The 2002 Supreme Court Decisions: Did They Leave Enough of Apprendi to Effectively Protect Criminal Defendants?

INTRODUCTION

Two defendants are arrested in different states for committing the same exact crime—armed robbery with an automatic weapon resulting in injury to one person. Defendant One is indicted in his state under a statute that provides for a fifty-year maximum for armed robbery, but allows for an increase in that sentence based on the finding of aggravating factors, including use of an automatic weapon and injury to another person in the course of the offense. Since the prosecution is seeking an increase in the maximum sentence for the offense, they are required to prove the aggravating factors to a jury beyond a reasonable doubt. The jury finds Defendant One guilty of the offense of armed robbery, but not of the aggravating factors. At the sentencing phase, the prosecution is again permitted to try to prove the aggravating factors to the judge, but under a lower standard of proof this time—preponderance of the evidence. The judge finds these facts, but is only allowed to impose a sentence up to the fifty-year maximum. He decides instead to impose a thirty-year sentence because this is Defendant One’s first offense.

Defendant Two is indicted in his state under a statute that requires a thirty-year mandatory minimum sentence for armed robbery, which is increased to fifty years if an automatic weapon is used and is increased again to life imprisonment if a person is injured in the course of the offense. The only question presented to the jury is whether Defendant Two committed the armed robbery, which they find beyond a reasonable doubt. At the sentencing stage, the judge determines the factors that raise the mandatory minimum of the sentence by a preponderance of the evidence. The judge finds both that the offense was committed with an automatic weapon and that a person was injured in the course of the robbery, which means that the judge is required by law to impose a life sentence, even if he would like to impose a lesser sentence based on the fact that this is Defendant Two’s first offense.

In several recent opinions, the United States Supreme Court has decided that Defendant One is entitled to greater constitutional protection
In sentencing than Defendant Two. In Defendant One’s state the judge could not surpass the maximum sentence authorized by statute without the jury finding beyond a reasonable doubt that the aggravating factors existed. The judge could, however, impose any sentence lower than the maximum at his own discretion. Defendant Two, on the other hand, is serving a life sentence for the same offense because in his state those same aggravating factors are determined by the judge by a preponderance of the evidence and the judge has no discretion to lower a sentence based on mitigating factors. Looking at the above hypothetical, Defendant Two is clearly in need of just as much procedural due process protection at the sentencing phase as Defendant One. The Supreme Court, however, refused to extend this protection to Defendant Two, determining that as long as the judge was sentencing within the range authorized by the jury verdict for the offense, he could determine aggravating factors by a preponderance of the evidence standard. The prosecution in Defendant One’s state, however, was required to submit those same aggravating factors to a jury for determination beyond a reasonable doubt because that finding could have increased Defendant One’s sentence above the statutory maximum. In drawing the line at whether a sentence is within or outside the sentencing range, the Supreme Court tried to create a bright-line rule to protect defendants by limiting judicial discretion at sentencing. The Court ended up, however, with a rule that provides little protection for defendants that legislatures can easily circumvent by cleverly redrafting statutes to ensure that courts are sentencing within the range allowed by the statute.

Part I of this comment will explore the case that began all of the controversy, Apprendi v. New Jersey. It will touch on several cases prior to Apprendi and discuss their impact on the Court’s decision. It will then explore the reasoning behind the Court’s holding and look at how the Court distinguished three cases that clearly conflicted with Apprendi’s holding. Finally, Part I will discuss Justice Thomas’ strong concurrence and the equally strong dissenting opinions.

Part II will look at the tremendous amount of controversy that has been generated by the decision in Apprendi. It will focus on three specific areas: mandatory minimums, the potential for legislative manipulation, and

2. See Apprendi, 530 U.S. at 490.
3. See id.
4. See Harris, 536 U.S. at 557.
5. See Apprendi, 530 U.S. at 490.
6. Apprendi, 530 U.S. 466.
the impact of the decision on the defendant. First, the question of whether Apprendi applies to mandatory minimums is of crucial importance as it has the potential of invalidating the Federal Sentencing Guidelines, as well as numerous determinate sentencing schemes in the states. Second, many commentators have argued that the flexible structure of the rule in Apprendi gave legislatures room to redraft their statutes in order to avoid application of the rule. Finally, while Apprendi was viewed by many as a triumph for the rights of the defendant, others believed that the burdens of the decision would come to outweigh the benefits.

Part III will examine three recent Supreme Court decisions and their holdings, and analyze their impact on Apprendi. Part IV will argue that the Supreme Court, both in these recent opinions and in their refusal to overrule others in Apprendi, has been inconsistent and unable to adhere to a unifying principle in their efforts to protect defendants. The Court should therefore overrule Apprendi in favor of an alternative that would more effectively protect the procedural due process rights of all defendants at sentencing.

I. APPRENDI V. NEW JERSEY

In June of 2000 the Supreme Court decided Apprendi v. New Jersey, a significant case that threatened to completely change the structure of sentencing in this country. Many “dire predictions” were made that the Court’s decision could potentially invalidate the Federal Sentencing Guidelines and many states’ determinate sentencing schemes. These predictions were based in part on the concern expressed by Justice

10. Apprendi, 530 U.S. 466.
11. Alex Ricciardulli, The U.S. Supreme Court’s Surprise Ruling on Sentence Enhancements: The Court Strikes Down a Hate Crime Enhancement and Leaves Others in Some Doubt, LOS ANGELES LAWYER, Feb. 2001, at 15 (arguing that Apprendi will not impact determinate sentencing laws, but may affect double jeopardy, some states’ death penalty laws, and California’s three-strikes law).
O'Connor in her strong dissent to *Apprendi* that "the apparent effect of the Court's opinion today is . . . to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree." 12 Prior to its controversial decision in *Apprendi*, the Court had for the most part allowed legislatures a free hand in determining whether the judge or jury should make findings on an issue. 13 In *Apprendi*, the Court attempted to severely limit that authority in order to "protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges," 14 but as will be explained later, *Apprendi* actually gave prosecutors more power in some areas and left the door wide open for legislatures to avoid its rule by putting control back into the hands of the court. 15

A. FACTS AND LOWER COURT DECISIONS

In the early morning of December 22, 1994, Charles Apprendi fired a gun into the home of an African-American family that had just moved into the all-white neighborhood of Vineland, New Jersey. 16 He was arrested that same night and apparently made a statement to the police that he did not want the family in the neighborhood because of their race. 17 Apprendi plead guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb. 18 Under state law the penalty range for the second-degree offenses was five to ten years and for the third-degree offense the range was three to five years. 19 In exchange for dismissing twenty other counts against Apprendi, the prosecutor reserved the right to request an enhanced sentence on one count involving the shooting on December 22, claiming it was committed with a biased purpose under New Jersey's hate crime statute. 20 Apprendi in turn reserved the right to claim that the hate
crime sentence enhancement violated the United States Constitution.\textsuperscript{21} During sentencing the trial judge determined by a preponderance of the evidence that racial bias was the motivating factor behind Apprendi’s actions based on the statement that Apprendi made to police.\textsuperscript{22} Rejecting Apprendi’s constitutional challenge, the judge applied the hate crime enhancement, raising the maximum on that count from ten years to twenty years.\textsuperscript{23} Apprendi was subsequently sentenced to twelve years on that count and to concurrent sentences on the other two counts.\textsuperscript{24}

Apprendi appealed, claiming that the Due Process Clause of the Constitution required that a jury make a finding of biased purpose beyond a reasonable doubt.\textsuperscript{25} The state appellate court, based on the Supreme Court’s decision in \textit{McMillan v. Pennsylvania},\textsuperscript{26} upheld Apprendi’s sentence, determining that the hate crime enhancement was a “sentencing factor” and not an offense element that would have to be proven to a jury beyond a reasonable doubt.\textsuperscript{27} A divided New Jersey Supreme Court affirmed, first asserting that the mere fact that the legislature had placed the hate crime enhancement within the sentencing provisions in the statute did not mean that it could not be an offense element.\textsuperscript{28} In the end, however, the majority decided that the legislature had simply taken a traditional sentencing factor and determined the weight courts were to assign to that factor.\textsuperscript{29}

B. THE SUPREME COURT DECISION

The United States Supreme Court granted certiorari and reversed the New Jersey Supreme Court in a five-four decision.\textsuperscript{30} Before going into the Court’s rationale in \textit{Apprendi}, however, two earlier opinions that had significant influence on the Court’s decision in \textit{Apprendi} are worth noting. The first is \textit{In re Winship}, in which the Court explicitly held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

\begin{itemize}
\item \textit{Apprendi}, 530 U.S. at 470.
\item \textit{Id.} at 471.
\item \textit{Id.} at 470-71.
\item \textit{Id.} at 471.
\item \textit{Id.}
\item \textit{Apprendi}, 530 U.S. at 471.
\item \textit{Id.} at 472.
\item \textit{Id.} at 473.
\item \textit{Id.} at 474.
\end{itemize}
with which he is charged." 31 In *Apprendi*, the critical question then became whether a particular fact was an element of the offense, requiring proof beyond a reasonable doubt under *Winship*, or a sentencing factor, not requiring such constitutional protection. The second decision to influence *Apprendi* is *Jones v. United States*, 32 in which the Court foreshadowed their opinion in *Apprendi* by stating in a footnote:

under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. 33

While the Court in *Jones* was construing a federal statute, the Court in *Apprendi* determined that the same principle should apply to a state statute through the incorporation doctrine of the Fourteenth Amendment. 34 Accordingly, based on past precedent and history, the Court reaffirmed *Jones* by holding that except for "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." 35 The Court determined that any rise in the maximum sentence of a defendant is of constitutional significance because of the actual increase in number of years behind bars and because it has "significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." 36 The Court concluded that the proper determination was "one not of form, but of effect"—did the judge make a finding that had the potential of increasing the defendant's sentence to a level above that authorized by the jury verdict? 37 If so, that finding was an element of the offense and had to be proven to a jury beyond a reasonable doubt.

33. *Id.* at 243 n.6.
34. *Apprendi*, 530 U.S. at 476.
35. *Id.* at 490.
36. *Id.* at 495.
37. *Id.* at 494.
C. DISTINGUISHING PRIOR DECISIONS

Several past precedents created problems for the holding in *Apprendi*, requiring the Court to either reconcile or overturn them. In the first of those cases, *Almendarez-Torres v. United States*, the Supreme Court had determined that the Constitution did not require recidivism to be treated as an element of an offense.\(^3^8\) The holding in *Apprendi* conflicted with *Almendarez-Torres* because a finding of recidivism could easily elevate a defendant’s sentence above the maximum allowed by the jury verdict.\(^3^9\) The Court concluded, however, that recidivism was an exception to the *Apprendi* rule because “the defendant [already] had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt” for the earlier offenses.\(^4^0\)

Another Supreme Court decision that clearly conflicted with the holding of *Apprendi* was that of *Walton v. Arizona*, in which the Supreme Court upheld Arizona’s capital sentencing scheme.\(^4^1\) The validity of this system became questionable under *Apprendi* because it allowed judges to make findings of aggravating factors that would raise a defendant’s sentence from life imprisonment to death.\(^4^2\) The Court in *Apprendi* distinguished *Walton* by interpreting the Arizona statute as allowing for the maximum penalty of death and leaving it to the judge to determine if that maximum penalty should be imposed rather than a lesser one, such as life imprisonment.\(^4^3\)

The final case that presented a problem for the Court was *McMillan v. Pennsylvania*.\(^4^4\) In *McMillan* the Court upheld Pennsylvania’s Mandatory Minimum Sentencing Act, which provided that a person convicted of certain enumerated felonies would be subject to a mandatory minimum sentence of five years upon a finding by the trial judge that the person “visibly possessed a firearm” while committing the offense.\(^4^5\) In determining that visible possession of a firearm was merely a sentencing factor rather than an element of the offense, the Supreme Court in *McMillan* concluded that the state legislature had not altered the existing offense, but rather had “[taken] one factor that has always been considered

\(^3^9\) See *Apprendi*, 530 U.S. at 488.
\(^4^0\) Id. at 496.
\(^4^2\) See id. at 645.
\(^4^3\) *Apprendi*, 530 U.S. at 496-97.
\(^4^5\) Id. at 81.
by sentencing courts to bear on punishment... and [had] dictated the precise weight to be given that factor."\(^{46}\) The statute was not tailored to allow the finding of that factor to be the "tail which wags the dog of the substantive offense."\(^{47}\) The Court distinguished Apprendi's situation in that the potential increase in Apprendi's sentence based on a judge's finding by a preponderance of the evidence from ten years to twenty years had more than a "nominal effect" and increased the maximum punishment authorized by the jury verdict.\(^{48}\) Thus, it became the ""tail which wags the dog of the substantive offense."\(^{49}\)

D. THOMAS' CONCURRENCE

Justice Thomas, concurring in \textit{Apprendi}, would have carried the holding of the case further and would have overruled two of the three cases discussed above. His broad definition of crime would include "every fact that is by law a basis for imposing or increasing punishment."\(^{50}\) Thus, every finding of an aggravating factor, even the fact of a prior conviction, would make up the crime and therefore would have to be proven to a jury beyond a reasonable doubt.\(^{51}\) Accordingly, Thomas stated that even though at the time \textit{Almendarez-Torres} was decided he was in the majority, he would now overrule it.\(^{52}\) "If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."\(^{53}\) Thus, since recidivism is often used as a basis for increasing punishment, Thomas would conclude that it is an element of the underlying offense.\(^{54}\) The same would be said for facts which establish mandatory minimums, such as those in \textit{McMillan}.\(^{55}\) While Thomas conceded that a defendant could be sentenced to the same term with or without a mandatory minimum, he would still require that any fact increasing the defendant's possible sentence within a range be determined by a jury because "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment

\(^{46}\) \textit{Id.} at 89-90.
\(^{47}\) \textit{Id.} at 88.
\(^{48}\) \textit{Apprendi}, 530 U.S. at 495.
\(^{49}\) \textit{Id.} (quoting \textit{McMillan}, 47 U.S. at 88).
\(^{50}\) \textit{Id.} at 501.
\(^{51}\) \textit{See id.}
\(^{52}\) \textit{Id.} at 520-21.
\(^{53}\) \textit{Apprendi}, 530 U.S. at 521.
\(^{54}\) \textit{Id.}
\(^{55}\) \textit{Id.} at 521-22.
than he might wish."56 Finally, Thomas addressed the capital scheme in Walton, in which the judge is permitted to find aggravating factors that potentially expose the defendant to a greater punishment.57 Based on Thomas' earlier principle, that fact would clearly be an element of the crime.58 Due to the unique nature of capital crimes, however, and the barrier that the Court has "interposed between a jury finding of a capital crime and a court's ability to impose capital punishment," Thomas declined to come to the conclusion that his principle would apply to capital sentencing schemes such as that in Arizona.59 Instead, he left it as "a question for another day."60

E. THE DISSENTS

Justice O'Connor, writing the dissent for four justices, did not find the Court's justifications for its new bright-line rule convincing, partly because she believed the Court was ignoring precedent.61

In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a single instance, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.62

In O'Connor's view, an enhancement based on motive, such as that in Apprendi, and one based on commission of a prior offense, as in Almendarez-Torres, is a "difference without constitutional importance" since "[b]oth factors are traditional bases for increasing an offender's sentence and, therefore, may serve as the grounds for a sentence enhancement."63 O'Connor also found the majority's reliance on McMillan "puzzling" since its holding points to a rejection of the Apprendi rule.64 In her opinion, the majority's holding applies to any finding of fact that

56. Id.
57. Id. at 522.
58. Apprendi, 530 U.S. at 522.
59. Id. at 523.
60. Id.
61. Id. at 525.
62. Id. (emphasis in original).
63. Apprendi, 530 U.S. at 554.
64. Id. at 532.
“increases or alters the range of penalties to which a defendant is exposed,” and therefore the Court must overrule McMillan and explain the appropriateness of this decision, based on principles of stare decisis.\(^\text{65}\) The majority did neither, instead deriving a rule from McMillan that was never there.\(^\text{66}\) Thus, O'Connor concluded that the New Jersey legislature stayed within the bounds of McMillan by taking a "traditional sentencing factor and dictat[ing] the precise weight judges should attach to that factor."\(^\text{67}\) Finally, O'Connor found the Court's distinction of Walton "baffling, to say the least."\(^\text{68}\) She believed that the Court's decision in Walton clearly conflicted with the Court's holding in Apprendi because a defendant convicted of first-degree murder could only be sentenced to death upon the judge's finding of a statutory aggravating factor under the Arizona sentencing scheme upheld in Walton.\(^\text{69}\) The scheme, therefore, violated Apprendi in allowing the judge to make a determination elevating the maximum sentence for the crime from life imprisonment to death.\(^\text{70}\) O'Connor failed to understand how the majority could allow the state to "remove from the jury a factual determination that makes the difference between life and death," but the "State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed."\(^\text{71}\) O'Connor found the majority's attempt to distinguish these cases unconvincing and "[o]n the basis of . . . prior precedent" would have held the New Jersey enhancement statute constitutional.\(^\text{72}\)

In a separate dissent Justice Breyer expressed his concerns about the practical implications of the majority's rule. While a rule requiring juries instead of judges to determine facts upon which increased punishment is based would "seem to promote a procedural ideal," he believed that the "real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing."\(^\text{73}\) The traditional basis for allowing judges to decide facts affecting the length of sentences rather than juries was not to reflect "an ideal of procedural 'fairness' . . . but rather an administrative need for

\(^\text{65}\) Id. at 533.
\(^\text{66}\) Id.
\(^\text{67}\) Id. at 553-54.
\(^\text{68}\) Apprendi, 530 U.S. at 538.
\(^\text{69}\) Id.
\(^\text{70}\) Id. at 537.
\(^\text{71}\) Id.
\(^\text{72}\) Id. at 554.
\(^\text{73}\) Apprendi, 530 U.S. at 555.
procedural compromise." Breyer believes this compromise is necessary due to the overwhelming number of potential sentencing factors that could be submitted to a single jury for consideration. Taking into account the varying backgrounds, experiences, and education of the men and women on the jury, requiring them to deliberate on all such factors is impracticable. Thus, Breyer supports the contention that evaluation of those potentially endless factors should be left to judges and their vast amounts of experience. Another problem resulting from the holding in Apprendi, according to Breyer, is that in requiring submission of all facts relevant to guilt or innocence and enhancements to the jury, the Apprendi rule puts the defendant in the awkward position of having to deny his guilt while also offering proof as to how he committed the crime. Lastly, Breyer cannot reconcile the majority's decision with their holding in McMillan because in his view the mandatory minimum is of far greater importance to a defendant than maximum sentences, since a judge is allowed to impose any sentence below a statute's maximum, but he cannot select a sentence below the mandatory minimum. Why is a new crime created when the legislature "authorizes a judge to impose a higher penalty for bank robbery," but not when the legislature "requires a judge to impose a higher penalty than he otherwise would" in similar circumstances? So while the goal of the majority in adopting their rule in Apprendi may have been to further protect a defendant's procedural due process rights, Breyer believes that application of the rule may actually result in "significantly less procedural fairness, not more." Breyer supports a sentencing system in which judges have discretion because it is "workable" and "consistent with the Constitution." Such a system may lead to "greater fairness because judges will better preserve equality of sentencing across cases if guided by statutes or sentencing guidelines."

74. Id. at 556 (emphasis in original).
75. Id. at 556-57.
77. Apprendi, 530 U.S. at 558.
78. Id. at 557.
79. Id. at 563.
80. Id. at 563-64.
81. Id. at 564.
82. Apprendi, 530 U.S. at 559.
Due to the close decision in *Apprendi* and its potential to wreak havoc on determinate sentencing schemes, the true impact of the decision has been subject to considerable debate among commentators and courts. One of the major areas of controversy has been whether *Apprendi* applies to mandatory minimum sentencing schemes. Since this is largely the structure of the Federal Sentencing Guidelines, interpreting *Apprendi* broadly enough to apply to mandatory minimums could have spelled the end of the Guidelines.84 Another area of concern after *Apprendi* was the ease with which legislatures could avoid the application of *Apprendi’s* rule by cleverly redrafting statutes.85 Finally, *Apprendi* generated considerable debate as to whether its rule in fact helped defendants or hurt them.86 While the Court ended some of this controversy in the 2002 term, it is helpful to review some of the post-*Apprendi* debate in order to determine the impact of the 2002 cases.

### A. MANDATORY MINIMUMS

One question that many believed went unanswered in *Apprendi* was whether its rule applied to sentencing schemes based on mandatory minimums. While the holding of the case only applied to facts that "increase[d] the penalty for a crime beyond the prescribed statutory maximum,"87 other language in the opinion made its application questionable to facts which simply increased a defendant’s sentence within a range, but not beyond the maximum. For instance, Justice Stevens' statement that the inquiry as to whether a fact was an element or a sentencing factor was "one not of form, but of effect" concluded with the question of whether the finding exposed the defendant "to a greater punishment than that authorized by the jury’s guilty verdict."88 Language such as this in the Court’s opinion left their position on mandatory minimums subject to debate. In addition, Justice Thomas made the exact stance of the Court even more uncertain by unequivocally stating in his concurrence that the rule should be extended to mandatory minimum

84. See, e.g., Standen, *supra* note 7, at 796-97.
85. See, e.g., Ross, *supra* note 8, at 201.
86. See, e.g., Bibas I, *supra* note 7, at 465.
87. *Apprendi*, 530 U.S. at 490.
88. *Id.* at 494.
sentences.\(^{89}\) Thus, with the exact position of the Supreme Court uncertain, both courts and commentators have been divided as to whether to apply *Apprendi* to mandatory minimums. For the most part state and federal appellate courts followed the narrow holding of *Apprendi* and did not apply it to cases involving mandatory minimums.\(^{90}\) The only exception was the Sixth Circuit Court of Appeals, which applied *Apprendi* to mandatory minimums until the 2002 Supreme Court decisions came down.\(^{91}\) Most likely the appellate courts feared the potential impact that *Apprendi* would have on criminal sentencing at local, state and federal levels, so they conservatively chose to narrowly construe *Apprendi* in expectation of a determination from the Supreme Court as to how far the holding would be extended.\(^{92}\)

Commentators are split as well on the application of *Apprendi* to facts which trigger mandatory minimums, with an apparent majority determining that the logic of *Apprendi* should extend to mandatory minimums. "For *Apprendi* to have teeth, it would have to reach all facts that affect the actual punishment imposed," not just those facts that increase a defendant’s sentence above the statutory maximum.\(^{93}\)

In both kinds of determinate sentencing, the offender faces a more onerous sentence than he otherwise would, based on a sentencing factor that has not been proved to a jury beyond a reasonable doubt. If *Winship* is evaded by increases in the statutory maximum sentence, then it is just

\(^{89}\) Id. at 521-22.


\(^{91}\) United States v. Ramirez, 242 F.3d 348, 351 (6th Cir. 2001); United States v. Hough, 276 F.3d 884, 890 (6th Cir. 2002); United States v. Campbell, 279 F.3d 392, 397 (6th Cir. 2002); United States v. Leachman, 309 F.3d 377, 383 (6th Cir. 2002) (overruling earlier cases in light of recent Supreme Court decision United States v. Harris, 536 U.S. 545 (2002)).


\(^{93}\) Bibas I, supra note 7, at 469; see also McGinnis, supra note 83, at 564 (stating that "the inner logic of the decision would embrace the broader rule of law" of applying *Apprendi* to mandatory minimums).
as clearly evaded by legislative impositions of mandatory minimums.  

Therefore, if the Court is willing to force judges to adhere to mandatory minimums, which can result in "arbitrary and potentially severe sentence[s]," then the Court should also be willing to uphold a scheme which gives judges more flexibility in sentencing, such as that in Apprendi.  

As Justice Breyer pointed out in his dissent in Apprendi, mandatory minimums are of more concern to defendants because a judge is bound to impose the mandatory minimum if he finds a particular fact, while a judge is free to impose a sentence below a statutory maximum.  

Applying the rule in Apprendi only to facts that increase sentences above the statutory maximum:  

ignores the reality that whenever a court enhances a defendant's sentence . . . based on conduct proven only by a preponderance of the evidence, the court deprives the defendant of liberty without the protection of the reasonable doubt standard — a clear violation of the constitutional liberty protections identified in In re Winship.  

Even though most courts chose not to extend Apprendi to mandatory minimums, perhaps fearing the impact of such a decision on determinate sentencing schemes, the overwhelming belief of commentators that Apprendi should logically apply to mandatory minimums suggests that if the Court declines to do so in the future, they are not applying the rule of Apprendi in such a way as to truly protect the procedural due process rights of defendants.

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97. Thomas M. Morrow, Note, Apprendi v. New Jersey: In the "Sleeper Decision of 2000," the Supreme Court Restores Constitutional Protections to (Some) Criminal Defendants, 38 HOUS. L. REV. 1065, 1094 (2001) (arguing that the Court's adherence to past precedent in Apprendi may have limited its ability to protect the constitutional rights of criminal defendants).
B. LEGISLATIVE MANIPULATION OF STATUTES

Justice O’Connor, in her *Apprendi* dissent, introduced a second area of debate generated by the Court’s holding. Assuming that *Apprendi* does not apply to mandatory minimums, then its holding appears to have no real meaning beyond punishing “legislatures for not jumping through the right drafting hoops.”98 If *Apprendi* only applies to findings of fact which raise the defendant’s punishment above that of the statutory maximum, then “[a] State could . . . remove from the jury (and subject to a standard of proof below ‘beyond a reasonable doubt’) the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced.”99 Legislatures can easily avoid the rule in *Apprendi* by either returning to indeterminate sentencing ranges, giving judges more power, or raising statutory maxima, allowing judges to impose lesser sentences if they find certain mitigating factors.100 Thus, the New Jersey legislature could cure its sentencing scheme by setting a range of punishment for weapons possession from five to twenty years, with a provision that a sentence greater than ten years can only be imposed if a judge finds, by a preponderance of the evidence, that the defendant acted with the intent to intimidate based on race.101 This example illustrates the fact that by cleverly redrafting statutes legislatures can turn aggravating factors that trigger application of *Apprendi* into mitigating factors which are currently at the discretion of the judiciary.102 “This course could appeal to legislatures unwilling to choose between eliminating gradations of offense severity in their penalty scheme and reallocating such questions from judge to jury.”103

The majority in *Apprendi* recognized such a possibility, but brushed it off in a footnote. “While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests . . . this possibility seems remote.”104 The majority relied on “structural democratic constraints” to prevent legislatures from acting to create maximum sentences that were not proportional to the crime.105 One commentator

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98. Bibas I, supra note 7, at 469.
100. Bibas I, supra note 7, at 468; see also Costello, supra note 76, at 1245-46 (discussing two possible interpretations of *Apprendi* and how legislatures could get around either one).
102. See Ross, supra note 8, at 201.
103. Id.
104. *Apprendi*, 530 U.S. at 490 n.16.
105. Id.
found this suggestion "implausible" because in order to appear tough on crime, legislators could choose to raise maximum sentences in the hope of gaining political points with their constituents. If, however, these constraints failed to operate and legislatures did undertake extensive revision of their statutes in light of Apprendi, the Court left open the possibility that these revisions could be reviewed for constitutionality. The Court has never determined, however, that legislatures must define crimes in a particular way. "Instead, the Court has contented itself with elaborating constitutional doctrines that limited the ability of legislatures to shift burdens of proof, create factual presumptions, convert elements to sentencing factors, or recharacterize elements of crimes as affirmative defenses." It would be "incompatible with the sporadic interventions characteristic of judicial oversight" for the courts to take the time to identify essential elements of every crime.

C. PRACTICAL IMPLICATIONS OF APPRENDI FOR DEFENDANTS

A third area of disagreement generated by the holding in Apprendi is its actual impact on defendants. "Although Apprendi appears to be a victory for the constitutional rights of defendants, in reality it is not." The Court in Apprendi expressed concern as to loss of liberty and the heightened stigma that attaches to sentences increased beyond the statutory maximum when they decided that the protections of Winship should apply to findings of fact that increase a defendant's sentence beyond the statutory maximum. One commentator has argued that sentence enhancements do not heighten the stigma associated with a crime because it is the label of the crime that carries the stigma. Thus, the stigma will be the same for a person who committed burglary as it will be for a person who committed burglary while carrying a weapon. Similarly, the stigma and loss of liberty will be the same whether connected with an increase in the maximum sentence or with an increase within a sentencing range, once

106. Bibas I, supra note 7, at 469.
107. Apprendi, 530 U.S. at 491 n.16.
108. Standen, supra note 7, at 782.
109. Id.
110. Id.
111. Id. at 800.
112. Apprendi, 530 U.S. at 484.
114. Id.
again providing no justification for excluding mandatory minimums from
the rule.\textsuperscript{115} So if the \textit{Apprendi} rule does not reach the concerns of the
majority, does it provide any additional benefits to the defendant that he did
not have before the rule?

The practical benefits of \textit{Apprendi}'s rule include... better
protection for defendants, enhanced accuracy of fact-
finding under a reasonable doubt standard, and additional
certainty from replacing multi-factor standards with a
bright-line test. But \textit{Apprendi}'s analysis overlooks a
number of unintended consequences of his proposal that
call into question its predicted advantages.\textsuperscript{116}

One of those unintended consequences is the pressure the new rule
will put on defendants to produce evidence at trial that prior to \textit{Apprendi}
would only have been brought out at the sentencing phase.\textsuperscript{117} Defendants,
who would previously have chosen not to present evidence or testify under
\textit{Apprendi}, now have "to choose between remaining silent in the hope of
acquittal or presenting evidence that might be inconsistent with innocence
in the hope of avoiding an adverse finding on aggravating factors."\textsuperscript{118} For
example, after \textit{Apprendi}, a defendant would be forced to simultaneously
argue before a jury: "I did not commit the burglary, but if I did, I was not
carrying a weapon at the time." This example suggests another negative
impact of the \textit{Apprendi} rule on the defendant. If the defendant is forced to
rebut evidence of aggravating factors, such as racial bias, during the trial,
this unfortunate necessity will likely have a prejudicial impact on the final
decision the jury reaches on the actual offense.\textsuperscript{119} Thus, higher conviction
rates could result from forcing the defendant to present evidence that would
previously only have been brought up at sentencing.\textsuperscript{120} Judges are far more
likely to deal with such factors rationally and even-handedly than juries
made up of average members of the community who do not deal with that
type of information on a regular basis.\textsuperscript{121}

One suggestion that has been made to address both the problem of
forcing a defendant to simultaneously argue inconsistent defenses and the

\begin{footnotes}
\item \textsuperscript{115} \textit{Id.} at 1134.
\item \textsuperscript{116} \textit{Ross}, supra note 8, at 197.
\item \textsuperscript{117} \textit{Id.} at 199.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{See Smith}, supra note 95, at 690.
\item \textsuperscript{120} \textit{See Costello, supra} note 76, at 1257.
\item \textsuperscript{121} \textit{Smith}, supra note 95, at 691.
\end{footnotes}
problem of the prejudicial impact on the defendant is the use of a bifurcated trial. As Justice Breyer mentioned in his dissent in *Apprendi*, however, bifurcated trials, with the exception of capital cases, have not seemed "worth their administrative costs." 122 In addition, bifurcation would add yet another stage to the trial process, it would place additional burdens on jurors and witnesses, and it could prove cumbersome in trials involving multiple defendants with multiple enhancements. 123

Indeed, the very suggestion that the jury should bifurcate its fact-finding between issues bearing on guilt and issues bearing on degrees of culpability reveals the difference in function between fact-finding at trial and fact-finding at sentencing, and the inherent tension between the two. Relegating certain factual issues to sentencing gives defendants the opportunity to avail themselves of their right to silence at trial without forfeiting the opportunity to be heard in mitigation. 124

A final argument against the use of bifurcation is that it would "perversely" lead prosecutors to approach the worst offenders with the most enhancements with extremely favorable plea offers in order to avoid a long, drawn-out trial. 125 Thus, while bifurcation may appear to be a good solution in the abstract, it would be completely unworkable in practice.

Arguing in support of the *Apprendi* rule, Professors Klein and King claim that the defendant is actually benefited under *Apprendi* because the prosecution is required to prove aggravating facts beyond a reasonable doubt, rather than by a preponderance of the evidence as was the case prior to *Apprendi*. 126 Their argument assumes, however, that the defendant actually goes to trial, since it is the defendant who is successful in challenging the aggravator who is benefited or the defendant actually innocent of those aggravating elements. 127 Today jury trials are not the norm in criminal cases. Approximately ninety-one percent of felony defendants plead guilty, while fewer than four percent go before a jury and

123. Standen, *supra* note 7, at 794.
127. *Id.* at 302-03.
five percent before a judge. Today defendants who were able to plead guilty prior to Apprendi and still benefit from enhancement hearings at sentencing, no longer have that option. Professor Stephanos Bibas, who has written numerous articles on the Apprendi decision, argues that the Apprendi Court, in assuming that jury trials were the norm, "reached the wrong answer because they asked the wrong question." The myth of the jury trial is deeply embedded in our culture, our psyche, and our law school curricula. But today, the reality is but a faint echo of a bygone era.

Based on the rare appearance of a felony defendant before a jury, the impact of Apprendi on those defendants who choose to plea bargain is critical to assessing the overall effect of the rule. First, those defendants who plead guilty under the Apprendi rule will be deprived of their constitutional right to be heard. The enhancements, which were previously considered in the sentencing phase of the trial, now are part of the guilt phase, forcing the defendant to surrender them if he pleads guilty. Second, a defendant's guilty plea may totally eliminate any opportunity to raise an Apprendi challenge. As the Illinois Supreme Court stated in People v. Jackson, a defendant bringing an Apprendi challenge argues that one or more of the elements of the offense for which the defendant was charged and convicted was not proven to a jury beyond a reasonable doubt. A defendant, however, who has waived his right to a jury trial by pleading guilty cannot argue that he has been deprived of his due process rights. Thus, a defendant who pleads guilty to first-degree murder under a statute with a maximum sentence of sixty years, who is then sentenced to natural-life based on the court's determination of exceptionally brutal or heinous behavior, has waived his right to bring an Apprendi challenge. Finally, Apprendi gives prosecutors more power to control the sentence that the defendant receives, affording judges fewer

131. Id. at 1183.
132. Id. at 1152.
133. Id.
136. Id.
opportunities to check those prosecutors. This argument applies both to defendants who plead guilty and those who go to trial. "What matters is no longer the defendant's real offense, but the statutory maximum of the statute cited in the indictment," and it is the prosecutor who determines which statute to cite. This decision "may reflect racial bias, the quality and connections of defense counsel, the prosecutor's temperament, and regional variations." Judges traditionally had the power to check these inconsistencies at the sentencing stage, but under Apprendi the judge's power to check is limited to statutory maximum sentences. Thus, a prosecutor may elect to treat two identically situated defendants differently, favoring one with a lesser charge, perhaps because he cooperated fully with the prosecution. Under Apprendi the judge is constrained by the maximum sentence for the favored defendant. As these problems illustrate "[b]y framing the issue anachronistically as one of juries versus judges, the Court missed the more salient competition between judges and prosecutors in the real world of guilty pleas."

III. APPRENDI REVISITED

The Supreme Court's decision in Apprendi v. New Jersey obviously left a lot of unanswered questions, and created a large number of new concerns. The answer to the controversy as to Apprendi's real impact comes down to how far the Court is willing to extend its holding beyond "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," and how the Court plans to address the unintended consequences of its decision. In its 2002 term, the Supreme Court decided three cases that had an impact on how far the holding of Apprendi would reach, ending some of the controversy. This article will discuss those cases and their ultimate effect on Apprendi. Then, based on the failure of any definite, unified principle to emerge from the Apprendi-related decisions, this article will conclude that the only rational action for the
Court to take is to overrule *Apprendi* and look for a more practical, consistent way to protect the procedural due process rights of defendants at sentencing.

A. **UNITED STATES V. COTTON**

The Supreme Court’s decision in *United States v. Cotton* was the first to impact *Apprendi*. While the effect of *Cotton* on the controversy in the previous discussion is nominal, it is worth noting because it is the first limitation on the *Apprendi* rule expressed by the Court, indicating that *Apprendi* may not be as far-reaching as some had feared. The Court in *Cotton* confirmed that in federal prosecutions the aggravating factors required in *Apprendi* to be proven to a jury beyond a reasonable doubt must be charged in the indictment.\(^1\)

\[^1\] Thus, if *Apprendi* had been a federal court case, the prosecutor would have been required to charge in the indictment that the crime had been racially motivated.\(^2\) If the prosecutor failed to do so, however, the Supreme Court held in *Cotton* that the defendant was not entitled to automatic resentencing, but instead courts are to apply the plain error test.\(^3\) At the end of the opinion, the Court made it clear that the plain error test would be difficult to meet.\(^4\) An example of plain error, according to the Court, would be if defendants, clearly involved in a “vast drug conspiracy,” were given sentences meant for less serious drug offenders “because of an error that was never objected to at trial.”\(^5\) The Supreme Court in *Cotton* decided to limit the retroactive effects of *Apprendi* in federal cases, thus marking the Court’s first check on the impact of *Apprendi.*\(^6\)

B. **RING V. ARIZONA**

In *Ring v. Arizona*, the Court chose to extend the logic of *Apprendi* to the same capital-sentencing scheme that the Court had upheld in *Walton v.*

\(^{147}\) *Cotton*, 535 U.S. at 627.

\(^{148}\) See *id*.

\(^{149}\) *Id.* at 631. Under the plain error test, for an appellate court to correct an error not raised at trial, there must be (1) error, (2) the error must be plain, and (3) the error must affect substantial rights. If all three are met, then the court may notice a forfeited error, but only if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 631-32.

\(^{150}\) See *id.* at 634.

\(^{151}\) *Id*.

\(^{152}\) See *Cotton*, 535 U.S. at 628-29.
Arizona and failed to overrule in Apprendi.\footnote{153} Timothy Ring, along with two others, was involved in the armed robbery of an armored van and the death of its driver.\footnote{154} Ring was convicted by a jury of felony murder in the course of armed robbery.\footnote{155} “Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made,” and those findings were to be made by the Court alone.\footnote{156} Based on the testimony of one of the conspirators in the crime, the trial judge determined that Ring was the one who had actually shot and killed the driver.\footnote{157} The judge also made a finding of two aggravating factors – that Ring committed the offense in expectation of receiving something of pecuniary value and that the offense was committed in an “especially heinous, cruel or depraved manner”—and sentenced Ring to death.\footnote{158} In reviewing the death sentence, the Arizona Supreme Court noted that a correct reading of Arizona law was that the maximum sentence for first-degree murder was life imprisonment, with the death penalty becoming an option if the judge makes a finding of a statutory aggravating factor.\footnote{159} This interpretation squarely rejects that made by the United States Supreme Court in Apprendi, that the maximum sentence was actually the death penalty.\footnote{160} The Arizona Supreme Court nonetheless upheld Ring’s death sentence because it was bound by the Supremacy Clause to apply Walton.\footnote{161} The United States Supreme Court, however, found the reasoning of Walton “irreconcilable” with that of Apprendi and overruled it.\footnote{162} “The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant’s sentence by two years [as in Apprendi], but not the fact-finding necessary to put him to death.”\footnote{163} While some may view the decision of the Court to apply Apprendi to death-penalty sentencing as an extension of Apprendi, Ring is not a true extension. It is merely a correct application of the logic of Apprendi.

Justice Breyer, one of the dissenters in Apprendi, concurred in the judgment of the plurality in Ring, not because he supported the reasoning

\begin{itemize}
  \item \footnote{153} See Ring, 536 U.S. 584 (2002).
  \item \footnote{154} Id. at 589.
  \item \footnote{155} Id. at 591.
  \item \footnote{156} Id. at 592.
  \item \footnote{157} Id. at 594.
  \item \footnote{158} Ring, 536 U.S. at 594-95.
  \item \footnote{159} Id. at 596.
  \item \footnote{160} Apprendi v. New Jersey, 530 U.S. 466, 496-97 (2000).
  \item \footnote{161} Ring, 536 U.S. at 596.
  \item \footnote{162} Id. at 589.
  \item \footnote{163} Id. at 609.
\end{itemize}
of the Court that the judgment was required by the Sixth Amendment right to trial by jury, but because he believed that the Eighth Amendment prohibition on cruel and unusual punishments required that the decision to sentence a defendant to death be made by a jury, not a judge. Breyer thought the jury to be "uniquely capable" of determining whether capital punishment is appropriate in that the jury would reflect the conscience of the community on the issue of life or death. Breyer was strongly criticized by Justice Scalia for his reliance on the Eighth Amendment to uphold Ring because Scalia believed that the line of Eighth Amendment cases starting with Furman v. Georgia, that required states to specify "aggravating factors" in order to impose the death penalty, "had no proper foundation in the Constitution." In a strong dissent to Ring, Justice O'Connor stated that while she understood how the reasoning of Walton was irreconcilable with that of Apprendi, as she had expressed in her dissent in Apprendi, she would choose to overrule Apprendi instead of Walton. She once again conveyed her belief that the decision in Apprendi was not supported by the Constitution, history or past precedent, and that it ignored the history of discretionary sentencing by judges in the United States. Significantly, O'Connor noted that the practical impact of Apprendi has been great on the court system. According to her research, as of May 31, 2002, less than two years after the decision in Apprendi, the federal appellate courts had decided approximately 1,802 cases in which the defendants had challenged either their sentences or their convictions under Apprendi. O'Connor claimed that these federal cases were just the "tip of the iceberg" since most of the criminal cases in the nation are heard at the state level and not the federal level. She noted that appeals brought under Apprendi are burdening an "already overburdened judiciary," and the decision in Ring will significantly add to that burden because it in effect declared the capital

164. Id. at 614.
165. Id. at 615-16.
167. Ring, 536 U.S. at 610. Scalia's exact words in criticism of Justice Breyer are worth noting: "There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to Apprendi. Concisely put, JUSTICE BREYER is on the wrong flight: he should either get off before the doors close, or buy a ticket to Apprendi-land." Id. at 613 (emphasis in original).
168. Id. at 619.
169. Id.
170. Id.
171. Id. at 620.
172. Ring, 536 U.S. at 620.
sentencing schemes of five states unconstitutional and left in question the schemes in four other states in which the jury renders an advisory opinion, but the judge makes the final decision.\footnote{Id. at 620-21.} If the death row inmates in those nine states were to appeal after \textit{Ring}, the courts of those states would be burdened with approximately 797 additional appeals.\footnote{Id.} Thus, based on these practical considerations, and the fact that the rule in \textit{Apprendi} had no basis, Justice O’Connor would choose to overrule \textit{Apprendi} rather than \textit{Walton}.

\textbf{C. HARRIS V. UNITED STATES}

\textit{Harris v. United States}, a plurality decision, had the greatest impact of all the 2002 cases on the reach of \textit{Apprendi}. \textit{Harris} ended all speculation concerning the application of \textit{Apprendi} to mandatory minimums and clearly indicates that the Court has failed to find any definite principle to unite its decisions in regards to what are elements of a crime and what are sentencing factors. The defendant, Harris, sold illegal drugs out of his pawnshop and kept an unconcealed semiautomatic pistol at his side.\footnote{Harris v. United States, 536 U.S. 545, 550 (2002).} Harris was arrested for violating federal drug and firearms laws, including 18 U.S.C. § 924(c)(1)(A),\footnote{It states: 
[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
(i) be sentenced to a term of imprisonment of not less than 5 years; 
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and 
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years. 18 U.S.C. §924 (2000).} which allows for an increased sentence from five to seven years for brandishing a firearm.\footnote{Harris, 536 U.S. at 550-51.} Considering brandishing to be a sentencing factor, the prosecution made no mention of it in the indictment.\footnote{Id. at 551.} After Harris was found guilty, the trial judge found by a preponderance of the evidence that Harris had brandished a gun and, as required by statute, sentenced him to seven years in prison.\footnote{Id.} Harris
appealed in light of *Apprendi*, but the Court of Appeals affirmed, determining that the statute in question made brandishing a sentencing factor instead of an element of the offense.  

The Supreme Court granted certiorari and a plurality affirmed the Court of Appeals.  

In coming to their decision, the Court first looked at the structure of the statute to determine if brandishing was intended by Congress to be an element of the offense or a sentencing factor. Based on the fact that the statute was broken down into a principal paragraph listing the elements of a complete crime followed by subsections explaining how defendants are to be sentenced, the Court determined that the structure of the statute indicated brandishing was intended by Congress to be a sentencing factor. This determination was not dispositive, however, since the carjacking statute in *Jones v. United States* had a similar structure and was interpreted as listing elements of multiple offenses. Another factor the Court considered was whether the provisions at issue in the statute “altered the defendant’s punishment in a manner not usually associated with sentencing factors.” In *Jones*, the Court placed great emphasis on the fact that the three subsections of the carjacking statute imposed significantly higher penalties, enhancing the defendant’s sentence from fifteen years, to twenty-five years, to life. The statute in question in *Harris*, on the other hand, only affected the minimum that the judge could impose—five years, seven years or ten years—and still allowed the judge to impose a sentence in excess of those minimums. The Court felt that these provisions were more in line with “traditional understandings about how sentencing factors operate.” In looking at the structure of the statute in question in *Harris* and the penalties imposed, the Court seems to be engaging in an ad hoc analysis of what statutes fall under the *Apprendi* rule. The Court engaged in the same type of analysis in *Castillo v. United States*, decided the same month as *Apprendi*. In *Castillo*, the Court considered a firearms statute that imposed increased mandatory minimums based on the type of firearm used. The Court determined unanimously

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180. *Id.* at 551-52.  
181. *Id.* at 552.  
182. *Harris*, 536 U.S. at 552.  
183. *Id.* at 552-53.  
184. *Id.* at 553.  
185. *Id.* at 554.  
186. *Id.*  
188. *Id.*  
190. *Id.* at 122.
that Castillo was a "stronger 'separate crime' case than either Jones or Almendarez-Torres," based on some of the same factors considered in Jones.\textsuperscript{191} If this type of analysis is required of every statute that is questionable under Apprendi, then there appears to be no need for a bright-line rule that requires consideration of only those statutes that increase the defendant's sentence above the statutory maximum.

The Court in Harris next sought to make a distinction between Apprendi and McMillan once again.

\textit{McMillan} and \textit{Apprendi} are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. \textit{Apprendi} said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime - and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.\textsuperscript{192}

The Court's reliance on those facts that would be considered elements of an aggravated crime by those who framed the Bill of Rights seems misplaced, however, since mandatory minimums did not exist at the time the Bill of Rights was passed. As the Court admits, mandatory minimums were largely a product of the Twentieth Century.\textsuperscript{193} So while it is true that "[t]here was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury,"\textsuperscript{194} that is not because legislators in the Nineteenth Century made a conscious choice to do so, but simply because mandatory minimums did not exist at that time. Thus, history does not appear to provide strong support for the Court's distinction between \textit{McMillan}, and consequently \textit{Harris}, and \textit{Apprendi}. The Court instead appears to be searching for a way to justify its decision in \textit{Apprendi} without taking the next logical step of overruling \textit{McMillan}, thereby invalidating the Federal Sentencing Guidelines.

\begin{figure}[h]
\begin{itemize}
\item \textsuperscript{191} \textit{Id.} at 131.
\item \textsuperscript{192} \textit{Harris}, 536 U.S. at 557.
\item \textsuperscript{193} \textit{Id.} at 560.
\item \textsuperscript{194} \textit{Id.} at 563.
\end{itemize}
\end{figure}
Justice Breyer concurred in *Harris*, but still refused to support the decision in *Apprendi*. His basis for concurring in the judgment was that he believed, as he always had, that the “Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).” Breyer clearly expressed his dissatisfaction with mandatory minimum sentences as a matter of policy, but he did not believe that applying *Apprendi* in this case would lead Congress to change or abolish mandatory minimum sentencing.

Justice Thomas, writing the dissent in *Harris*, emphasized that the plurality’s holding “rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi*.” Thomas would instead apply *Apprendi* to the situation in *Harris* because “[a]s a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense.” Therefore, determinations of facts that lead to an increased mandatory minimum sentence should receive the same constitutional protection as do determinations of facts that increase the sentence beyond the statutory maximum. “Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.” If *Apprendi* does not apply to *Harris*, brandishing would remain a sentencing factor even if the mandatory minimum for carrying a firearm without brandishing was five years, and the mandatory minimum for brandishing increased to life imprisonment. “The result must be the same because surely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity,” as was suggested by the plurality in distinguishing *Jones*. If the result remains the same, however, then allowing judicial determination of any fact within the range allowed by statute permits legislatures, as commentators predicted after *Apprendi*, to avoid application of *Apprendi* with “clever

195. *Id.* at 569.
196. Breyer disapproved of mandatory minimums because they deny judges the power to depart downward in the case of extraordinary circumstances that may call for leniency and because mandatory minimums transfer too much power to prosecutors, who can determine sentences by the charges they bring. *Id.* at 570-71.
197. *Harris*, 536 U.S. at 571.
198. *Id.* at 572.
199. *Id.* at 577-78.
200. *Id.* at 578.
201. *Id.* at 579.
203. *Id.* at 579.
statutory drafting." Thomas believed that the same principle that drove the *Apprendi* decision must apply equally to *Harris* because in both cases the defendant was unable to "predict the judgment from the face of the felony . . . and [because] the absolute statutory limits of his punishment change, constituting an increased penalty." Thus, according to Thomas, the Supreme Court must "maintain [an] absolute fidelity" to *Apprendi* and the "protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements," which the plurality failed to do by declining to apply *Apprendi* to *Harris*.

IV. THE FUTURE OF *APPRENDI*

A. WHY *APPRENDI* SHOULD BE OVERRULED

As illustrated, the Supreme Court has been unable to hold to any consistent principle in its attempt to protect defendants at sentencing. The Court refused to overrule *Almendarez-Torres* in *Apprendi*, even though its holding went explicitly against that of *Apprendi* in allowing courts to use prior convictions to increase a defendant's sentence above the statutory maximum. Instead, the Court decided to make prior convictions an exception to the *Apprendi* rule because the "procedural safeguards attached to the 'fact' of a prior conviction make a sentence enhancement based on recidivism more constitutionally acceptable than other sentence enhancements based on factual determinations made by a judge." This exception overlooks the fact that a defendant may choose to argue that the prior conviction was wrongly attributed to him. *Apprendi* denies that defendant the opportunity to argue before a jury that beyond a reasonable doubt the conviction was not his, even if it may raise his sentence beyond the statutory maximum. The holding in *Almendarez-Torres* and the Court's refusal to overrule it in *Apprendi* is one illustration of the Court's failure to hold to a unified principle to protect defendants' rights in the sentencing arena.

A further example of the inconsistency of the Court's decisions surrounding *Apprendi* is its failure to overrule *McMillan* in *Harris*. In

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204. *See id.*
205. *Id.* at 579-80.
206. *Id.* at 581-82.
207. *Id.* at 581-82.
208. *Smith, supra* note 95, at 682.
refusing to apply *Apprendi* to mandatory minimum sentencing schemes, the Court further obscured the principle behind its rule. As Justice Thomas stated in his dissent in *Harris*, imposing an increased mandatory minimum on a defendant "heightens the loss of liberty and represents the increased stigma society attaches to the offense."\(^{209}\) Take the armed robbery example given at the beginning of this article. Both defendants were charged for the exact same crime, but Defendant One, who received the protections of *Apprendi*, received a lesser sentence than Defendant Two, who was sentenced under a mandatory minimum scheme and was therefore not protected by *Apprendi*. The loss of liberty and stigma suffered by Defendant Two would undoubtedly be much higher because he received a life sentence rather than the thirty years Defendant One was given. So in failing to protect Defendant Two by requiring his sentence enhancements to be proven beyond a reasonable doubt, the Court made the safeguards of *Apprendi* practically meaningless. In addition, the only real difference between the cases of Defendant One and Defendant Two is the way their respective legislatures drafted their statutes. By making the maximum penalty for armed robbery life imprisonment, the legislature in Defendant Two’s state effectively removed from the jury determination of any fact that would increase the defendant’s sentence to that level, and gave the judge power to determine the factors that increased the mandatory minimum, as allowed by the Court under *Harris*. The true impact of *Harris* is “to give legislators far more leeway to label facts as sentencing factors rather than as elements of the offense – meaning that they can be found by judges rather than by juries, and by a preponderance of the evidence rather than beyond a reasonable doubt."\(^{210}\) *Harris* supports Justice O’Connor’s claim that the ruling in *Apprendi* was purely formalistic in that states would be able to avoid it by clever statutory drafting—increasing maximum penalties so that all sentences imposed by the courts fall within the range allowed by the jury verdict.\(^{211}\) “Had the *Harris* Court instead extended the principles of *Apprendi* to mandatory minimum sentences, the clear message would have been that *Apprendi*, and the Sixth Amendment protections that it sought to vindicate, cannot be easily evaded.”\(^{212}\) Instead the *Harris* Court sent the message that the Court is not completely sold on the principles of *Apprendi* and how they should be applied. It is important to note that the validity of *Harris* remains questionable, however, since it was only supported by a plurality of the

\(^{209}\) *Harris*, 536 U.S. at 578.
\(^{211}\) *Id.*
\(^{212}\) *Id.*
Court and since the Court has taken a “volatile approach” to sentencing in recent years.\textsuperscript{213} In fact the Court in \textit{Harris} was split evenly as to whether to apply \textit{Apprendi} to mandatory minimums with the deciding vote being that of Breyer, who refused to support \textit{Apprendi}, but who believed that judges should be able to consider any sentencing factors, whether they increase the statutory maximum or apply a mandatory minimum.\textsuperscript{214} Thus, the Court could easily go the other way the next time they consider the applicability of \textit{Apprendi} to mandatory minimums.

While the Court’s decision in \textit{Harris} cleared up any conjecture as to whether \textit{Apprendi} applies to mandatory minimums, at least for now, its recent decisions further solidified the other two practical problems resulting from the \textit{Apprendi} rule. First, as mentioned when discussing mandatory minimums, \textit{Apprendi} can still easily be avoided by legislative manipulation of statutes. By allowing legislatures a way out of the \textit{Apprendi} rule, the Court effectively eliminates any protection the rule may have afforded defendants. In fact, it “encourages any legislature interested in asserting control over the sentencing process to do so by creating those [mandatory] minimums. That result would mean significantly less procedural fairness, not more.”\textsuperscript{215} Second, the Court’s recent decisions illustrate that even if legislatures choose not to redraft their statutes, the protections afforded by \textit{Apprendi} may be unclear. “At a minimum, \textit{Apprendi} is likely a double-edged sword.”\textsuperscript{216} For example, prior to \textit{Apprendi}, when a defendant pled guilty to a drug charge, he did not have to admit a particular quantity until the sentencing hearing. After \textit{Apprendi}, however, the defendant must admit the amount in the plea agreement and as a result loses any opportunity to dispute the quantity at sentencing.\textsuperscript{217} The Court’s recent decisions did not address this problem, or the fact that under \textit{Apprendi} defendants may be forced to make arguments in the alternative. For example, if the defendant mentioned above went to trial instead of pleading, he would be forced to argue both that he did not commit the drug offense, but if he did, he had in his possession less than fifty grams.\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{214} \textit{Harris}, 536 U.S. at 569.
\item \textsuperscript{215} \textit{Apprendi} v. New Jersey, 530 U.S. 466, 564 (2000).
\item \textsuperscript{216} Levine, \textit{supra} note 213, at 448.
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.} at 449.
\end{itemize}
B. ALTERNATIVES TO THE RULE IN APPRENDI

Due to these practical considerations and the fact that the Court has been unable to consistently follow the principle adopted in Apprendi, the Court should overrule Apprendi and adopt a rule that would better protect defendants at the sentencing stage. "Given the stakes at sentencing, Apprendi is right to worry about the reliability of the process" so that even if "sentencing factors need not be proven to a jury beyond a reasonable doubt, they may still deserve some procedural safeguards under the Due Process Clause."\(^{219}\) The most logical approach to protecting the procedural due process rights of defendants during sentencing is to grant defendants more rights during sentencing. These rights would extend to all defendants at sentencing, not just those looking at sentences in excess of the statutory maximum. Granting these rights during sentencing rather than during the trial would alleviate concerns with mandatory minimums, legislative manipulation of statutes, prejudicial juries, inconsistent defenses, and plea bargaining. While overruling Apprendi would leave the decision of what are elements of a crime and what are sentencing factors to legislatures, defendants would still be protected "from the potentially arbitrary exercise of power by prosecutors and judges"\(^{220}\) by extending them procedural protections at sentencing.

The most effective alternative to protect defendants at sentencing would be to raise the standard of proof for sentencing factors from preponderance of the evidence to proof beyond a reasonable doubt, the same standard a jury would be required to apply during trial. Raising the standard of proof would achieve the same results desired by the Court in Apprendi, requiring facts that increase the statutory maximum to be proven beyond a reasonable doubt,\(^{221}\) and the higher standard would also protect those not included in the Apprendi rule who are sentenced under mandatory minimum sentencing schemes. Use of proof beyond a reasonable doubt would ensure more uniform sentencing decisions for all similarly situated defendants. Take the example given at the beginning of this article. The result for Defendant One would not change because the prosecution would still be unable to prove the aggravating factors beyond a reasonable doubt, this time to the judge instead of the jury. The judge would once again be constrained by the fifty-year maximum sentence and would once again decide to impose a thirty-year sentence instead based on mitigating factors.

\(^{219}\) Ross, supra note 8, at 202.
\(^{220}\) Apprendi, 530 U.S. at 550.
\(^{221}\) Smith, supra note 95, at 700.
The result for Defendant Two, who was sentenced to life imprisonment under *Apprendi*, would change dramatically. The jury would again find Defendant Two guilty of armed robbery, requiring the judge to impose a thirty-year sentence, but at sentencing the prosecution would be unable to prove the aggravating factors beyond a reasonable doubt while previously they were able to prove them by a preponderance of the evidence. Therefore, the judge would not be required to impose the mandatory life sentence. While the judge would still have discretion to impose a sentence higher than the thirty-year mandatory minimum, under this alternative the judge could take into account mitigating factors, such as this being Defendant Two’s first offense, and he could choose to limit the sentence to thirty years. Considering that Defendant One and Defendant Two committed the same exact crime in the same manner, the result under this alternative appears more equitable than that achieved under *Apprendi*.

In addition to resolving problems for defendants sentenced under mandatory minimums, requiring proof beyond a reasonable doubt at sentencing would also alleviate the other practical problems that result from the Court’s holding in *Apprendi*. First, legislatures would not be able to get around this requirement by redrafting statutes. Proof beyond a reasonable doubt at sentencing would apply to any aggravating factor, whether it raised the maximum sentence or the sentence within a statute’s range. Therefore, no amount of alteration to a statute would place it outside the requirement. Second, this alternative would not require proof of aggravating factors to be produced at trial before the jury because it would not be relevant to the determination of the elements of the crime. This change avoids the risk of prejudicing the jury against the defendant in determining if he committed the substantive offense, and it saves the defendant from having to argue inconsistent defenses. Finally, requiring proof beyond a reasonable doubt at sentencing would avoid the negative effects of *Apprendi* on plea bargaining. Defendants would retain their constitutional right to be heard on enhancements because they would no longer be part of the guilt phase of the trial. And prosecutors would lose their ability to control the defendant’s sentence since the judge would now be able to check that power at the sentencing stage. Thus, from a practical standpoint, insisting on proof beyond a reasonable doubt at sentencing provides more consistent and fair protection of the procedural due process rights of defendants than the rule set out in *Apprendi*.

While the above alternative seems to be adequate protection for defendants at sentencing, some commentators have suggested other alternatives that could be adopted to provide even further protection. One
alternative would be to require the government to provide defendants with notice of all aggravating sentencing factors that they may pursue. This would avoid the “inherent unfairness” that results when a defendant is allowed to plead guilty before he is advised of the maximum punishment that may be imposed against him. Another alternative that would further protect a defendant would be to apply relevant state or federal rules of evidence to sentencing. Rules of evidence are not ill-suited to determine the quantity of drugs involved in a defendant’s offense, and they are not less worthwhile than at trial when, in either case, years of a person’s freedom may depend on this factual determination. Application of rules of evidence would prevent the judge from considering hearsay or irrelevant evidence in determining the defendant’s final sentence, which would ultimately be more fair to the defendant, although it would also prevent the defendant from introducing his own hearsay or irrelevant evidence to rebut the prosecution. A final alternative would be to enhance the defendant’s ability to conduct discovery before sentencing. “Creating a substantial right of discovery after a plea or guilty verdict would give defendants access to all the evidence that the fact-finder might deem relevant to aggravating sentencing factors.” While these three additional alternatives would further protect the defendant at sentencing, simply requiring proof beyond a reasonable doubt of aggravating factors at sentencing would achieve the same objectives as the rule in Apprendi and avoid a majority of its pitfalls.

CONCLUSION

The Supreme Court’s Apprendi decision in 2000 had the potential to wreak havoc on determinate sentencing schemes throughout the country. It had commentators speculating on its potential effects and on how far the Supreme Court was going to allow it to reach. In the 2002 term, however, the Court stopped Apprendi dead in its tracks and completely obscured the

222. Smith, supra note 95, at 698.
223. Bibas II, supra note 113, at 1175.
224. Smith, supra note 95, at 699.
225. Id. at 701.
227. Smith, supra note 95, at 699.
228. Id. at 700.
principle behind it. *Apprendi* sought to extend to defendants the Sixth Amendment guarantee of trial by jury when judges determined facts that extended their sentences beyond the maximum allowed by statute.\(^{229}\) The reasoning behind applying constitutional protection in these cases was that the increase in the defendant’s sentence impacted his “very liberty” and heightened the stigma that would attach to his crime.\(^{230}\) The Court stayed true to this reasoning by refusing to uphold Arizona’s capital-sentencing scheme in *Ring v. Arizona*, but in upholding *Harris* the Court allowed for the continuation of a mandatory minimum sentencing scheme that at the very least impacts a defendant’s liberty and heightens the stigma that attaches to his crime. The Court’s decision in *Harris* thus reduced its holding in *Apprendi* to “pure formalism,” rejecting any application of the underlying principle that “any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt.”\(^{231}\)

In addition, the Court failed in *Apprendi* or any of its recent decisions to address the practical implications of *Apprendi*’s rule. Real world application of the rule demonstrates few benefits for the defendants it was intended to protect and tremendous burdens. Defendants are forced under *Apprendi* to argue alternative, often inconsistent defenses. Juries are given information concerning aggravating factors that may result in prejudice against defendants when determining guilt or innocence. Defendants lose some of the advantages of plea bargaining while prosecutors gain more power to control sentences. Undoubtedly, some defendants will benefit from the Court’s rule, but the vast majority will be fighting an even harder uphill battle than before. As Justice O’Connor stated in her *Apprendi* dissent, the Court’s rule “accords, at best, marginal protections for the constitutional rights that it seeks to effectuate.”\(^{232}\)

The best course of action for the Supreme Court at this time would be to overrule *Apprendi* and adopt an alternative more likely to consistently protect the procedural due process rights of criminal defendants at sentencing. “Ultimately, criminal sentencing is about due process checked by practicality, fairness checked by feasibility. . . . Justice requires both uniformity, where similar offenders who commit similar offenses are sentenced similarly, and fairness, where the sentencing judge considers all of the exigencies of a particular situation so that a just sentence is


\(^{230}\) *Id.* at 495.

\(^{231}\) *Id.* at 543-44 (emphasis in original).

\(^{232}\) *Id.* at 539.
imposed."233 Putting the authority to determine aggravating factors back into the hands of judges, but requiring proof beyond a reasonable doubt, would be an effective way to ensure fairness and uniformity in sentencing. This alternative would protect all defendants equally at sentencing, not just those indicted under a statute permitting an increase in the maximum punishment based on a finding of certain aggravating factors. Additionally, this alternative addresses the practical problems created by the Apprendi rule. Defendants would no longer be required to argue inconsistent defenses before a jury, resulting in prejudice. Defendants could still take advantage of plea bargaining without losing the ability to challenge enhancements at sentencing. Ultimately, defendants would receive far more effective procedural due process protection than they currently receive under Apprendi's bright-line rule by simply requiring that all aggravating factors be proven at the sentencing phase beyond a reasonable doubt.

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233. Levine, supra note 213, at 454.