree that in the circumstances of this case [a drug conspiracy charge under 21 U.S.C. §§ 841 and 846] the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities."). On the other hand, courts reviewing sentences under some provisions have held that the distinctions between sentences for type and amount of drugs do create separate offenses, making type and amount an element of the offense. *See, e.g.*, United States v. Stone, 139 F.3d 822 (11th Cir. 1998) (holding that third sentence of 21 U.S.C. § 844, regarding punishment for possession of cocaine base, does create a separate offense from the first two sentences, which create the sim-

B. Analyzing the Proposed Constitutional Tests

Which of the seven proposed tests provides the best constitutional definition of a "crime" for purposes of resolving the elements/sentencing factors question? A critical analysis of each test reduces the decision to two alternatives.

1. The Pro-Government Position. The pro-government position is a coherent and viable constitutional test. Under this view, there is no elements/sentencing factors definition for a "crime" in the Constitution. Instead, the scope of the text's references to "crimes" includes only whatever statutory offenses and elements thereof the legislature chooses to enact. This position thus provides complete deference to the legislature. Nothing is, as a matter of constitutional law, ever "necessary" as an element of an offense other than the facts specified in the operational provisions of generative statutes which expressly create "crimes."[179] Furthermore, when the legislature creates sentencing factors, in external sentencing guidelines or even in generative statutes, those factors are not elements of a "crime" because the legislature said they are not elements.[180] If ambiguity about which type of law the legislature has enacted arises, there is no constitutional issue but only the question of legislative intent—how did the legislature mean for this fact to be adjudicated? The pro-government position argues that the only substantive protection necessary for defendants at sentencing is to ensure that the punishment imposed is proportional to the offense of conviction.

The pro-government position is the soundest one to adopt if the Court believes that the statutes challenged in recent cases do not in fact present a threat to constitutional criminal procedure. The position imposes no substantive lim-

---

ple possession offense for all drugs, and citing cases from other circuits in favor of and contrary to this construction; the court distinguished *Almendarez-Torres* on the facts and under the factors analysis test); *see also* Brief for Petitioner at 17 n.12, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203) (citing cases interpreting 21 U.S.C. § 844).

In the federal drug offenses, the specification and precision for particular amounts and types of drugs, with different minimum and maximum sentences for each, appears in the generative statutes. If the constitutional test adopted distinguishes between specific generative statutes and general regularization schemes, the drug offense amounts probably would be held to be distinct "crimes." Thus, a less-than-10-pounds and a more-than-10-pounds marijuana possession offense must be separate "crimes" and not merely sentencing factors. On the other hand, a constitutional test that does not determine a statute's constitutionality on the distinction between generative and regulatory statutes would permit the drug amounts to be proved as sentencing factors even though the sentence differences appear in the generative statutes. *Cf. infra* Part V.B.-C. (discussing the maximum sentences position, which probably would do the former analysis, and the pro-government position, which likely would adopt the latter).

179. The holding of *Mullaney* is the entire constitutional rule under the pro-government position: So long as the prosecution proves as elements of the offense (that is, to a jury beyond a reasonable doubt) the elements specified in the statute, the government has met fully its constitutional burden for purposes of the elements/sentencing factors issue. *See supra* note 32 and accompanying text.

180. Under the pro-government position, therefore, the type and amount of drugs attributed to the defendant for purposes of sentencing for a federal drug offense conviction should be, and constitutionally may be, interpreted as sentencing factors. *Cf. supra* note 178 (discussing the drug offenses).

its on the provisions of crimes in generative statutes or on the shifting—by generative statutes or sentencing regulations—of factual determinations affecting the amount of punishment (but not guilt or innocence *per se*, which must be proved under trial procedures) into sentencing factors. So long as one is confident that legislatures are not currently abusing their powers to the detriment of constitutional rights, particularly the Fifth and Sixth Amendments, there is no reason to think that a rigorous constitutional rule is necessary. The federal and state governments, of course, can be counted on to argue this position consistently because it best maximizes legislative power. Defendants, similarly, certainly will continue to assert a parade of horribles in an attempt to convince the Court to constrain the anti-defendant incentives in the political process.[181] Ultimately, the Court must decide, on the basis of the cases, records, and briefs before it, whether it is comfortable concluding that the Constitution defers so greatly to the legislature in matters of criminal procedure.[182]

2. The Procedural Due Process Position. The procedural due process position is a satisfactory test, but it is not the best constitutional interpretation. By increasing the amount of process constitutionally due at sentencing proceedings, defendants' rights are protected because significant factual determinations that affect the amount of sentence imposed (beyond determining the offense of conviction itself, which of course occurs under trial procedures) must clear more significant procedural hurdles than currently are required.[183] As more and more due process is provided at sentencing, however, the distinction between trial for a "crime" and imposing punishment at sentencing begins to break down. Yet this distinction is one created by the Constitution. So long as sentencing procedures are noticeably less stringent than trial procedures, the distinction is preserved; if that is true, however, then the threat to defendants' rights that began the dispute over the elements/sentencing factors constitutional question in the first place is reduced but not eliminated.

In the end, the procedural due process position is little more than an unstable middle ground: Either the constitutional question will not be resolved because sentencing proceedings will continue to be perceived as procedurally inadequate, or the procedural due process position will become indistinguishable

181. After all, an argument in the legislature that elements of offenses are preferable to sentencing factors, even if based on sincere respect for the Constitution's procedural protections, is likely to be portrayed to the public as being "pro-criminal" or "soft on crime."

182. *Cf.* Knowles v. Iowa, 119 S. Ct. 484 (1998) (holding that an Iowa statute that authorized arrest and therefore full automobile searches for all stops, even those to issue traffic citations for speeding—premised on the Court's prior holdings that a police officer may search a car upon arresting the driver, or when he could have arrested the driver but did not—nevertheless violated the Fourth Amendment because the breadth of situations covered authorized "unreasonable" searches).

183. The procedural due process position feints around the issues of deference and generative/nongenerative statutes. Nominal deference to legislative distinctions between elements and sentencing factors is undercut in practice because increasing sentencing due process substantially moots the distinction. Similarly, it matters little whether the statute being enforced generates crimes or establishes sentencing regulations, because either kind of system receives rigorous procedural protections.

from the any-nonmitigating-fact position because every (nonmitigating) fact used at sentencing will be *de facto* an element of the "crime" because the procedural requirements at sentencing are essentially the same as those used at trial. Therefore, while it might serve as a temporary stopgap solution, the procedural due process position ultimately cannot resolve the constitutional issue.

3. The Factors Analysis Position. The factors analysis position is a necessary but not sufficient constitutional test. Under this position, while the Constitution, and the Due Process Clause in particular, does not constrain the legislature's choice of form, it does limit the law's substance when certain constitutional principles are infringed. Thus, for example, the presumption of innocence and the privilege against self-incrimination may not be undermined, nor may significant unfairness be imposed on the defendant at sentencing by excessive punishment differentials or insufficiently rigorous procedures. Within these limits, however, the position is very deferential to the legislature, and whether the law is a generative criminal statute or a sentencing regulation is irrelevant—there is no constitutional violation so long as the final result does not shock the conscience of the Court in the totality of circumstances.

If the Court intends to hold that the only constitutional violations in the elements/sentencing factors area are those in which the sentencing tail is wagging the substantive offense dog, the best solution is not to adopt solely the factors analysis test. The Court should adopt the pro-government position and the factors analysis position together. The pro-government position provides a clear and easily administered rule for the lower courts: No statute ever violates the Constitution because of the manner in which it determines elements and sentencing factors. A constitutional violation occurs only when the *consequence* of that determination violates collateral constitutional principles—those described in the factors analysis test. The factors analysis position is a supplement to the pro-government position, a reminder that the Constitution places some indirect substantive limits on the legislature's power even when there is no direct constitutional rule in that area of law. The same analysis applies if the Court adopts a position other than the pro-government one, because a violation of the factors analysis test is always unconstitutional, regardless of whether any other constitutional rule also limits the elements/sentencing factors determination. The factors analysis position solves only a narrow class of constitutional problems, those at the limits of the legislature's power; to resolve the cases that do not push the envelope, the Court must select a test that provides a constitutional answer in all cases.[184]

4. The Maximum Sentences Position. The maximum sentences position is a sound constitutional test. Under Justice Scalia's view, a new "crime" is created when the legislature imposes a binding maximum sentence that cannot be passed without an additional factual determination. This position generally

184. *Cf. infra* text following note 199 (reaching a similar conclusion about the historical elements position).

provides great deference to the legislature. Most issues are left entirely to legislative discretion: what criminal offenses will exist, which facts must be proved to establish guilt for each offense, what the maximum and minimum sentences will be for those facts, and so on. The only matter about which the maximum sentences position is not deferential is the *definition* of the "maximum sentence" for each crime. When the legislature establishes an upper limit on the sentence that cannot be passed without additional factual findings (a "mandatory subsidiary maximum"), it has created a "crime," and the facts proved to increase the sentence above that limit are elements of a different, aggravated "crime."[185] Except with respect to this constitutional definition of a "crime," the maximum sentences position is deferential to the legislature.

In addition, the maximum sentences position adopts the distinction between generative statutes and sentencing regulations. The Sentencing Guidelines, for example, do not define any new "crimes"; although they limit judicial discretion when imposing punishment, the maximum possible sentence is always restricted to that of the underlying statutory offense of conviction.[186] In other words, the maximum sentences position's frame of reference for identifying a "mandatory subsidiary maximum" is the generative statute creating the offense. A generative statute, even when it is only one section of the criminal code, defines more than one "crime" every time it establishes a binding sentence maximum. The statutes in *Almendarez-Torres*, *Monge*, and *Jones* each did exactly that.[187] Similarly, nongenerative statutes or regulations limiting the discretion of the sentencing judge by regularizing sentencing procedures and factfinding do not define new "crimes" (because they are not generative statutes).[188] The maximum sentences position provides a constitutional definition of "crime" that is generally deferential to the substance of the criminal law and to the regulation of sentencing procedure.

5. The Any-Nonmitigating-Fact Position. The any-nonmitigating-fact position is perhaps the clearest of the various constitutional tests, but the legislative choice it compels is not consistent with the Constitution's basic distinction between trial and punishment. Under the any-nonmitigating-fact position, every factual determination that does not play a mitigating role for

185. *See supra* notes 108-111 and accompanying text.

186. *See supra* note 111. Other effects, such as mandatory minimums, which operate underneath the maximum, merely determine the sentence imposed for the offense and also do not create new "crimes"—the scope of a "crime" defined by its maximum possible sentence.

187. *See* Monge v. California, 118 S. Ct. 2246, 2256 (1998) (Scalia, J., dissenting) ("I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime."); Almendarez-Torres v. United States, 118 S. Ct. 1219, 1244 (1998) (Scalia, J., dissenting) ("I would find that § 1326(b)(2) establishes a separate offense . . . ."); *see also supra* notes 108-110 and accompanying text.

188. In the federal drug laws, the binding maximum sentence levels based on precise quantities of various drugs do appear in the generative statutes. Therefore, Justice Scalia would likely conclude that these statutes stated multiple "crimes," and thus that drug type and amount are elements of those offenses. *Cf. supra* note 178 (discussing the federal drug offenses).

the defendant must be an element of the offense—it is "necessary to constitute the crime" as a matter of constitutional, not simply statutory, construction. In other words, all nonmitigating facts must be parts of "crimes"; they cannot be used at only the punishment stage. This position thus flatly rejects the dichotomy between generative criminal statutes and nongenerative sentencing regulations: No matter how the legislature labels it, a nonmitigating fact must be proved as an element. This is a tenable definition for a "crime": Any facts used to define prohibited (that is, nonmitigating) conduct are parts of crimes; sentencing is only a formality of punishment imposition, not a time for additional nonmitigating facts to be considered.

This definition of a "crime," however, compels the legislature to adopt some form of a determinate sentencing system because no additional nonmitigating facts may be considered after the trial. The consequence is to give the legislature two choices. In one, the legislature could abandon individualized sentencing—all defendants convicted of each crime (robbery, murder, petty theft, and so on) would receive the same sentence regardless of the facts of their cases. In the other, the legislature could retain individualized sentencing by enacting a highly detailed and extremely micromanaged criminal code—the prosecutor would select precisely the elements to meet the defendant's conduct (such as assault, assault with intent to injure, assault while possessing a gun, assault with intent to injure while possessing a gun, *ad infinitum*). Under such a finely tuned criminal code, each different assortment of facts has a determinate punishment, so individualized punishment is achieved not in a factfinding sentencing proceeding but in the selection of facts revealed by the prosecution's charge(s) and the jury's conviction(s). Thus, the any-nonmitigating-fact position is not at all deferential to the legislature.

The any-nonmitigating-fact position should not be adopted—despite its intellectual clarity—because it will produce results inconsistent with long-accepted constitutional principles. First, its definition of a "crime" does not fit the Constitution's distinction between trial and punishment. Although the Constitution permits determinate sentencing, our constitutional history and practice also demonstrate that judges always have exercised discretion to consider additional facts not proved at trial during a sentencing proceeding.[189] The Constitution has never been interpreted to *require* determinate sentencing, which is the conclusion the any-nonmitigating-fact position compels. Second, while the any-nonmitigating-fact position is the most protective of defendants' rights by extending full criminal procedural protections to all nonmitigating factual determinations, the Constitution cannot fairly be read to command that outcome. This is a battle already fought and lost; not every fact that might be important to the defendant's sentence must be an element. The simplest example is also the most visceral: The Constitution does not require that even the aggravating factors proved by the government as justifications for imposing the death penalty—surely the most nonmitigating factual determinations of all—

189. *See, e.g.*, *supra* notes 7-19, 171, and accompanying text.

must be proved as elements under full trial procedures.[190] Although the any-nonmitigating-fact position is simple to understand and administer, adopting it would require a radical break with the Court's contemporary constitutional interpretation not only in this area, but in other, more well-developed fields of jurisprudence.

6. The Historical Elements Position. The Court and many Justices have acknowledged, often in dicta, that it is troublesome when the legislature rewrites its statutes to ease the government's burden of proof by altering the elements of traditional offenses. For example, Maine in *Mullaney* and New York in *Patterson* in effect were tinkering with the well-established *mens rea* elements of murder and manslaughter.[191] Yet the legislature should not be allowed to avoid *Winship* by redefining the traditional elements of long-established crimes.[192] In light of the constitutional text, however, this concern is not really part of the elements/sentencing factors issue. The problem is not that the state is easing the government's burden by shifting a traditional element into a sentencing factor; the problem is that the state is altering the elements of a "crime" it no longer has the right to redefine. In other words, the argument is that continuous practice and understanding have constitutionalized the status of certain "crimes" or portions thereof, be they the standard state common law crimes (such as murder and manslaughter, or burglary, or arson) or codified state or federal offenses. To remove the *mens rea* gradations from homicide is to alter a "crime" that the people (through the constitutional decisions of the Supreme Court) view as so long established that its definition is immune from legislative abrogation.

Under the historical elements position, the issue is not whether the disputed facts are elements or sentencing factors, but whether a specific offense is itself directly included in the constitutional "crime" category; its elements are constitutionally required elements not because of a test or definition of the Constitution's "crime," but because the offense *is* a constitutional "crime." This constitutional "gloss"[193] or "long-continued practice"[194] limits the legislature's power to redefine its criminal code. That some crimes may be constitutionalized in whole or in part does not affect the choice of the constitutional definition for elements/sentencing factors purposes, because the two issues are based on dif-

190. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 647 (1990) (holding that the findings of fact supporting the imposition of a capital sentence need not be made by a jury); Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam) (holding that capital sentence aggravating factors are not elements of the offense which require jury determination, but may be determined through factfinding by the judge alone).

191. *See supra* text accompanying notes 21-41.

192. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 89-90 (1986); Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975); *id.* at 706 (Rehnquist, J., concurring); *see also* Brief for the United States at 48, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203).

193. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

194. United States v. Midwest Oil Co., 236 U.S. 459, 469, 474 (1915).

ferent theories of what type of "crime" (specific offenses or general legislative power, respectively) is involved.

In addition, the historical elements position has very limited applicability. The instances of crimes or elements of crimes that are so embedded that they can no longer be revised are few and far between. Only the most obvious cases (such as homicide *mens rea*) will be easily resolved by the historical elements position. For almost every contemporary criminal offense, whether a given type of factual determination is a traditional element of an "historical" crime is rarely, if ever, clear—and in almost every case it probably is not. For example, Justice Powell argued that allowing affirmative defenses for an unloaded or inoperative gun, or for a reasonable belief about a statutory rape victim's age, or for corporate due diligence do not undermine the constitutional criminal procedure protections because these "new" affirmative defenses do not eliminate elements of traditional crimes in the way, for example, the New York homicide *mens rea* provision in *Patterson* did.[195] Similarly, in *Almendarez-Torres*, the Court argued that "recidivism[] is a traditional, if not the most traditional" nonjury-triable sentencing factor;[196] the dissent insisted that while the Court's decisions do show that recidivism sentencing enhancements do not constitute a second punishment for the first offense under the Double Jeopardy Clause, the decisions have "not allowed recidivism to be determined by a judge as more likely than not."[197] Likewise, the *Jones* briefs could not disagree more strongly about historical practice: Serious bodily injury "is the type of fact that has historically been determined, and is best determined, by a jury beyond a reasonable doubt,"[198] but "the question of victim harm . . . is 'as typical a sentencing factor as one might imagine.'"[199]

In the end, the historical elements position serves as an outer limit on legislative power, but it does not resolve the core elements/sentencing factors question in dispute. With the exception of a few easily recognizable situations, almost every law the legislature enacts will not violate this rule. The historical elements position makes a new *Mullaney* case easy to decide. It does not help, however, to determine the outcome in *Almendarez-Torres*, *Monge*, or *Jones*; most criminal offenses lack a deeply embedded history and practice that could create an historical elements position violation. A few crimes may become so well established that they cannot be altered; for these crimes, the historical elements position defines "crime" in a way that resolves the case. As with the factors analysis position, the historical elements position serves as a reminder that the Court should not be deferential when the legislature exceeds its appropriate powers in defining criminal offenses and their elements and sentencing factors. The Constitution's "crime" cannot be defined *only* by the historical

195. *See* Patterson v. New York, 432 U.S. 197, 229-30 & n.14 (1977) (Powell, J., dissenting).

196. Almendarez-Torres v. United States, 118 S. Ct. 1219, 1230 (1998).

197. *Id*. at 1238 (Scalia, J., dissenting).

198. Brief for Petitioner at 15, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203).

199. Brief for the United States at 23, *Jones* (No. 97-6203) (quoting *Almendarez-Torres*, 118 S. Ct. at 1224).

elements position, however, because the position applies to a much narrower constitutional issue. To resolve the broader elements/sentencing factors constitutional question, the historical elements position must be supplemented by another theory, such as the pro-government or maximum sentences position. Thus, the historical elements position is a necessary but not sufficient part of the definition of a constitutional "crime."

7. The Facts-of-the-Offense Position. The facts-of-the-offense position is initially attractive, but it suffers from theoretical difficulties that preclude its adoption as the constitutional test. The distinction between facts related to the offense and facts related to the offender is an intuitive one. The distinction is also sensible in terms of the constitutional text: Facts relating to the circumstances of the present commission of a "crime" are different from facts relating solely to the character or past behavior of the person who allegedly committed that "crime." The structure of the facts-of-the-offense position is easy to understand and apply.

Unfortunately, the position has two theoretical flaws. First, it conflicts with established constitutional principles. The facts-of-the-offense position is comparable to the any-nonmitigating-fact position in all respects except that the facts-of-the-offense position does not require element status for offender-related nonmitigating factual determinations. In other words, the petitioner in *Jones* adopted Justice Stevens's position, modified to accommodate the holding of *Almendarez-Torres* that the offender-related fact of recidivism may be a sentencing factor. The facts-of-the-offense position still asserts that other, offense-related nonmitigating factual determinations must be proved as elements. This assertion, therefore, suffers from the same defects as the any-nonmitigating-fact position: It compels determinate sentencing contrary to accepted doctrine, and it follows a rule more protective of defendants than the Court has ever required.[200]

The second theoretical flaw is that, although the distinction between offense- and offender-related facts is intuitive, there is no sound theoretical reason for *making* the distinction as a matter of constitutional law. Why should all facts of the offense be proved as elements, but not facts relating to the offender? The *Monge* majority suggested the risk of prejudice to the defendant as one explanation.[201] Some facts—like recidivism in *Almendarez-Torres*[202]—may be so prejudicial that "fairness calls for defining [that] fact as a sentencing factor. A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved."[203] But as the *Monge* Court's own example shows, it is not only offender characteristics that may be highly prejudicial. Furthermore, Justice Scalia's *Monge* dissent persuasively insists that it would never be necessary to

200. *See supra* Part V.B.5.
201. *Cf.* FED. R. EVID. 404 (generally excluding offender-related character evidence).
202. *See Almendarez-Torres*, 118 S. Ct. at 1226.
203. Monge v. California, 118 S. Ct. 2246, 2250 (1998).

exclude *any* fact from jury trial and proof beyond a reasonable doubt requirements: "Even if I agreed that putting a defendant to such a choice would be fundamentally unfair . . . , for example, when one of the elements involves the defendant's prior criminal history[], the trial can be bifurcated without sacrificing jury factfinding in the second phase."[204] Thus, the risk of prejudice is not a satisfactory reason for separating out offender facts—bifurcating the trial preserves element status while ensuring that the prejudicial element does not color factfinding on any other element. Another possible reason for distinguishing between offense and offender facts, if it is provable, would be a traditional practice of treating offender characteristics this way. Again, however, the opportunity for bifurcation at trial undermines the persuasiveness of such a practice. Therefore, while the facts-of-the-offense position draws an attractive distinction, there is no sound theoretical explanation to justify the adoption of that distinction as a constitutional rule. Unless such a reason is developed, the facts-of-the-offense position should be rejected by the Court.

8. Conclusions from the Proposed Constitutional Tests. Only two of the proposed constitutional tests provide workable, complete definitions of the Constitution's "crime" language. The pro-government position is highly deferential to the legislature, and places no significant constitutional limitations on which facts may be elements or sentencing factors. The maximum sentences position is also deferential, limiting the legislature only to the extent that the position imposes a constitutional definition of "crime" linked to the factual findings needed to impose binding maximum sentences.

The other proposed tests are not suitable for use as the Court's constitutional test for the elements/sentencing factors question. The procedural due process position might temporarily mute the issue, but cannot solve the theoretical conflict in the long term. The any-nonmitigating-fact position is powerful, but it would require too great a break with traditional practice and contemporary constitutional principles. The facts-of-the-offense position suffers from similar flaws while facing the additional problem that it lacks a sound theoretical reason for making the distinction it draws. Finally, the factors analysis and historical elements positions have merit, but each is by itself insufficient as a constitutional test. The factors analysis test elaborates the outer limits that the Constitution and Due Process Clause place on the legislature's power, while the historical elements position explains why certain traditional crimes or elements may not be altered by the legislature. These two narrow, collateral limitations will remain in effect whether the pro-government or maximum sentences position is adopted.

In selecting the constitutional test, the Court should choose between the pro-government position and the maximum sentences position, while preserving the restrictions of the factors analysis position and historical elements position in extreme cases.

---

204. *Id*. at 2255 n.1 (Scalia, J., dissenting).

C. The Decision: Choosing the Constitutional Test

The choice between the pro-government position and the maximum sentences position is not an obvious one. The decision must be based on which test provides the better definition of "crime" in the Constitution and the more convincing accommodation of the constitutional interests at stake: judicial deference to the legislature and the constitutional protections in criminal procedure.

In many respects, the two positions are quite similar. Both the pro-government position and the maximum sentences position accept the distinction between generative criminal laws and sentencing schemes. Under either test, if the legislature merely seeks to limit sentencing discretion generally, by a regularization statute or regulations akin to the federal Sentencing Guidelines, then those nongenerative rules may be sentencing factors even when they involve factfinding.[205] Similarly, both positions agree with the holding in *McMillan* that the imposition of a mandatory minimum does not require proof as an element.

The positions diverge, however, on the facts of the most recent cases. For example, the *Monge* Court concluded that the maximum possible increased sentence available after the application of California's recidivism enhancement (fourteen years) was constitutionally proportional to the sentence otherwise available (seven years) for the offense of which Monge was convicted, using a minor to sell drugs.[206] Justice Scalia's dissent, by contrast, insisted that because Monge's sentence of eleven years exceeded the seven-year maximum in the drug-selling statute, Monge had been sentenced for an aggravated crime of which he had not been convicted; the recidivism allegation had not been proven to the jury beyond a reasonable doubt.[207]

Similarly, the two positions disagree about the proper disposition of *Jones*. The pro-government position would find no constitutional difficulty in the sentence imposed on Jones: The serious bodily injury sentence enhancement may

---

205. Under the pro-government position, sentencing factors created in generative statutes also are constitutional. Under the maximum sentences position, by contrast, factfinding tied to the defendant's maximum possible sentence in the generative statute must be made as elements of the offense. *Cf.* Edwards v. United States, 118 S. Ct. 1475 (1998). Justice Breyer, for the Court, argued the following:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed [under the Guidelines] *exceeded* the maximum that the statutes permit for a cocaine-only conspiracy. . . . But, as the Government points out, the sentences imposed here were *within* the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner.

Id. at 1477-78 (emphasis added). So long as the final sentence imposed is no greater than the maximum provided for the "crime" in the generative statute, the use of nongenerative sentencing factors is constitutional. *See id.* at 1477 (citing United States v. Watts, 519 U.S. 148 (1997) (per curiam) (upholding consideration under the Guidelines of conduct for which the defendant was acquitted); Witte v. United States, 515 U.S. 389 (1995) (holding that uncharged conduct may be considered when calculating sentence under the Guidelines)).

206. *See Monge*, 118 S. Ct. at 2251 ("That increase falls well within the range that the Court has found to be constitutionally permissible. *See Almendarez-Torres* . . . (upholding a potential 18-year increase to a 2-year sentence).") (citation omitted).

207. *See id.* at 2256 (Scalia, J., dissenting) ("I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime."); *cf. infra* note 212 (discussing sentence enhancement provisions).

be permissibly determined as a sentencing factor. The maximum sentences position, by contrast, would reverse Jones's sentence. The carjacking statute does not permit a sentence in excess of fifteen years without proof that serious bodily injury or a death resulted, so such a provision is a generative statute maximum sentence.[208] Jones was sentenced, however, to twenty-five years, but the allegation of serious bodily injury was not proved as an element of the offense. Therefore, the length of Jones's sentence violates the Constitution under the maximum sentences position. It is for *Jones* and cases with similar divergences between the pro-government position and the maximum sentences position that the choice of the constitutional test is important.

In the final analysis, the maximum sentences position is the superior constitutional interpretation because it provides the better definition of a constitutional "crime." As with the pro-government position, the legislature retains the power to determine the facts that must be proved to declare guilt and the power to establish the maximum sentence to be imposed on the convicted defendant based on those facts. When, however, the legislature limits the maximum sentence for specific facts in the generative statute, each such mandatory subsidiary maximum is a new "crime" under the maximum sentences position, and the factual determination that bumps one up to the other is thus an element of the more severe crime.

By contrast, the pro-government position imposes no definition of "crime" at all—the elements of an offense are only what the legislature says they are. A defendant can complain that the government failed to prove the "crime" of conviction only in the unusual case that the prosecutor somehow failed to read the statute properly. This definition of "crime" is overly deferential to the legislature, given that interests of a constitutional magnitude (the Fifth and Sixth Amendments) are at stake. Even under the deferential *Blockburger* double jeopardy doctrine, for example, there is some constitutional limitation: Two crimes can be the "same offense"—even if the legislature enacts and codifies them separately—if each does not contain an element not required by the other.[209] Yet the pro-government position asserts that the Constitution says absolutely nothing about how to define a "crime" in resolving the elements/sentencing factors question.

The pro-government position's definition of "crime" is not as persuasive as that provided by the maximum sentences position. The Fifth and Sixth Amendments provide strong procedural protections for defendants on trial for a "crime." If "crime" has no meaning other than that given it by the legislature, however, the constitutional magnitude of these protections is destroyed. The maximum sentences position imbues the Constitution's "crime" language with meaning, and thereby imposes some limits on the legislature's ability to evade constitutional protections.[210] As in double jeopardy, the constitutional

208. *See supra* note 110 and accompanying text.

209. *See supra* notes 168-170, 177, and accompanying text.

210. This difference between the pro-government and maximum sentences positions is illustrated

by reconsidering the hypothetical statute posed by Justice Scalia (quoted at the beginning of this note), under which the only criminal offense is knowingly causing injury to another, punishable by up to *30 days* imprisonment, but accompanied by a detailed system of sentence enhancements. *See supra* text accompanying note 3. Under the pro-government position, this statute passes constitutional muster so long as the sentence imposed is proportional and does not otherwise violate the Constitution (that is, there is no violation of the factors analysis position, the historical elements positions, or of collateral principles such as unconstitutional vagueness or the Ex Post Facto Clause). The defendant's offense of conviction could be the 30-days knowingly-causing-injury offense, but his sentence could be twenty-five years because he used a firearm, caused serious bodily injury, and the victim was a police officer.

Under the maximum sentences position, however, no sentence may be imposed under this statute in excess of 30 days, no matter how egregious the facts. Facts used to impose a greater sentence must be proved as elements of the offense. This conclusion, however, reveals what could be seen as a weakness in the maximum sentences position. Suppose the legislature had instead provided that knowingly causing injury to another shall be punishable by up to *life imprisonment*, with a detailed set of sentencing guidelines for judges to follow when determining the defendant's sentence in the zero-to-life range, premised on a nongenerative "base offense" sentence of 30 days. This statute would not violate the maximum sentences position: The generative statute provides a maximum of life imprisonment for the crime's facts. The nongenerative sentencing regulations may increase or decrease the defendant's sentence from the 30-days baseline without violating the Constitution, for all sentences up to and including the single maximum in the generative statute—life imprisonment.

Thus, the maximum sentences position does not limit the power of the legislature to evade constitutional criminal procedure protections by providing for draconian sentences for simple offenses. If Congress is willing to enact a law providing for—in the generative statute—life imprisonment for damage to property, *cf. supra* notes 82-83 (discussing the religious property defacement statute), and to rely on the nongenerative Sentencing Guidelines to ensure that graffiti is not punished as severely as arson, then the maximum sentences position does not prohibit such an outcome.

This result is not necessarily troublesome because of the elements/sentencing factors issue, however. In some respects, the elements/sentencing factors issue is locked in a chicken-and-egg dilemma with the severe punishments currently in favor in most legislatures. For example, suppose—under the life-imprisonment-maximum generative statute, which satisfies the maximum sentences position—a property damage crime caused serious bodily injury to a victim, and the defendant was accordingly sentenced to twenty years in prison under the Sentencing Guidelines. If one finds this result troubling, is it because the victim injury facts were not proved to the jury, or because the sentence is twenty years when the offense of conviction is "throwing a bucket of paint on a wall"? Transcript of Oral Argument at 30, Jones v. United States, 119 S. Ct. 1215 (1999) (No. 97-6203), *available at* 1998 WL 713483. The answer is probably the latter. Similarly, are criticisms of the drug laws' punishments mainly focused on the argument that drug amounts should be proved to the jury, or that being sentenced to 5 to 40 years in prison—on the first offense—for five grams of crack cocaine or one gram of LSD, *see* 21 U.S.C. § 841(b)(1)(B) (1994), is simply too harsh? *See, e.g.*, Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335 (1995) (criticizing the severity of penalties for federal drug offenses). The latter concern is often the dominant one. If that is the case, then using the maximum sentences position is still a sound answer to the elements/sentencing factors constitutional question. The position functions as an intellectually comfortable definition of a "crime" so long as the maximum sentences available in the generative statutes are reasonably related to the severity of those offenses.

Arguments that legislatures are out of control, and that the available maximum sentences for crimes need to be reined in, are not best resolved by requiring constitutionally that the facts justifying those outrageously high maxima to be proved to the jury. The legislatures will simply rewrite the laws to meet that requirement, and the problem of sentence severity will not be solved. Instead, the attack must focus on the heart of the matter, the lack of reasonable proportionality between the severity of crimes and the sentences imposed. That issue, however, does not affect the elements/sentencing factors question, but should be resolved by political pressure or other constitutional principles (such as a more rigorous Eighth Amendment proportionality doctrine), not by expanding the range of facts proved as elements of the offense.

test does not micromanage the criminal code,[211] but it does not put defendants' rights at the will and whim of the legislature's labels.

The maximum sentences position also provides a better explanation of the constitutional interests at stake when defining "crime" in the elements/sentencing factors context. The defendant's most important interest, Justice Scalia argues, is understanding the government's accusation in terms of the maximum possible sentence to which the defendant is exposed. The facts the government must prove as elements are those that determine the maximum sentence; sentence enhancement provisions cannot increase the sentence *above* this maximum without also being proved as elements of the offense.[212] Any fact that determines the sentence *within* that maximum—be it an enhancement above an intermediary nongenerative baseline (as in the federal Sentencing Guidelines), or a mandatory minimum, or so on—may permissibly be proved as a sentencing factor. The legislature is required to designate as elements of the offense in the generative statute only those facts that will determine the maximum possible sentence, while intermediate determinations may be sentencing factors. The defendant receives the Constitution's procedural protections for criminal trials on all facts that determine his "crime"—that is, his maximum possible exposure to deprivation of life, liberty, or property—but not on facts that calculate the appropriate level of sentence within that range.

The maximum sentences position will not be satisfactory to all critics. Under this position, there are still many very significant sentencing determinations made only by a judge and without the rigorous procedural protections of the Constitution (or even the Rules of Evidence[213]), such as mandatory minimums

---

211. *Cf. supra* notes 169 and accompanying text & 177 (noting that the Court has rejected a "same conduct" test in double jeopardy, and arguing that the Court should similarly reject a conduct- or any-facts-based test in this area).

212. Sentence enhancement provisions may appear in nongenerative statutes (such as the provision in *Monge*, which created a sentence enhancement for recidivism available for application to offenders convicted of many different generative statute crimes), or within a single section of a generative statute (such as the provisions applied in *Almendarez-Torres* and *Jones*, which were specific to the offenses of conviction in those cases). Under the maximum sentences position, neither type of sentence enhancement can increase the sentence above the maximum—including a mandatory subsidiary maximum—in the generative statute creating the offense of conviction. If, however, the facts underlying the sentence enhancement are proved to the jury beyond a reasonable doubt, then a conviction for an additional "crime" *has* taken place. In essence, an additional offense of conviction is entered, and the constitutionally permissible maximum sentence would include the provisions of both the sentence enhancement and the original offense.

A prominent situation in which this rule has important consequences is the application of hate crime legislation. For example, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Court unanimously held that a sentence enhancement provision that increased the defendant's sentence because he intentionally selected his victim because of race did not violate the First Amendment. No mention of the elements/sentencing factors constitutional question appeared in the opinion. In fact, however, the defendant had been convicted by the jury only of aggravated battery, which carried a maximum sentence of two years; the enhanced sentence imposed was four years. *See id.* at 480-81. Under the maximum sentences position, that enhancement was not constitutionally proper—because the facts proved to the jury only permitted a maximum sentence of two years under the aggravated battery conviction—unless the enhancement's underlying facts (that is, the intentional racial selection of the victim) were also proved to the jury beyond a reasonable doubt.

213. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (1998) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant

or aggravating factors within the statutory range. This situation poses grave risks to defendants. Perhaps it would be sound criminal procedure policy to afford defendants more rights in sentencing than they currently are provided. Adopting the maximum sentences position does not foreclose such developments. Rather, it merely means that, as a *constitutional* matter, the government has met its burden so long as the factual determinations of guilt or innocence and the maximum possible sentence are made under the elements-of-the-offense procedures. Such a conclusion is not an odd result: The Constitution, after all, declares only the minimum standards to which the people hold the government; it is often a good idea to do much more. The maximum sentences position should be adopted as the solution to the elements/sentencing factors question because it provides the best interpretation of the constitutional issue.

VI

A MISSED OPPORTUNITY

The Supreme Court decided *Jones v. United States* on March 24, 1999, shortly before this note went to press and five and a half months after oral argument.[214] The Court reversed and remanded in a 5-4 decision[215] without reaching a disposition on the merits of the elements/sentencing factors constitutional question—the holding of the case is limited to the interpretation of the carjacking statute alone.[216] The opinions also reveal, however, that the Court may be close to resolving the constitutional issue.

The *Jones* majority opinion held that the carjacking statute itself creates "three distinct offenses."[217] The Court argued that this was the proper reading as a matter of statutory interpretation. The opinion reviewed the statute's structure and unclear grammar, the elements of state robbery statutes and of the federal robbery statutes that were the models for the carjacking offense, and the ambiguous legislative history.[218] Serious bodily injury, the Court concluded, was intended by Congress to be an element of the offense of an aggravated carjacking crime within 18 U.S.C. § 2119. Jones's appeal thus succeeded: The Court agreed that he could not be sentenced to a term of imprisonment greater than fifteen years unless the government proved the serious bodily injury allegation to a jury beyond a reasonable doubt.[219]

---

information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.").

214. *See* 119 S. Ct. 1215 (1999).

215. Justice Souter wrote the majority opinion, joined by Justices Stevens, Scalia, Thomas, and Ginsburg. Justice Kennedy's dissent was joined by Chief Justice Rehnquist and Justices O'Connor and Breyer.

216. *See* 119 S. Ct. at 1217.

217. *Id*.

218. *See id*. at 1219-22.

219. *See id*. at 1228 ("The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.").

The majority opinion, however, further justified its statutory interpretation with an extensive discussion of the "constitutional doubt" that would arise were the serious bodily injury fact treated only as a sentencing factor.[220] The Court examined *Mullaney*, *Patterson*, and *McMillan*,[221] distinguished *Almendarez-Torres* and the capital sentencing cases,[222] and discussed the historical power of juries to determine not only the facts but also the defendant's ultimate fate.[223] This analysis led the majority to conclude that if the sentencing gradations in the carjacking offense were only sentencing factors, there would be grave doubts about the statute's constitutionality because it would violate the maximum sentences position.[224] Despite the support of a majority of the Court for the maximum sentences position, however, the *Jones* majority opinion did not adopt directly the maximum sentences position as the constitutional rule; instead, the discussion was restricted to the doctrine of constitutional doubt.

The *Jones* dissenters rejected both parts of the majority opinion. First, the dissent argued that the carjacking statute defined only one offense, with proof of serious bodily injury made as a sentencing factor.[225] Second, the dissenters insisted that interpreting serious bodily injury as a sentencing factor did not call into question the statute's constitutionality: "[T]he Court's constitutional doubts are not well founded."[226] Relying on its interpretation of *Almendarez-Torres*, the dissent insisted that the constitutional question was closed.[227]

In one respect, therefore, the *Jones* decision made no headway in resolving the elements/sentencing factors constitutional question—a majority of the Court has yet to pass definitively on the issue. From another perspective, *Jones* may be a turning point: It marked the first case since *Mullaney* in which the Court rejected on constitutional grounds the government's argument on the elements/sentencing factors issue, albeit only in the form of constitutional doubt, not a constitutional holding. Whether *Jones* ultimately will be described as a landmark decision, however, remains unclear. Four Justices repeatedly have rejected the adoption of a constitutional test, and, if forced to decide the constitutional question, presumably would favor the pro-government posi-

---

220. *See id*. at 1217, 1222-1228.

221. *See id*. at 1222-24.

222. *See id*. at 1226-27 & n.10 (distinguishing *Almendarez-Torres* because its holding was limited to the narrow issue of proof of recidivism); *id*. at 1227-28 (arguing that the capital sentencing cases "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available.").

223. *See id*. at 1224-26. "The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." *Id*. at 1226.

224. *See id*. at 1222, 1224 & n.6, 1228 n.11.

225. *See id*. at 1230-34 (Kennedy, J., dissenting).

226. *Id*. at 1236 (Kennedy, J., dissenting). In effect, therefore, the dissent called for the adoption of the pro-government position as the constitutional rule.

227. *See id*. (Kennedy, J., dissenting). The dissent also suggested that the maximum sentences position can be evaded by legislative drafting, *see id.* at 1235-36 (Kennedy, J., dissenting), an argument refuted in this note, *see supra* Part III.B.2.

tion.[228] On the other hand, two Justices expressly have committed to the maximum sentences position as a constitutional rule,[229] and two Justices implicitly have done so.[230] Justice Thomas, without separate comment, determined the result in *Jones*. Perhaps he has not settled his views on the elements/sentencing factors constitutional question,[231] although the *Jones* majority opinion included several clues that suggest otherwise.[232] It seems likely that Justice Thomas—or

228. Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer each joined the dissent in *Jones* as well as the majority opinions in *Almendarez-Torrez* and *Monge*.

229. In *Jones*, Justice Scalia reaffirmed his commitment to the maximum sentences position as a constitutional requirement, *see* 119 S. Ct. at 1229 (Scalia, J., concurring), while Justice Stevens remains willing to go even further, *see id*. at 1228-29(Stevens, J., concurring).

230. Justices Ginsburg and Souter joined without separate comment Justice Scalia's dissents in *Almendarez-Torres* (asserting constitutional doubt) and *Monge* (asserting constitutional *violation*), and voted with the majority in *Jones* (asserting constitutional doubt).

231. Without separate comment, Justice Thomas joined the majority opinions in *Almendarez-Torres* and *Monge*, each of which directly confronted and rejected the constitutional arguments of Justice Scalia's dissents in those cases. In *Jones*, however, Justice Thomas joined—again without separate comment—the majority opinion by Justice Souter, which in part expressly relied on the same constitutional doubt arguments previously expressed in Justice Scalia's dissents.

232. If Justice Thomas's vote in *Jones* truly depended on only the statutory interpretation arguments, he easily could have joined Part II but not Part III of Justice Souter's majority opinion; such a vote would have preserved the outcome without supporting the constitutional doubt reasoning. In fact, it would have been possible for Justice Thomas to join Part II of Justice Kennedy's dissent (which reasserted the constitutional position Justice Thomas had joined in *Almendarez-Torres* and *Monge*) but also to join Part II of Justice Souter's majority opinion, thereby forming a five-Justice majority for the pro-government position on the constitutional issue but holding that the carjacking statute itself established serious bodily injury as an element of the offense. Justice Thomas's actual vote in *Jones*, however, did neither of these—he joined both the statutory and constitutional analyses of the majority.

Several statements in the *Jones* majority opinion may provide insight on Justice Thomas's decision. First, the majority repeatedly asserted that *Jones* is not controlled by *Almendarez-Torres*. *See* 119 S. Ct. at 1219 ("Because of features arguably distinguishing this case from *Almendarez-Torres* . . . we granted certiorari . . . ."); *see also id*. at 1220. In particular, the Court emphasized that the holding in *Almendarez-Torres* depended upon, and was limited by, the fact that recidivism, and not some other type of factual finding, was used to increase the maximum possible sentence in that case. *See id*. at 1226-27 & n.10. This distinction was also apparent in the majority's formulation of the maximum sentences position: "[A]ny fact (*other than prior conviction*) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id*. at 1224 n.6 (emphasis added). The majority suggested one reason recidivism was distinguishable: "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established" under elements of the offense procedures; that is, the recidivist defendant *already* has received the full constitutional procedural protections on those facts, and therefore does not need to be given those protections a second time before recidivism is used to increase the maximum possible sentence. *Id*. at 1227. This argument, if accepted, eliminates any inconsistency between the holding of *Jones* and the holdings of *Almendarez-Torres* and *Monge*.

A second argument repeated by the majority is that the maximum sentences position, even if adopted as a constitutional rule, would not interfere with legislative power. The Court noted that the maximum sentences position only limits the *procedures* used to determine the defendant's maximum sentence; it does not limit the substance of what facts the legislature may declare to be relevant in calculating sentence. *See id*. at 1224 n.6, 1228 n.11. Thus, the Court concluded that the maximum sentences position is sufficiently deferential to the legislature: The rule "would in no way hinder the States (or the National Government) from choosing to pursue policies aimed at rationalizing sentencing practices." *Id*. at 1228 n.11.

Third and finally, the majority opinion included a lengthy historical explanation of the right to jury trial and the practice of jury nullification. *See id*. at 1224-26. This discussion concluded by arguing that preserving the Sixth Amendment's original principles might require the maximum sentences position as a constitutional rule. *See id*. at 1226.

perhaps the next Justice elevated to the Court—will control the outcome of future cases on this issue.

Despite the opportunity to do so, the Court did not resolve the elements/sentencing factors constitutional question in *Jones*. Rather than face an endless stream of *certiorari* petitions from defendants citing the *Jones* constitutional doubt analysis to support their claims that their statutes of conviction also require a similar interpretation, the Court should hold definitively—and as soon as possible—that the maximum sentences position does not merely raise doubts, but is a constitutional rule.

VII

CONCLUSION

The elements/sentencing factors constitutional problem is not an easy one to resolve. Does the Constitution entirely defer to the legislature on the determination of which facts are "necessary to constitute" a crime and therefore must be proved as elements of the offense (that is, with the full constitutional criminal procedure protections of jury trial and proof beyond a reasonable doubt), and which facts merely relate to the "severity of punishment" and may be proved as sentencing factors? The pro-government position provides a strong argument for such deference. The better constitutional interpretation, however, is the maximum sentences position. This position defines a "crime" for elements/sentencing factors constitutional purposes as those facts necessary to establish the maximum sentence to which the defendant is exposed under the generative criminal statute for which the jury convicted him at trial. In the generative statute, the legislature must specify those facts and must set the binding maximum sentence for the facts chosen. The legislature is also free to provide sentencing judges with no discretion, complete discretion, or some discretion when determining the appropriate sentence for each convicted defendant. Factfinding that results in a sentence within the maximum established in the offense's generative statute may be done at sentencing—that is, by use of sentencing factors. Factfinding that leads to a sentence above the maximum in the generative statute, however, is factfinding about a different "crime" and therefore the determinative facts differentiating the two "crimes" must be

---

Any or all of these arguments, or an argument not revealed in the *Jones* majority opinion, may have persuaded Justice Thomas to join the Court's constitutional doubt analysis. The Court's opinions, furthermore, provided no explanation for why the opinion of the five-Justice majority in *Jones* was *limited* to the constitutional doubt analysis. The constitutional question was raised by a question presented, and was fully briefed and argued. The Court could have adopted the maximum sentences position outright as the constitutional rule, but did not do so. Perhaps Justice Thomas still harbors genuine doubts about the constitutional question. Perhaps Justice Scalia, following the posture of his *Almendarez-Torres* dissent, insisted that the majority—although the votes for adopting the constitutional rule were present—not reach a constitutional decision not *required* by the facts of the case (as would have been the case in *Monge*, but was not in *Jones*). For an unexplained reason, the majority limited its analysis to constitutional doubt rather than handing down a holding with the maximum sentences position as the constitutional rule.

proved as elements of the offense at trial under the Constitution's full criminal procedure protections.

The maximum sentences position does not fully eliminate the criticism that defendants may have very important determinations about their fate (for example, enhancements for uncharged conduct, mandatory minimums, and so on) made only at sentencing and not at trial. The Constitution, however, has never been interpreted to require that every fact affecting a criminal sentence must be proved at trial. At the same time, if there is no constitutional definition of a "crime" at all, then the stringent criminal trial procedural protections can be evaded easily by leaving factfinding of any importance to the sentencing proceeding. The maximum sentences position, therefore, provides the best definition of a constitutional "crime": The Constitution requires that the government prove beyond a reasonable doubt to a jury those facts that will determine the maximum sentence the defendant faces. This maximum is the "crime" for which the defendant is convicted at trial. When sentence is imposed through whatever sentencing factors or guidelines the legislature has chosen to provide, the defendant cannot claim that he has been sentenced for a "crime" for which he was not convicted unless his sentence is greater than the maximum available under the legislature's generative statutes given the facts proved to the jury at the trial. The Constitution does not micromanage criminal sentencing, but it does require that the defendant not be sentenced for a "crime" the government did not prove he committed. The facts proved by the government as elements of the offense establish the maximum possible sentence and thus determine the defendant's "crime."