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### Elements, Sentencing Factors, and the Right to a Jury Trial: An Analysis of Legislative Power and Its Limits

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#### INTRODUCTION

A criminal defendant's sentence is determined not only by facts that must be proven to a jury at trial ("elements" of an offense), but also by facts proven to a judge at a sentencing hearing ("sentencing factors"). Perhaps surprisingly, sentencing factors, such as how a firearm was used, may account for a greater proportion of a defendant's term of imprisonment than elements of the offense.<sup>1</sup> This is worrisome because sentencing hearings are procedurally relaxed in comparison to trials<sup>2</sup> and because the government does not include sentencing factors in its indictment, which means a defendant cannot predict how sentencing factors could impact his or her length of imprisonment.<sup>3</sup>

In its recent decision *United States v. O'Brien*, the Supreme Court has stated that the decision as to whether a given fact is an element or a sentencing factor

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1. See, e.g., *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79, 80-82 (1986).
2. See, e.g., *United States v. Mobley*, 956 F.2d 450, 455 (3d Cir. 1992) ("[A]t the trial stage the accused receives the full panoply of constitutional rights. . . . At the sentencing stage, however, a convicted criminal is entitled to less process. . . ."). At sentencing, the preponderance standard replaces the beyond-a-reasonable-doubt trial standard, the defendant does not have the right to a jury, and the rules of evidence do not apply. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 548-49 (1993). To satisfy the preponderance standard, a judge simply must find that a fact is more than fifty-percent likely to be true, a dramatically lower bar than beyond-a-reasonable-doubt.
3. See, e.g., *Jones v. United States*, 526 U.S. 227, 232 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing [factor], given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.").

is a “question for Congress,”<sup>4</sup> but this seemingly straightforward statement masks some complicated subtleties. Using *O’Brien* as a starting point, this Comment explores the extent to which Congress is theoretically free to make these decisions, and the extent to which Congress makes them in practice.

The argument proceeds as follows. Part I explores the breadth of Congress’s power to label facts as elements or sentencing factors. It finds that, in theory, Congress could minimize fact-finding at trial and substantially undermine the right to a jury trial by labeling facts that trigger dramatic sentence enhancements as sentencing factors. There are constitutional constraints at the extremes, but within the realm of statutes that are politically realistic, the Constitution is not a factor. Part II examines the Court’s “element/sentencing factor” jurisprudence and finds that, despite emphasizing Congress’s authority in this area, the Court sometimes makes the final decisions. This is because, in practice, Congress is often inexplicit about whether a fact is an element or a sentencing factor, leaving the Court free to reach its own conclusions via flexible statutory interpretation and policy analysis. Part III critiques the Court’s policy analysis, argues that the system can and should support more fact-finding at trial, and proposes a first step Congress could take to achieve this goal.

#### I. THE BREADTH OF CONGRESS’S POWER TO REMOVE FACT-FINDING FROM TRIAL

*O’Brien* is the latest of the Court’s element/sentencing factor cases.<sup>5</sup> In this case, the Court addressed section 924(c) of a federal firearms statute, which provides mandatory minimum sentences of five years if a firearm is used in the commission of a violent or drug trafficking crime<sup>6</sup> and thirty years if the firearm is a machinegun.<sup>7</sup> The prosecution in *O’Brien* could not establish beyond a reasonable doubt that the firearm used was a machinegun, so it argued that the machinegun provision was a sentencing factor.<sup>8</sup> This would have allowed the government to prove the type of firearm at the procedurally relaxed sentencing stage where only a preponderance of the evidence is required. The Court rejected the government’s argument, holding that the machinegun provision is

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4. 130 S. Ct. 2169, 2175 (2010).

5. See, e.g., *Harris v. United States*, 536 U.S. 545, 556 (2002) (holding that brandishing a firearm or discharging a firearm are sentencing factors); *Jones*, 526 U.S. at 251-52 (holding that whether serious bodily injury occurred is an element); *Almendarez-Torres*, 523 U.S. at 226-27 (holding that whether the defendant had prior convictions is a sentencing factor).

6. 18 U.S.C. § 924(c)(1)(A)(i) (2006). Section 924(c) is discussed in more detail below. See *infra* Part II.

7. 18 U.S.C. § 924(c)(1)(B)(ii).

8. *O’Brien*, 130 S. Ct. at 2173.

an element.<sup>9</sup> In doing so, however, the Court affirmed Congress's expansive power to define facts as elements or sentencing factors.<sup>10</sup>

When the Court addresses whether a fact is an element or a sentencing factor, the inquiry is framed as a search for "congressional intent."<sup>11</sup> To determine Congress's intent, the Court in *O'Brien* considered "(1) [the statute's] language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history."<sup>12</sup> If Congress's intent is clear from the statute's language and structure, the Court ends its inquiry.<sup>13</sup> In Parts II and III, I discuss how the Court proceeds when it finds that language and structure are not dispositive. Here, I focus on a separate question: If Congress makes its intent explicit, are there constitutional limits to how much fact-finding it can move to the sentencing stage?

*O'Brien* provides useful insight into this question. The opinion suggests that if Congress had explicitly labeled the machinegun provision a sentencing factor, the statute would not have faced constitutional constraints. In other words, the Court in *O'Brien* appears to answer the above question in the negative. The Court repeatedly hints that the holding could have been different if Congress had clearly expressed its intention for the machinegun provision to be a sentencing factor.<sup>14</sup> The Court seemingly decided that the machinegun provision is an element not because the Constitution dictated the result, but because there was not a "clear congressional indication to the contrary."<sup>15</sup>

One could reasonably argue that in reaching this conclusion the Court was motivated by the constitutional avoidance canon, because labeling the machinegun provision a sentencing factor would have raised constitutional doubts.<sup>16</sup>

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9. *Id.* at 2180.

10. *See id.* at 2174-75; *see also Almendarez-Torres*, 523 U.S. at 228 ("[T]he question of which factors are which is normally a matter for Congress.").

11. *See O'Brien*, 130 S. Ct. at 2175.

12. *Id.* (citing *Castillo v. United States*, 530 U.S. 120, 124-31 (2001)).

13. *Id.* at 2176 ("The [second] factor is to be consulted when . . . a statute's text is unclear . . ."). This is an ambiguous moment in the case as it could be read to suggest either that factor one (language and structure) trumps all the others, or that clear language and structure obviates the need to consult tradition but not the need to consult factors three through five. The former is more plausible, as the latter seems unprincipled and would warrant more explicit recognition in the opinion.

14. *See, e.g., id.* at 2180 ("Congress would not enact so significant a change *without a clear indication of its purpose to do so.*" (emphasis added)).

15. *See id.* at 2178.

16. The avoidance canon dictates that the Court interpret a statute to avoid constitutional doubts if multiple interpretations are plausible. *See generally* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL

The Court articulated a vague constitutional rule decades ago in *Patterson v. New York* when it noted that, in reallocating fact-finding from trial to sentencing, “there are obviously constitutional limits beyond which [legislatures] may not go.”<sup>17</sup> While this limitation imposed by the Due Process Clause is vague and quite weak,<sup>18</sup> it is possible that the Court thought the Clause would be violated if the machinegun provision’s thirty-year mandatory minimum sentence were attached to a sentencing factor.<sup>19</sup> However, there is reason to believe this was not the case.

Unlike in prior, related cases, the *O’Brien* Court did not invoke the constitutional avoidance canon explicitly,<sup>20</sup> and the *O’Brien* Court did not cite *Patterson*. The most illustrative prior case is *Castillo v. United States*.<sup>21</sup> *Castillo*, decided

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L. REV. 831, 836-43 (2001) (outlining the history and development of the avoidance canon).

17. 432 U.S. 197, 225 (1977); see also *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). Since announcing the vague limit described in *Patterson*, the Court has acknowledged that it has “never attempted to define precisely [these] constitutional limits.” *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986).
18. See Richard Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 FED. SENT’G REP. 203, 205 (2000) (describing the Court’s warning that clear manipulations of the element/sentencing factor distinction by legislatures would violate Due Process as “a slim reed,” given the Court’s history of tolerating “transparent attempt[s]” by a legislature to avoid trial protections). The fact that the thirty-year mandatory minimum sentence addressed in *O’Brien* could seemingly have been triggered by sentencing factors had the legislature been explicit shows just how slim this protection may be.
19. Another possible constitutional constraint comes from the proportionality requirement of the Eighth Amendment. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (holding that life without parole for nonhomicide juvenile offenders violates the Eighth Amendment because it is a disproportionate penalty). But see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 103 (2003) (“The Court is reluctant to find punishment disproportionate under the Eighth Amendment.”).
20. See *Jones v. United States*, 526 U.S. 227, 239 (1999) (“[W]here a statute is 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.” (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909))); cf. *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) (noting that if a legislature changed statutes in a way that seemed to intentionally undermine the right to a jury trial, the Court “would be required to question whether the revision was constitutional”).
21. 530 U.S. 120 (2000).

ten years before *O'Brien*, addressed the exact same question.<sup>22</sup> The Court reconsidered whether the machinegun provision was an element or a sentencing factor in *O'Brien* because Congress had amended the statute since *Castillo*. The *Castillo* Court reached the same conclusion as the *O'Brien* Court—that the machinegun provision is an element—but openly stated that deciding otherwise “would give rise to significant constitutional questions.”<sup>23</sup> The implication of the *O'Brien* Court’s silence on the same topic is disconcerting: If Congress makes its intention clear, the Court may uphold a statute that allows the imposition of thirty-year mandatory minimum sentences to be based on complex, contested facts found at procedurally relaxed sentencing hearings. This would substantially undermine the right to a jury trial.

The absence of constitutional doubt in *O'Brien* reflects a change in the contours of the Constitution since *Castillo*. This change occurred in *Apprendi v. New Jersey*,<sup>24</sup> which was decided less than a month after *Castillo* and settled doubts about the constitutional limits on fact-finding at sentencing.<sup>25</sup> *Apprendi* held that “[o]ther than . . . a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>26</sup> In many instances, this rule constrains Congress and strengthens the right to a jury trial,<sup>27</sup> but when the statutory maximum is life imprisonment, as it is for section 924(c), which contains the machinegun provision, the rule provides no constraint. When *Castillo* was decided, the Court had doubts that a legislature could constitutionally attach a thirty-year mandatory minimum sentence to a sentencing factor, but *Apprendi* held that so long as the statutory maximum for the crime itself was greater than the sentence assigned, the statute would pass constitutional muster. When the *O'Brien* Court stated that the *Apprendi* rule was the only constitutional constraint on Congress, it implicitly suggested that Congress could have made the machinegun provision a sentencing factor without raising constitutional doubts.<sup>28</sup>

It would seem to flow logically from *O'Brien* that even more troubling statutes would be upheld. For example, imagine that the machinegun provision

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22. *Id.* at 123.

23. *Id.* at 124.

24. 530 U.S. 466.

25. The uncertainty about a potential bright-line constitutional rule relating to elements and sentencing factors was clearly on display in *Jones*, where the majority hinted at the rule that later came to fruition in *Apprendi*. See 526 U.S. at 243 n.6.

26. *Id.* at 490 (emphasis added).

27. See Nancy J. Kling & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1486 (2001) (arguing that the *Apprendi* rule “adds an additional hoop through which legislators must jump before taking action that disadvantages a politically powerless group—those accused of crime”).

28. See *United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010).

provided a mandatory minimum of life imprisonment rather than just thirty years, and imagine that Congress explicitly labeled the machinegun provision a sentencing factor. If the thirty-year mandatory minimum could have been triggered by a sentencing factor had Congress's intent been clear,<sup>29</sup> the same should be true of a mandatory minimum of life imprisonment. Neither offends *Apprendi* when the statutory maximum is life imprisonment.

More troubling still, Congress is free to raise statutory maxima for all criminal statutes. Members of the Court have expressed concern that Congress could make an end-run around the *Apprendi* rule by raising the statutory maximum to life imprisonment for all basic offenses, with the assumption that judges would assign lower sentences unless the government proved aggravating factors (such as machinegun use) at sentencing.<sup>30</sup> This would mean that only the most elementary facts would need to be proven to a jury. Trial's safeguards, including the right to a jury trial, would be eviscerated.

Despite these troubling implications that seem to logically follow from the lack of constitutional doubt expressed in *O'Brien*, it is probably too quick to assume that the Constitution provides no protection against extreme legislative actions like those described in the two paragraphs above. In *Apprendi*, the dissent raised the aforementioned concern about an end-run around the formalistic rule.<sup>31</sup> The majority responded with the warning that, "if such an extensive revision of [a] criminal code were enacted for the purpose the dissent suggests . . . we would be required to question whether the revision was constitutional" under *Patterson's* vague rule.<sup>32</sup> Although the *O'Brien* Court did not cite *Patterson* and even said that the *Apprendi* rule was the only constitutional constraint on Congress, it is possible that the Court would remember *Patterson* and its warning in *Apprendi* if it were faced with sentencing factors even more dramatic than the thirty-year mandatory minimum contemplated in *O'Brien*.

Additionally, practical political constraints are probably sufficient to guard against Congress completely undermining the right to a jury trial by manipulating statutory maxima. As the *Apprendi* majority noted, "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant . . . to a maximum sentence exceeding that which is, in

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29. See *supra* note 14 and accompanying text.

30. The primary dissent in *Apprendi* argues that "the rule rests on a meaningless formalism" because, as noted above, legislatures are free to adjust statutory maxima. *Apprendi*, 530 U.S. at 539-40 (O'Connor, J., dissenting); see also *Jones*, 526 U.S. at 267 (Kennedy, J., dissenting); Singer & Knoll, *supra* note 19, at 205 (discussing a rule the Court mentioned in *Jones v. United States*, which became the *Apprendi* rule, and stating that the "approach might fail to prohibit merely raising all maxima and then 'decreasing' the sentence unless the prosecutor proves (by a preponderance) an aggravating factor").

31. *Apprendi*, 530 U.S. at 539-40 (O'Connor, J., dissenting)

32. *Id.* at 490 n.16; see *supra* note 17 and accompanying text.

the legislature's judgment, generally proportional to the crime."<sup>33</sup> Overhauling the criminal code would be massively expensive and time-consuming, requiring levels of commitment and political coordination that may simply be unrealistic.<sup>34</sup>

Nonetheless, *O'Brien* highlights Congress's surprisingly broad authority to shift fact-finding from trial to sentencing by declaring that facts linked to lengthy mandatory minimum sentences are sentencing factors. While rejecting the result on other grounds, the Court expressed no doubt over the constitutionality of treating the machinegun provision as a sentencing factor. Apparently, the Due Process constraints mentioned above are weak enough that Congress could constitutionally attach a thirty-year mandatory minimum sentence to a sentencing factor. Since statutes more extreme than that seem politically unrealistic, for practical purposes there are no apparent constitutional limitations on Congress's power to move fact-finding to sentencing.

## II. INEXPLICIT DRAFTING AND FLEXIBLE STATUTORY INTERPRETATION

As discussed above, the Court has stressed Congress's power to determine whether a fact is an element or a sentencing factor and the Constitution offers little constraint.<sup>35</sup> Nonetheless, the Court still sometimes has the final say on whether facts are elements or sentencing factors.

*O'Brien* formalized the analysis from the Court's prior element/sentencing factor cases and produced a five-factor test for determining whether Congress intended a fact to be an element or a sentencing factor.<sup>36</sup> The Court appears prepared to defer to clearly expressed congressional intent,<sup>37</sup> but notes, crucial-

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33. *Apprendi*, 530 U.S. at 490 n.16; see also Kling & Klein, *supra* note 27, at 1485-88 (analyzing the structural and constitutional limitations suggested in footnote 16 of *Apprendi*'s majority decision); Singer & Knoll, *supra* note 30, at 205 ("One possible response to this concern is simply to deny that legislatures will feel compelled to manipulate the system.").

34. See, e.g., Rachel E. Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 FED. SENT'G REP. 312, 314 (2004) ("Although the Court's opinions give Congress wide latitude . . . that does not mean that Congress will act on that authority."). Barkow argues that "[t]here is support at the state level for the view that legislatures will not necessarily seek an end-run around *Blakely*" and *Apprendi*, but expresses some concern that "the politics of sentencing at the federal level may prompt Congress to take advantage of the loopholes." *Id.*

35. See, e.g., *United States v. O'Brien*, 130 S. Ct. 2169, 2175 (2010) ("[W]hether a given fact is an element of the crime itself [to be proven to a jury at trial] or a sentencing factor [to be considered by the judge at sentencing] is a question for Congress.").

36. See *supra* text accompanying note 12.

37. See *supra* note 13 and accompanying text.

ly, that Congress is rarely so explicit.<sup>38</sup> Thus, in practice, the Court often relies on factors other than the statute's language. While the inquiry is framed as a search for congressional intent, it may be more fairly described as the Court making its own judgments.<sup>39</sup> The Court's discretion to interpret ambiguous statutes is a practical limitation on Congress's actual power in this area beyond the weak constitutional limitations discussed in Part I.

The Court's much-maligned decision in *Harris v. United States*<sup>40</sup> and its recent decision in *O'Brien* are illustrative. Like *O'Brien*, *Harris* addressed section 924(c). The provision, which was discussed more generally in Part I, reads, in part:

- (A) . . . [A]ny person who, during . . . any crime of violence or drug trafficking, . . . uses or carries a firearm . . . , shall . . .
- (i) be sentenced to . . . not less than 5 years;
  - (ii) if the firearm is brandished, be sentenced to . . . not less than 7 years; and
  - (iii) if the firearm is discharged, be sentenced to . . . not less than 10 years.
- (B) If the firearm . . .
- (i) is a short-barreled rifle . . . , the person shall be sentenced to . . . not less than 10 years; or
  - (ii) is a machinegun . . . , the person shall be sentenced to . . . not less than 30 years.<sup>41</sup>

In *Harris*, the Court held that the "brandishing" and "discharging" provisions are sentencing factors, not elements,<sup>42</sup> a sharp contrast from *O'Brien*, which held that the machinegun provision was an element.<sup>43</sup>

Both *Harris* and *O'Brien* held that the statute's language and structure did not definitively answer whether the provisions were elements or sentencing factors, which seems reasonable, but the contradictory results are confusing. An examination of the statute's language and structure strongly favors either

38. *O'Brien*, 130 S. Ct. at 2175 ("Congress . . . seldom directly addresses the distinction between sentencing factors and elements . . .").

39. My argument is not necessarily that the Court is inappropriately "legislating from the bench"—after all, when faced with an inexplicit or ambiguous statute, it still must decide the case before it.

40. 536 U.S. 545 (2002). For criticism of *Harris*, see, for example, Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 407 (2010), which calls the decision "intellectually indefensible."

41. 18 U.S.C. § 924(c) (2006).

42. *Harris*, 536 U.S. at 555-56.

43. *O'Brien*, 130 S. Ct. at 2180. The *O'Brien* Court did not address the short-barreled rifle provision, but it would be an odd result if that provision were treated as a sentencing factor while the machinegun provision was treated as an element.



treating all the provisions in question as elements or as sentencing factors, not some combination of the two. The language of the machinegun provision is practically identical to the language of the brandishing and discharging provisions.<sup>44</sup> In terms of structure, the machinegun provision and the brandishing and discharging provisions appear in the same tier of the statute's subdivisions. It is hard to imagine that if Congress truly intended for the machinegun provision to be an element and the brandishing and discharging provisions to be sentencing factors that they would appear in such a symmetrical fashion within the statute.

Based on the language and structure of the statute alone, it seems clear that either Congress intended all the provisions to receive the same treatment and the Court undermined Congress's intent, or Congress did not consciously consider whether certain facts would be treated as elements or sentencing factors. Either way, the statute's inexplicitness left the Court with the final say in labeling the provisions as elements or sentencing factors. In this sense, whenever Congress drafts an ambiguous statute, some of its power to make decisions in this area shifts to the Court.<sup>45</sup>

### III. POLICIES BEHIND THE ELEMENT/SENTENCING FACTOR DETERMINATION

Because neither the Constitution nor the statute's language controlled the outcome in *Harris* or *O'Brien*, policy concerns probably weighed heavily in the decisions. Although the Court frames its analysis as a search for legislative intent, it has substantial discretion to reach its preferred outcomes.<sup>46</sup> In this Part, I examine the policies that seem to guide the Court's element/sentencing factor jurisprudence and discuss how they sometimes undermine trial's safeguards without sufficient justification. Then I consider whether Congress could realistically react and move more fact-finding to trial.

"Severity of the sentence" is perhaps the most crucial of the *O'Brien* factors. In *Harris*, the Court distinguished between facts that lead to "incremental changes in the minimum," and those that lead to "steeply higher penalties," the latter of which should be elements.<sup>47</sup> Applying that distinction, the *O'Brien*

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44. A slight difference is that the words "if the firearm" appear in the brandishing and discharging provisions, but appear one subdivision above the machinegun provision. It is arguably a stretch to infer from this slight difference that Congress intended the provisions to be treated so differently. Compare 18 U.S.C. § 924(c)(A)(ii),(iii), with *id.* § 924(c)(B).

45. Congress has not acted to overrule *Harris*, which may suggest that the Court correctly ascertained congressional intent. However, inferring too much from congressional inaction is ill-advised.

46. The arguably contradictory results in *Harris* and *O'Brien* and the starkly divided nature of the Court in *Harris* both demonstrate that searching for legislative intent does not lead the Court to a definitive answer.

47. *Harris*, 536 U.S. at 554.

Court argued that the “drastic, sixfold increase” linked to the machinegun provision “strongly suggests a separate substantive crime,” not a mere sentencing factor.<sup>48</sup> Similarly, in *Jones v. United States*,<sup>49</sup> the Court argued that it would be “questionable” if “facts sufficient to increase a penalty range by two-thirds . . . carr[ie]d] none of the process safeguards that elements of an offense bring with them.”<sup>50</sup> It held, therefore, that the “serious bodily injury” provision of a carjacking statute was an element of the offense.<sup>51</sup>

The result in *Harris* is difficult to reconcile with *Jones*. The serious bodily injury provision in *Jones* increased the maximum sentence by two-thirds.<sup>52</sup> The discharging provision in *Harris* doubled the mandatory minimum.<sup>53</sup> Somehow the Court considered the sentence enhancement in *Harris* merely an “incremental change” despite the proportional increase being greater than the increase in *Jones*.<sup>54</sup> *Harris* and *Jones* could be reconciled if the Court were only concerned with the number of years added, not the proportional increase: In *Jones*, increasing the maximum sentence by two-thirds added ten years; in *Harris*, doubling the minimum sentence added only five. Whether one reads *Harris* and *Jones* charitably and accepts the distinction based on the number of years, or instead criticizes the Court’s inconsistent conception of “incremental” proportional increases, the Court’s belief that a jump from five to ten years does not typically warrant the procedural protections of trial underestimates the gravity of what is at stake for defendants.

In addition to “severity of the sentence,” “tradition” heavily influences the Court’s decisions.<sup>55</sup> In *O’Brien*, the Court said that “[c]haracteristics of the offense itself are traditionally treated as elements, and the use of a machine-

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48. *O’Brien*, 130 S. Ct. at 2177.

49. 526 U.S. 227 (1999). *Jones* held that the “serious bodily injury” provision of a carjacking statute, which exposed a defendant to a sentence of up to twenty-five years, was an element of the offense. *Id.* at 229-30.

50. *Id.* at 233.

51. *Id.* at 229-30.

52. *Id.* at 230.

53. Additionally, the statute in *Harris* imposed mandatory minimum sentences, making it harsher than a statute that only imposes potential maximum sentences, like the statute scrutinized in *Jones*. *Harris*, 536 U.S. at 550-51.

54. *See id.* at 554. Granted, the Court considered the statute’s progression as a whole: five years for possessing the firearm, seven years for brandishing, ten years for discharging. But the middle ground of seven years for brandishing would not make the increase feel any more incremental to a defendant whose mandatory minimum doubled based on a finding that the firearm was discharged.

55. *See id.* at 553 (“Traditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (e.g., that the defendant . . . brandished a gun.” (emphasis added) (quoting *Castillo v. United States*, 530 U.S. 120, 126 (2000))).

gun . . . lies ‘closest to the heart of the crime at issue.’”<sup>56</sup> Conversely, the *Harris* Court states that “there is no . . . federal tradition of treating brandishing and discharging as offense elements.”<sup>57</sup> Treating *how the firearm is used* as a question for the judge and *the type of firearm* as a question for the jury does not reflect clear principles. Neither presents factual questions that are inherently more or less appropriate for a jury to resolve. The Court’s recitation in *O’Brien* that elements are characteristics of the offense, as opposed to characteristics of the offender, does not explain why brandishing and discharging were treated as sentencing factors in *Harris*—they are clearly characteristics of the offense, not the offender. Whether these logical inconsistencies accurately reflect Congress’s traditions or are created by the Court’s discretion, they undermine trial’s safeguards without a principled justification.<sup>58</sup>

While some fact-finding at sentencing is a necessity, it is crucial that we strive for as many facts to be found at trial as is practically possible because sentencing hearings lack many of trial’s safeguards,<sup>59</sup> and because prosecutors need not include sentencing factors in indictments.

Supporters of broad judicial discretion at sentencing emphasize the practical impediments to shifting more fact-finding to trial<sup>60</sup> and claim that a

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56. United States v. O’Brien, 130 S. Ct. 2169, 2176 (2010) (quoting *Castillo*, 530 U.S. at 127).

57. *Harris*, 536 U.S. at 553.

58. As an aside, like the “tradition” and “severity of the sentence” prongs, the “risk of unfairness” prong could also be used to shift fact-finding to sentencing if the Court decided it was unfair to require the government to prove too many facts at trial. Cf. *O’Brien*, 130 S. Ct. at 2177 (“[T]he Government does not suggest that it would be subjected to any unfairness if the machinegun provision continues to be treated as an element.”).

59. See *supra* note 2.

60. Justice Breyer has argued that “a sentencing system tailored to fit *every conceivable wrinkle* of each case can become unworkable.” *Apprendi v. New Jersey*, 530 U.S. 446, 557 (2000) (Breyer, J., dissenting) (emphasis added); see also Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 Nw. U. L. REV. 1342, 1398 (1997) (“[C]riminal statutes have never been (and probably never could be) written with sufficient particularity to take *all* such factors into account.” (emphasis added)). But Justice Breyer does not consider a middle ground, where statutes are drawn with greater specificity, incorporating common aggravating factors, without attempting to include *every* permutation. Simply recharacterizing the brandishing and discharging provisions of section 924(c) would not be unworkable. Other practical arguments for the current balance include the fact that major modifications to our criminal code are unlikely and that the current code requires broad judicial discretion at sentencing, O’Sullivan, *supra*, at 1394-95, or that “the real world of criminal justice” cannot possibly require juries to determine every relevant fact, *Apprendi*, 530 U.S. at 555. This Comment does not propose wholesale changes to criminal statutes or a complete elimination of judicial discretion at sentencing, so it withstands these

determination of guilt that leads to a particular sentence is of greater importance than the determination of sentencing factors that increase the sentence.<sup>61</sup> Both are overstated. On the first point, commentators have proposed reasonable, workable reforms to shift more fact-finding to trial, such as incorporating aggravating factors from the Federal Sentencing Guidelines into criminal statutes as elements.<sup>62</sup> On the second point, both conviction and sentencing result in substantial deprivations of liberty, and defendants have a powerful interest in the number of years spent behind bars.<sup>63</sup> The primary arguments in favor of the current balance of fact-finding are far from iron-clad.

Some commentators have recommended wholesale reform of the criminal code in the interest of strengthening the right to a jury trial,<sup>64</sup> but such broad reform is unlikely to occur. Congress, though, could realistically amend section

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arguments. Justice Stevens also responded persuasively to the efficiency arguments in his *Booker* dissent. See *United States v. Booker*, 543 U.S. 220, 288-89 (2005) (Stevens, J., dissenting).

61. They argue that conviction carries a special stigma that is unaffected by the length of the sentence, O'Sullivan, *supra* note 60, at 1386; Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CALIF. L. REV. 419, 452 (1995), that a convicted defendant forfeits access to procedural safeguards at the moment of conviction, O'Sullivan, *supra* note 60, at 1355, and that conviction carries collateral sanctions such as disenfranchisement that are unaffected by the length of the sentence, Yin, *supra*, at 452. The stigma and forfeiture arguments are both unduly formalistic. See Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 309 (1992) (arguing that it would be more sensible to "look at the weight of the interest the defendant has at stake in deciding what process is due rather than at legislature's decisions about how to structure its criminal statutes"). Stigma is not an all or nothing proposition. *Cf. id.* at 337 n.195. One can imagine that a longer term of imprisonment is typically more stigmatizing than a shorter one. And simply because a defendant has been convicted of an offense does not mean he has forfeited the right to question the length and nature of his confinement.
62. See M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker*, 56 S.C. L. REV. 533, 571-75 (2005). Specifically, Darmer argues that many Guidelines provisions "are susceptible to reformulation so that juries make the . . . factual determinations." *Id.* at 572; see also Herman, *supra* note 61, at 301-02 ("[W]ith the [Guidelines'] predetermination of relevant factors . . . we now can predict which factual questions about the offense will be relevant at sentencing. It is no longer impossible to provide for the adjudication of all offense-related facts in one proceeding."). Herman may go astray by envisioning a single proceeding. This would require statutes to contain *all* permutations of offense conduct, which is unrealistic.
63. *Cf. Reitz*, *supra* note 59, at 550 ("The question of what punishment to impose remains one of great seriousness . . .").
64. For discussion of more substantial potential reforms, see, for example, Darmer, *supra* note 62, at 571-75.

924(c) and overrule *Harris*. A clause as simple as, “the brandishing and discharging provisions are offense elements,” would send a clear message to courts interpreting the statute. While it may seem like a small step, amending one statute in this way could influence the Court’s treatment of similar provisions in other criminal statutes.<sup>65</sup> When the Court applies the “tradition” and “severity of the sentence” factors, it supports its decisions with evidence of past congressional practice. Thus, if Congress took action and explicitly labeled the brandishing and discharging provisions as elements, it could have repercussions beyond section 924(c) that would broaden the protective scope of trial’s safeguards and the right to a jury trial. However, if Congress amended the statute without explicitly delineating between elements and sentencing factors, the Court’s flexible statutory interpretation, strong reliance on tradition, and misguided notions about “incremental” changes in sentences could lead facts Congress intended as elements to be treated as sentencing factors.<sup>66</sup>

#### CONCLUSION

*O’Brien* demonstrated that the Constitution does not appear to impose practical constraints on Congress’s ability to shift fact-finding to sentencing. *Harris* demonstrated that, in the face of ambiguity, the Court is all too ready to hold that Congress intended to allow such shifts. Thus, it is up to Congress to decide, as a matter of policy rather than constitutional mandate, to draft explicit statutes that increase the scope of trial’s safeguards and the right to a jury trial.

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65. On the other hand, the Justices might also argue that if Congress amended one statute and did not amend others, it *must* have intended the others to be treated differently.
66. *Harris* demonstrates the insufficiency of simply drafting more detailed criminal statutes without the crucial delineation this Comment proposes. Section 924(c) is already an intricate provision, but it does not explicitly delineate between elements and sentencing factors.

